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Nov 14, 2014

Court of Appeals

Division III

State of Washington

No.

COA No. 31659-9-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TOMMY AUSTIN ASHLEY,

Petitioner.

FILED
NOV 25 2014

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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

The Honorable Ruth E. Reukauf

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Tommy Ashley asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Tommy Austin Ashley*, No. 31659-9-III (October 16, 2014). A copy of the decision is in the Appendix at pages 1 to 7.

C. ISSUES PRESENTED FOR REVIEW

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 a significant question of law under the United States and Washington Constitutions presented, thus entitling Mr. Ashley 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?

D. 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.

On appeal, Mr. Ashley submitted he had no obligation to reregister after being released from custody for a violation of his community custody. The Court of Appeals disagreed, ruling that this Court's decision in *State v. Watson*, 160 Wn.2d 1, 154 P.3d 909 (2007), required Mr. Ashley to reregister, thus affirming his conviction. Decision at 3-5. The Court alternatively ruled that the statute was unambiguous, thus Mr. Ashley had a duty to reregister under the plain language of the statute. Decision at 5-6.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. THIS COURT SHOULD ACCEPT REVIEW TO DETERMINE WHETHER THE TRIAL COURT WAS CORRECT IN FINDING *WATSON* CONTROLS

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 trial court found that this Court's decision in *Watson* required Mr. Ashley to reregister upon his release from

custody, a decision affirmed by the Court of Appeals. Mr. Ashley contends *Watson* did not resolve the issue raised in this case, thus *Watson* does not control.

The issue of ambiguity in RCW 9A.44.130 has never addressed by this Court. In *Watson*, the issue presented and decided by this 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* dealt only with a void for vagueness challenge, not an ambiguity/statutory construction argument as raised here by Mr. Ashley. Thus, *Watson* did not control the issue in this case and the Court of Appeals and the trial court were wrong for so deciding.

Thus, this Court should accept review to determine whether *Watson* controls, find the statute ambiguous and apply the rule of lenity. As a result, this Court must reverse Mr. Ashley's conviction.

2. CONTRARY TO THE COURT OF APPEALS' CONCLUSION, RCW 9A.44.130 IS AMBIGUOUS AND APPLICATION OF THE RULE OF LENITY REQUIRES REVERSAL OF MR. ASHLEY'S CONVICTION

a. 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.

b. 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.

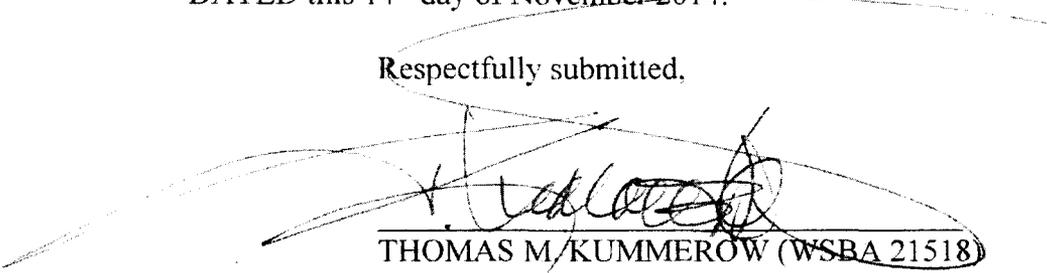
This Court should grant review to determine whether RCW 9A.44.130 is ambiguous, and if so, whether the application of the rule of lenity requires reversal of Mr. Ashley’s conviction.

F. CONCLUSION

For the reasons stated, Mr. Ashley asks this Court to grant review and reverse and remand his sentence.

DATED this 14th day of November 2014.

Respectfully submitted,



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APPENDIX

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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	
)	No. 31659-9-III
Respondent,)	
)	
v.)	
)	
TOMMY AUSTIN ASHLEY,)	UNPUBLISHED OPINION
)	
Appellant.)	

KORSMO, J. — Tommy Ashley appeals his most recent conviction for failing to register as a sex offender, arguing that his return to his residence of record cannot violate the statute. Since the statute required that he reregister upon being released from jail, we affirm.

FACTS

In 2007, Mr. Ashley was convicted in Yakima County Superior Court of third degree assault with sexual motivation. That conviction triggered his obligation to register as a sex offender under RCW 9A.44.130. In 2009, he was twice convicted of failing to register and sent to prison. After release from prison in 2011, he again was under the supervision of the Department of Corrections for the 2007 conviction.

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Mr. Ashley registered his residence as 2802 Beaudry Road #56A in Yakima on November 16, 2012. Twelve days later, Community Corrections Officer (CCO) Mungia unsuccessfully attempted to contact Mr. Ashley at that address. The two men spoke the following day on the telephone and Mungia advised Ashley that he had to report in person and register. As a result of failing later to appear before CCO Mungia, an arrest warrant issued in the third degree assault case. Mr. Ashley was incarcerated on that warrant in the Kittitas County Jail from December 4 to December 19, 2012.

Mr. Ashley did not reregister in Yakima County after his release from the Kittitas County Jail. Another warrant issued for his arrest and he eventually was stopped while driving in the trailer park at the Beaudry Road address. He was charged in Yakima County with failure to register as a sex offender. The charging document alleged the offense was committed between December 19 and 30, 2012.

The matter eventually proceeded to bench trial. The State argued that Mr. Ashley had a duty to again register after his release from the Kittitas County Jail since he had been incarcerated on the underlying sex offense. Mr. Ashley contended that he had no duty to reregister since he remained at the same location. The trial court concluded that Mr. Ashley did have a duty to reregister and convicted him of failure to register.

The court imposed a standard term of 57 months' incarceration. Mr. Ashley then timely appealed to this court.

