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November 22, 2013
Court of Appeals
Division III
State of Washington

No. 31659-9-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

TOMMY AUSTIN ASHLEY,

Appellant.

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

The Honorable Ruth E. Reukauf

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Ashley guilty of failure to register as a sex offender.

2. The trial court erred in finding Mr. Ashley had a duty to reregister after his release from the Kittitas County Jail.

3. The trial court erred in concluding the decision in *State v. Watson*, 160 Wn.2d 1, 154 P.3d 909 (2007), controlled the outcome of this case.

4. In the absence of substantial evidence, the trial court erred in entering Finding of Fact 47.

5. In the absence of substantial evidence, the trial court erred in entering Finding of Fact 48.

6. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 9.

7. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 11.

8. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 12.

9. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 19.

10. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 21.

11. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 23.

12. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 25.

13. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 26.

14. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 27.

15. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 28.

16. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 30.

17. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 32.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State prove every essential element of the charged offense beyond a reasonable doubt. Mr. Ashley was charged with failing to reregister following his release from county jail for failing to report to his Community Corrections Officer (CCO). RCW 9A.44.130, the sex offender registration statute, is silent on whether a defendant must reregister after being released from jail for a violation of the terms of his community custody. Is Mr. Ashley entitled

to reversal of his conviction for failing to register as a sex offender where the State failed to prove he had a duty to reregister, and where his address remained the same after his release from jail?

2. Where a statute is ambiguous, the appellate courts must interpret the statute in favor the defendant. Does application of the rule of lenity to the ambiguous statute here require reversal of Mr. Ashley's conviction where the State failed to prove he had a duty to reregister after being released from jail, where his address upon being released was the same as when the entered?

C. STATEMENT OF THE CASE

Tommy Ashley was convicted on June 13, 2007, of third degree assault with a sexual motivation. CP 63. He was released from prison on May 2011. CP 73 (Finding of Fact 10). As a result of his conviction, Mr. Ashley was required to register as a sex offender for a 10-year period. CP 75 (Finding of Fact 36). Mr. Ashley timely complied with the registration requirement of RCW 9A.44.130(3)(a)(i) after being released from prison. CP 73 (Finding of Fact 15). Mr. Ashley registered his address with the Yakima County Sheriff's Office as: 2802 Beaudry Road, 56A, Yakima, Washington 98901. RP 109-11.

On December 20, 2012, Mr. Ashley was arrested on a Department of Corrections (DOC) warrant for failing to report to his CCO. RP 67-69. From December 4, 2012, through December 19, 2012, Mr. Ashley was housed in the Kittitas County Jail in Ellensburg pursuant to the arrest warrant. RP 56, 67-69.

CarriAnn Ross, the records supervisor for the Yakima Sheriff's Office, testified that the policy of the department is that for those incarcerated for not more than 30 days, who have previously registered as a sex offender in Yakima County, and where the new incarceration is not for a sex offense, the defendant would be allowed to call the department - there was no requirement of reregistration if they had not changed their residence. RP 136-38.

If they're not changing their address and not updating any information, we will encourage them to call and check with us to make sure that all of their information is updated. Because they haven't been found guilty of Failure to Register, there's been no indication that they're not currently still registered at the address that they're -- . . . registered at.

If they're in custody for more than 30 days, then we will tell them that they need to come in and register within our office. If they are not in custody for more than 30 days, then we will tell them that they should call in and make sure that everything is current and valid.

RP 138-39.

Mr. Ashley was subsequently charged with Failure to Register as a Sex Offender for failing to reregister with the Yakima County Sheriff's Office within 3 days after being released from the Kittitas County Jail on December 19, 2012. CP 7-8. Mr. Ashley subsequently waived his right to a jury trial and the matter was tried to the bench. CP 6; RP 8-9. At the close of evidence, Mr. Ashley moved for acquittal arguing, among other things, that RCW 9A.44.130 required registration only upon release from incarceration for the original sex offense and did not require registration upon release from custody on any other matter. RP 154-63. The trial court ruled that the Supreme Court's decision in *Watson* required reregistration under RCW 9A.44.130 and denied Mr. Ashley's motion for acquittal. CP 72-80; RP 178-89.

At the conclusion of the bench trial, Mr. Ashley was found guilty as charged. CP 72-80.

D. ARGUMENT

THE STATE FAILED TO PROVE MR. ASHLEY HAD
AN OBLIGATION TO REREGISTER AS A SEX
OFFENDER UPON HIS RELEASE FOR A
COMMUNITY CUSTODY VIOLATION

1. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *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). 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). 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).

Here, the State was required to prove Mr. Ashley had a duty to reregister after his release from the Kittitas County Jail and that he

failed to comply. The State failed to prove Mr. Ashley had a duty to reregister, thus he is entitled to reversal of his conviction.

