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COA NO. 47368-2-II
Cowlitz Co. Cause NO. 14-1-00596-0

**SUPREME COURT OF STATE OF
WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

FAUZI BIN ZAIN

Appellant/Petitioner.

RESPONSE TO PETITION FOR REVIEW

RYAN JURVAKAINEN
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ORIGINAL

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I. IDENTITY OF RESPONDENT

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests this Court deny review of the December 1, 2015, unpublished opinion of the Court of Appeals in *State v. Zain*, COA No. 47368-2-II. This decision upheld the petitioner's conviction for one count of failure to register as a sex offender and upheld the petitioner's legal financial obligations.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

Washington's failure to register as a sex offender statute is not unconstitutional as it does not contain any provisions that intend to impede or restrict travel, nor does it actually prevent a person from traveling. Additionally, sufficient evidence supports the conviction, and Mr. Zain waived a claim of error regarding legal financial obligations (LFOs) by failing to object to their imposition below.

III. STATEMENT OF THE CASE

A. Procedural History.

On May 20, 2014, Fauzi Bin Zain was charged by information with Failure to Register as a Sex Offender, RCW 9A.44.130(1), 4(a), 4(b), 5(a), 5(b) and RCW 9A.44.132(1)(b). CP 5. On July 17, 2014, Zain waived his right to a jury trial, and stipulated that he had previously been convicted of

a sex offense and two prior failures to register as a sex offender. RP 1, CP 4–5, 10, 14. On July 24, 2014, Zain was convicted as charged at a bench trial. RP 4–70. On July 31, 2014, Zain was sentenced within the standard range. RP 75, CP 17. Zain timely appealed, and the Court of Appeals affirmed his conviction and the imposition of LFOs. CP 21.

B. Factual History

On January 16, 2014, Fauzi Bin Zain, having been released from custody, registered as a sex offender at the Cowlitz County Sheriff's Office, Sex Offender Unit. He listed his address as 1316 11th Ave, Apt 3, Longview, Washington. RP 11. According to Kris Taff, the clerk that handles the sex offender registrations, Zain did not submit a new change of address form. RP 11.

The Department of Corrections provided Zain with a three month voucher for housing. RP 16, 51–52. Brian Weathers, Manager of Hudson Hotel Annex testified that Zain's Department of Corrections voucher ran out on April 16, 2014. On that date, Weathers tried to contact Zain by going to the room a couple of times and by calling him. Five days later, on April 21, Weathers, with the help of Zain's roommate Benjamin Held, packed up Zain's belongings, changed the locks, and checked him out of the hotel. RP 17, 20. Weathers explained that "because it is a hotel, if somebody's late I generally give them the courtesy, although you don't have to because it's a

hotel, I give them the courtesy of trying to contact them and – uh – once I cannot do that, since it's not an apartment I don't have to evict, I just remove their belongings." RP 15. Once a person's belongings are removed, he keeps them for no less than thirty days and changes the locks. RP 15–16.

Weathers testified that Zain's belongings consisted of one blue Tupperware tub and a couple bags. No one ever collected these items. RP 18. After April 21, Benjamin Held paid increased rent to rent the room as a single, without a roommate. RP 22.

On April 17, Community Corrections Officer Terry Mathers attempted to contact Zain both in person at the Hudson Hotel and by phone but was unable to reach him. RP 29. Officer Mathers left Zain a message telling him to call by four pm. RP 31. Zain did not contact Officer Mathers.

On the early morning of April 21, 2014, Officer Mathers returned to the Hudson Hotel Annex and could not locate Zain. Officer Mathers also left him around one or two messages requesting a return call. On April 23, Zain called Officer Mathers and asked if there was a warrant issued for him. Officer Mathers called him back and left him a message that there was a warrant. RP 32–33. He did not receive another message from the Zain. Zain testified that his number has remained unchanged since his release from prison. RP 54. On April 28, 2014, Officer Mathers learned that Zain was in the Lewis County Jail. RP 33. Zain testified that he was arrested on

the DOC warrant when he was in Lewis County on April 28, 2014. RP 35, 52.