ANALYSIS

Mr. Ashley argues that he had no duty to reregister upon his release from jail and the evidence is thus insufficient to support his conviction. We agree with the trial court that the Washington Supreme Court has already rejected his construction of the statute.

Upon conviction of various sexual and kidnapping offenses, a person must register with the local sheriff after release from custody or moving to a new location. RCW 9A.44.130(1)(a). With respect to the release from custody reporting requirement, the statute provides in pertinent part:

(3)(a) Offenders shall register with the county sheriff within the following deadlines:

(i) OFFENDERS IN CUSTODY. (A) Sex offenders who . . . on or after July 28, 1991, are in custody, as a result of that offense, of the state department of corrections . . . or a local jail or juvenile detention facility . . . must register at the time of release from custody with an official designated by the agency that has jurisdiction over the offender. The agency shall within three days forward the registration information to the county sheriff for the county of the offender's anticipated residence. The offender must also register within three business days from the time of release with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation. The agency that has jurisdiction over the offender shall provide notice to the offender of the duty to register.

(Emphasis added.)

This court's objective in interpreting a statute is "to ascertain and carry out the legislature's intent." *State v. Gray*, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012). That interpretation process "begins with a statute's plain meaning." *Id.* If the statute is

unambiguous, “the court’s inquiry is at an end.” *Id.* at 927. A statute is ambiguous only when it is subject to more than one reasonable interpretation. *Id.*

Mr. Ashley contends that the statute is ambiguous over whether he had a duty to register again upon his release from the Kittitas County Jail. We disagree in light of our Supreme Court’s interpretation of this statute in *State v. Watson*, 160 Wn.2d 1, 154 P.3d 909 (2007).¹

The operative facts in *Watson* are the same as in this case. There the defendant had registered as a sex offender upon release from prison. *Id.* at 4. Four months later, he was found to have committed three violations of his community custody and sentenced to serve an additional 60 days in jail. *Id.* He was released from jail at that time and returned to the residence address he had supplied the sheriff upon release from prison. *Id.* at 4-5. He did not reregister and subsequently was charged with failure to register as a sex offender. *Id.* at 5. After his argument that he had no duty to again register was rejected, Mr. Watson was convicted and appealed. The Court of Appeals affirmed the conviction and the Washington Supreme Court granted review. *Id.*

The court rejected the argument that the statute was unconstitutionally vague because it was allegedly unclear about a duty to reregister. *Id.* at 4, 12. The defendant

¹ *Watson* involved a prior version of the statute, then codified at RCW 9A.44.130(4)(a)(i) (2002). That section was recodified by LAWS OF 2011, ch. 337, § 3. The language governing the duty to register was unchanged.

specifically argued that the statute was “ambiguous about whether reregistration is required when a sex offender was in custody due to violating conditions of his or her community custody for the sex offense.” *Id.* at 8. Noting legislative intent and prior rulings on similar issues, the court rejected the contention. *Id.* at 8-11.

Mr. Ashley attempts to distinguish *Watson* on the basis that it involved a vagueness argument while he is raising an ambiguity argument. However, as noted above, *Watson* involved a claim that the supposed vagueness of the statute arose from an ambiguity. *Id.* at 8. Mr. Ashley’s case cannot be meaningfully distinguished from *Watson* on that basis.

Mr. Ashley also argues that since he was living at the address on Beaudry Road² after his release from jail, he was still validly registered during the charging period. Those facts, however, are the same as in *Watson* where the defendant returned to the same address he had initially reported to the county sheriff. *Id.* at 4-5. Although it may seem unnecessary to reregister using the same address already on file, the purpose of the registration statute is fulfilled when the authorities know where the offender currently is located. Many people lose their residence when incarcerated. The legislature could reasonably require the offender to confirm his address after release from custody rather than require that law enforcement check to confirm whether the last address on file was still accurate.

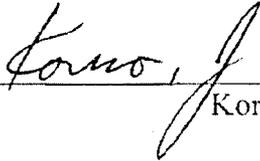
² There was an indication in the record that Mr. Ashley did not actually live at the Beaudry Road address. CP at 2. The trial, however, did not address that issue.

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On its face, the statute is not ambiguous. It requires an offender to register when released from custody "as a result of" the sex offense. Here, Mr. Ashley was incarcerated for violating the conditions of his community custody for the sex offense that also gave rise to his duty to register. He falls within the clear language of the statute. The statute does not limit its reach to the initial registration obligation or the initial release from custody, but applies in each instance where the defendant is incarcerated and released for the sex offense.

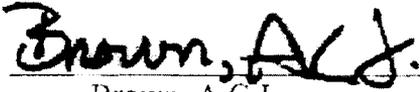
As recognized by the trial court, *Watson* is indistinguishable. This court is bound by the Washington Supreme Court's interpretation. *State v. Gore*, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984). Accordingly, the conviction for failure to register is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

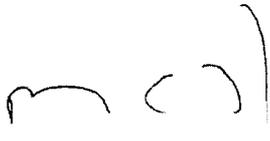


Korsmo, J.

WE CONCUR:



Brown, A.C.J.



Lawrence-Berrey, J.

IN THE SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	S.C. NO. _____
)	
v.)	COA NO. 31659-9-III
)	
TOMMY ASHLEY,)	
)	
PETITIONER.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **PETITION FOR REVIEW** TO BE FILED IN THE **COURT OF APPEALS** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] TOMMY ASHLEY 939685 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) U.S. MAIL () HAND DELIVERY () _____

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF NOVEMBER, 2014.

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WASHINGTON APPELLATE PROJECT

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Court of Appeals

Division III

State of Washington

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