2. The plain meaning of RCW 9A.44.130 did not require Mr. Ashley to reregister upon his release from county jail for a community custody violation. The trial court accurately described what was at issue in this appeal:

The central issue in this case is whether the defendant needs to reregister after being incarcerated on a community custody violation on the underlying sex offense.

CP 78 (Conclusion of Law 20).

Mr. Ashley was charged and convicted of failing to register as a sex offender pursuant to RCW 9A.44.130(4)(a)(i), which states in relevant part:

Sex offenders who committed a sex offense on, before, or after February 28, 1990, and who, on or after July 28, 1991, are in custody, as a result of that offense ... *must register at the time of release from custody* with an official designated by the agency that has jurisdiction over the offender.

(Emphasis added).

When interpreting a statute, the court's fundamental objective is to ascertain and carry out the legislature's intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The starting point is the

statute's plain language and ordinary meaning. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). When the plain language is unambiguous, the legislative intent is apparent, and courts will not employ principles of construction to construe the statute otherwise. *J.P.*, 149 Wn.2d at 450. In determining the plain meaning of a provision, courts look to the text of the statutory provision in question as well as "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Sweany*, 174 Wn.2d 909, 914-15, 281 P.3d 305 (2012); *Jacobs*, 154 Wn.2d at 600.

The plain language of RCW 9A.44.130(3)(a)(i) required Mr. Ashley to register on release from state prison on May 2011 for the conviction for the current sex offense; third degree assault with sexual motivation. The statute does *not*, as claimed by the State and found by the trial court, require that Mr. Ashley reregister every time he is arrested and incarcerated. The statute only requires registration "at the time of release from custody," meaning his release from prison on the underlying sex offense. RCW 9A.44.130(3)(a)(i). Mr. Ashley fully complied with the statute when he registered after being released from prison.

Further, the State's argument that Mr. Ashley moved when he was incarcerated in the Kittitas County Jail, thus requiring him to reregister his residence address, is patently absurd. Mr. Ashley did voluntarily *move* to the jail; he was incarcerated by the State and had no choice in the matter.

Since the statute's language is clear and unambiguous, the inquiry ends. The State did not carry its burden of proving that Mr. Ashley failed to register because he fully complied with the statute when he registered at the time of his release from prison.

3. The Legislative intent behind the enactment of RCW 9A.44.130 supports Mr. Ashley's interpretation that he did not have a duty to reregister. As noted above, when interpreting a statute, the court's fundamental objective is to ascertain and carry out the legislature's intent. *Jacobs*, 154 Wn.2d at 600.

When it enacted the statute, the Legislature unequivocally stated that the State's policy is to "assist local law enforcement agencies' efforts to protect their communities by *regulating* sex offenders by requiring sex offenders to register with local law enforcement agencies as provided in [RCW 9A.44.130]." (Italics ours.) Laws of 1990, ch. 3, § 401. *See also* Laws of 1991, ch. 274, § 1

State v. Ward, 123 Wn.2d 488, 499, 869 P.2d 1062 (1994) (emphasis in original). RCW 9A.44.130 does this by keeping law enforcement

informed of the whereabouts of sex offenders who may reoffend. *State v. Pray*, 96 Wn.App. 25, 28, 980 P.2d 240 (1999).

In addition, if the individual moves, he must register the new address:

(4)(a) If any person required to register pursuant to this section changes his or her residence address within the same county, the person must provide, by certified mail, with return receipt requested or in person, signed written notice of the change of address to the county sheriff within three business days of moving.

(b) If any person required to register pursuant to this section moves to a new county, the person must register with that county sheriff within three business days of moving. Within three business days, the person must also provide, by certified mail, with return receipt requested or in person, signed written notice of the change of address in the new county to the county sheriff with whom the person last registered. The county sheriff with whom the person last registered shall promptly forward the information concerning the change of address to the county sheriff for the county of the person's new residence. Upon receipt of notice of change of address to a new state, the county sheriff shall promptly forward the information regarding the change of address to the agency designated by the new state as the state's offender registration agency.

RCW 9A.44.130(4) If the individual knowingly fails to register or moves without notifying the authorities, he is guilty of failing to register under RCW 9A.44.130(7).

Here, Mr. Ashley never changed his address from that at which he registered when he was released from prison. Had he moved and not registered, he would have been guilty of failing to register. The statute is only concerned about finding convicted sex offenders and requiring them to register once upon release from prison furthers that goal. Thus, having them reregister when they return home after being released from jail is meaningless and does not further the intent of the Legislature in enacting this statute.