On April 24, 2014, Olga Lozano, a civilian investigator with the Longview Police Department, went to the Hudson Hotel to verify Zain's address and could not locate him. RP 38–39.

IV. ARGUMENT

A. **Washington's Failure to Register as a Sex Offender Statute is not unconstitutional as it does not burden a fundamental right, and there is a compelling State interest for the statute.**

The constitutionality of a statute is reviewed de novo. *City of Spokane v. Neff*, 152 Wn.2d 85, 88, 93 P.3d 158 (2004). A reviewing court presumes “that a statute is constitutional and it will make every presumption in favor of constitutionality where the statute’s purpose is to promote safety and welfare, and the statute bears a reasonable and substantial relationship to that purpose.” *State v. Glas*, 147 Wn.2d 410, 422, 54 P.3d 147 (2002); *State v. Lee*, 135 Wn.2d 369, 390, 957 P.2d 741 (1998). Whenever possible, a statute is to be interpreted in a way that upholds its constitutionality. *State v. Halstein*, 122 Wn.2d 109, 123, 857 P.2d 270 (1993) (following *Tacoma v. Luvene*, 118 Wn.2d 826, 841, 827 P.2d 1374 (1992), *State v. Dixon*, 78 Wn.2d 796, 804, 479 P.2d 931 (1971)).

If a statute implicates a fundamental right, the State must have a compelling interest to justify the statute. *State v. Schimelpfenig*, 128 Wn. App. 224, 226, 115 P.3d 338 (2005). The right to travel is a fundamental right and subject to strict scrutiny. *Kent v. Dulles*, 357 U.S. 116, 78 S. Ct. 1113 (1958); *City of Seattle v. McConahy*, 86 Wn. App. 557, 571, 937 P.2d 1113, *rev. den.*, 113 Wn.2d 1018, 948 P.2d 338 (1997). “A state law implicates the right to travel when it *actually* deters such travel and where impeding travel *is its primary objective.*” *State v. Enquist*, 163 Wn. App. 41, 256 P.3d 1277 (2011), *rev. den.*, 173 Wn.2d 1008 (2012) (emphasis added).

In the present matter, Zain’s contention that RCW 9A.44.130 is unconstitutionally overbroad is without merit. Zain cannot demonstrate beyond a reasonable doubt that RCW 9A.44.130 is facially invalid or unconstitutional “as applied.” First, despite Zain’s argument, and as previously recognized by the courts, the State does have a compelling interest that justifies the statute. “The statute was enacted to ‘assist local law enforcement agencies’ efforts to protect their communities by regulating sex offenders.” *Enquist*, 163 Wn. App. at 51 (*quoting* Laws of 1990 ch. 3, § 401). “Impeding travel has never been RCW 9A.44.130’s primary goal.” *Id.*

Furthermore, the failure to register as a sex offender statute does not contain any provisions that intend the impediment or restriction of travel. Likewise, the statute does not actually prevent Zain from traveling. Zain is not prohibited from moving his residence, nor is he prohibited from moving to a different city, county, or state. “The statute...permits a registrant to travel or move out of the state for work or educational purposes, if he...timely registers with the new state and notifies the sheriff of the last Washington county in which he registered.” *Id.* Zain fails to provide any evidence that RCW 9A.44.130 restricts his ability to travel.

Finally, Zain’s contentions that the registration statute is overbroad because it reaches people who are neither dangerous nor likely to reoffend is without merit. Legislatures need not have “scientific or exact proof of the need for legislation” for a statute to withstand a constitutional challenge. *State v. Smith*, 185 Wn. App. 945, 955, 344 P.3d 1244 (2015), quoting *State v. J.D.*, 86 Wn. App. 501, 508, 937 P.2d 630 (1997). There must only be an evidentiary nexus between the law’s purpose and its effect. *Id.* Such a nexus exists in this case, as the legislature enacted the registration statute upon a finding that sex offenders pose a high risk of re-offense after testimonial input from many groups as well as the Governor’s Task Force on Community Protection. *Id.* at 956. The legislature’s finding that sex offenders pose a danger to society, therefore, is not unfounded.