4. Alternatively, RCW 9A.44.130(3)(a)(i) is ambiguous regarding whether Mr. Ashley was required to reregister. Where a statute is susceptible to more than one reasonable interpretation, it is ambiguous and this Court “may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007); *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006) (“a statute is not ambiguous merely because different interpretations are conceivable.”). Statutory construction is a question of law reviewed *de novo*. *Lake v. Woodcreek Homeowners Association*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010); *State v. Chavez*, 163 Wn.2d 262, 267, 180 P.3d 1250 (2008).

It is a well-established canon of statutory construction that courts should avoid interpretations of a statute that render certain provisions superfluous. See *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”). In addition, when interpreting a statute, the court must avoid unlikely, absurd, or strained results. *In re Detention of Coppin*, 157 Wn.App. 537, 552, 238 P.3d 1192 (2010).

RCW 9A.44.130(3)(a)(i), is silent on whether a defendant must reregister every time he is incarcerated and released, even though he has not changed his residence address, which is also the address at which he originally registered. In the present case, the parties have each proffered a reasonable interpretation of the statute. Therefore, the statute is ambiguous.

5. Application of the rule of lenity to RCW 9A.44.130(3)(a)(i) requires reversal of Mr. Ashley’s conviction. If the statute remains ambiguous after both attempting to determine the plain meaning and after resorting to tools of statutory construction, this Court must then employ the rule of lenity. *In re Personal Restraint of Sietz*, 124 Wn.2d

645, 652, 880 P.2d 34 (1994). The rule of lenity requires the Court to construe a statute strictly against the State and in favor of the defendant “[w]here two possible constructions are permissible.” *State v. Brown*, 139 Wn.2d 757, 769, 991 P.2d 615 (2000), quoting *State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). See also *Jacobs*, 154 Wn.2d at 600-01 (“If a statute is ambiguous, the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary.”). Thus, under the rule of lenity, this Court must interpret the ambiguity in favor of Mr. Ashley. *Sietz*, 124 Wn.2d at 652; *State v. Johnson*, 159 Wn.App. 766, 776, 247 P.3d 11 (2011).

Here, if the statute remains ambiguous even after applying the tools of statutory construction, the statute must be construed narrowly in Mr. Ashley’s favor. Under this interpretation, the State failed to prove that Mr. Ashley was under an obligation to reregister where his residence address before entering jail, and after being released remained the same. Mr. Ashley is entitled to reversal of his conviction.

6. Contrary to the trial court's conclusion, the decision in *State v. Watson* did not directly address this issue. The trial court ruled that Mr. Ashley's argument was foreclosed by the Supreme Court's decision in *Watson*. CP 78-79. The trial court was in error; the issue of ambiguity in RCW 9A.44.130 has never addressed by the Supreme Court.

In *Watson*, the issue presented and decided by the Supreme Court was whether RCW 9A.44.130 was unconstitutionally vague. 160 Wn.2d 6-9. The Court ruled that the sex offender registration statute was not unconstitutionally vague. *Id.* at 11-12. In a footnote, the Court specifically noted:

Because there is no separate ambiguity challenge before us in this case, we decline the dissent's invitation to consider whether the rule of lenity should be used. The rule of lenity is a tool of statutory construction and not the proper remedy for a *void for vagueness challenge*.

Id. at 12 fn.4 (emphasis added). As a consequence, *Watson* does not control the issue in this case.

It may be argued that *Watson's* interpretation of RCW 9A.44.130 requiring reregistration upon release for a violation of community custody is binding. *Watson*, 160 Wn.2d at 8-9. First, that portion of the *Watson* decision was unnecessary for the determination

of the vagueness challenge and constitutes *dicta*. More importantly, as argued, *supra*, the Court's interpretation is inconsistent with the legislative purpose behind the enactment of the statute and would lead to an absurd result.

7. In light of the testimony of Ms. Ross, the State failed to prove Mr. Ashley was obligated to reregister. Alternatively, in light of Ms. Ross's testimony, the State failed to prove that Yakima County requires reregistration where the defendant is released from custody for anything other than failure to register and where the sentence is for no more than 30 days, there is no requirement for reregistration. RP 136-38. Mr. Ashley's sentence was less than 30 days and he never changed his address from that he originally registered. In light of this evidence, the State failed to prove Mr. Ashley was obligated to reregister.

8. Mr. Ashley is entitled to reversal of his conviction with instructions to dismiss. Since there was insufficient evidence to support the conviction, this Court must reverse the conviction 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).

E. CONCLUSION

For the reasons stated, Mr. Ashley requests this Court reverse his conviction with instructions to dismiss for a failure of the State to sustain its burden of proof.

DATED this 22nd day of November 2013.

Respectfully submitted,



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