Zain fails to demonstrate that the registration statute is unconstitutional. Even assuming that the statute does impair the right to travel, it is justified by a compelling State interest. Therefore, the petition should be denied.

B. There was sufficient evidence to convict Zain.

The test for reviewing a challenge to the sufficiency of evidence in a criminal case is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.” *State v. Gentry*, 125 Wn.2d 570, 596–97, 888 P.2d 1105 (1995). All reasonable inferences from the evidence are drawn in favor of the State. *Id.* at 597.

In this case, the State had sufficient evidence to show that Zain had failed to register as a sex offender as he was not living where he had registered and had not changed his address with the Cowlitz County Sheriff’s Office.

Zain registered as a sex offender on January 16, 2014, and listed his address at 1316 11th Avenue, Apartment 3. Zain did not submit a new change of address form when he moved. RP 11. Brian Weathers, the manager of the Hudson Hotel, testified that Zain’s DOC housing voucher ran out on April 16, 2014. RP 16, 51–52. The evidence at trial showed that Weathers tried to contact Zain on April 16 and was unable to do so.

Weathers then packed up Zain's belongings and changed the locks on April 21. RP 17, 20. No one, including Zain, came to collect his belongings. RP 15-18. After April 21, Benjamin Held began to rent the room as a single. RP 22.

On April 17, Community Corrections Officer Terry Mathers tried to contact Zain in person and by phone and was unable to reach him. Officer Mathers returned to the Hudson Hotel on April 21 and Zain was again not there. Officer Mathers left him around one or two messages requesting a return call. On April 23, Zain called Officer Mathers and asked if there was a warrant issued for his arrest. Officer Mathers called him back and left him a message that there was a warrant. RP 32-33. He did not receive another message from the Defendant. Zain testified that his number has remained unchanged since his release from prison. RP 54. On April 28th, 2014, Officer Mathers learned that Zain was in the Lewis County Jail. RP 33. Zain testified that he was arrested on the DOC warrant when he was in Lewis County on April 28, 2014. RP 35, 52.

After repeated attempts by Weathers and Officer Mathers, Zain was never located at the hotel room. The evidence presented at trial proved that Zain's rent was only paid through April 16 and that Zain was evicted on April 21 and had no lawful basis to inhabit the room. In fact, another tenant began to pay for the room as a single, and Zain never returned to the Hotel

to collect his belongings. Viewed in a light most favorable to the State, there was sufficient evidence presented to show Zain had failed to register as a sex offender after having moved from the Hudson Hotel.

C. Zain waived a claim of error regarding LFOs by failing to object to their imposition in the lower court.

The general rule for appellate disposition of issues not raised in the trial court is that appellate courts will not entertain them. RAP 2.5; *State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013) (citing *State v. Guzman Nunez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011)). Appellate courts can also refuse to address a RAP 2.5(a) issue sua sponte. *Id.*; *State v. Kirkpatrick*, 160 Wn.2d 873, 880 n. 10, 161 P.3d 990 (2007), *overruled in part on other grounds by State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012). In fact, this Court has previously declined to review the imposition of legal financial obligations when raised for the first time on appeal. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) (“Because he did not object in the trial court to finding 2.5, we decline to allow him to raise it for the first time on appeal.”). Because the defendant in this case failed to object to the imposition of LFOs at sentencing, this Court should not review the trial court’s imposition of LFOs.

In *State v. Duncan*, the defendant challenged for the first time on appeal the trial court’s finding that he had the current or future ability to pay

legal financial obligations, arguing that the record did not support the trial court's findings that he had the ability to pay. 180 Wn. App. 245, 247, 327 P.3d 699 (2014). In that case, the only evidence that the trial court considered the defendant's ability to pay was boilerplate language on the judgment and sentence. *Id.* at 253. The boilerplate language at issue was:

2.7 Financial Ability: The Court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The Court finds that the defendant has the present ability or likely future ability to pay the financial obligations imposed herein. RCW 9.94A.753.

Id. at 251. The Court in that case held that ability to pay LFOs is not an issue that defendants overlook; rather, it is one that they reasonably waive because it is "unhelpful for a defendant to portray himself as irretrievably indigent at the time of sentencing." *Id.* at 250. Because defendants typically choose to refrain from suggesting at sentencing that they will remain indigent, Division Three of this Court found that defendants waive the issue of imposition of LFOs at sentencing, rather than overlooking it. Therefore, this Court refused to address the issue when raised for the first time on appeal.

This case is directly on point with *Duncan*. Because Zain did not object to the imposition of LFOs at sentencing, this court should not consider the issue.

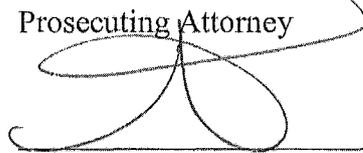
IV. CONCLUSION

For the reasons stated above, Petitioner's petition for discretionary review should be denied.

Respectfully submitted this 22nd day of January, 2016.

RYAN JURVAKAINEN
Prosecuting Attorney

By:



AILA R. WALLACE/WSBA #46898
Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petition for Review was served electronically via e-mail to the following:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on January 22nd, 2016.


Michelle Sasser

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Attached, please find the Response to Petition for Review regarding the above-named Petitioner.

If you have any questions, please contact this office.

Michelle Sasser
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Re: Deggs v. Asbestos Corporation Limited, et al. (S.C. #91969-1) – Request for Amicus Curiae Status and Permission to File An Amicus Curiae Brief

Dear Mr. Carpenter:

It has come to the attention of the Washington State Association for Justice Foundation (WSAJ Foundation or Foundation) that this Court granted review in this case on September 30, 2015, and that it has been set for oral argument on March 10, 2016. Under RAP 10.2(f), Rules of Appellate Procedure (2016 ed.), any amicus curiae brief is due on or before **Monday, January 25, 2016**.

Pursuant to RAP 10.6(b), WSAJ Foundation requests that it be granted amicus curiae status in this case and permitted to file its forthcoming proposed amicus curiae brief with the Court. The Foundation submits the following information regarding this request:

1. WSAJ Foundation is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. Both WSAJ and WSAJ Foundation name changes were effective January 1, 2009.
2. WSAJ Foundation has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the relationship between a decedent's inter vivos claim for personal injury and a related wrongful death claim brought for the benefit of the decedent's statutory beneficiaries under RCW 4.20.010 and .020.
3. The Foundation is familiar with the briefing before the Court in this case, and the forthcoming proposed amicus curiae brief addresses the following issues:

Does expiration of the statute of limitations for a decedent's inter vivos personal injury claims, or a judgment on those same claims during the decedent's lifetime preclude the decedent's personal representative from timely pursuing a related wrongful death claim for the benefit of the statutory beneficiaries under RCW 4.20.010 and .020?

4. If this amicus request is granted, it is believed that the forthcoming proposed amicus curiae brief would be helpful and add to the scholarship and analysis before the Court on the above issue.

Mr. Ronald R. Carpenter
January 22, 2016
Page 2

If this request is granted, the Foundation will be represented by the undersigned and the following co-counsel:

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Respectfully submitted,

s/George M. Ahrend

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On Behalf of WSAJ Foundation

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Subject: Deggs v. Asbestos Corporation Limited, et al. (S.C. #91969-1)

Dear Mr. Carpenter:

On behalf of the WSAJ Foundation, a letter request to file an Amicus Curiae Brief is attached to this email. Counsel for the parties and other Amicus Curiae are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

--

Please note new address below eff. Jan. 1, 2016.

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