State v. Gibson

127 Wash.App. 1009 (2005) | Cited 0 times | Court of Appeals of Washington | April 26, 2005

JUDGES Concurring: David H. Armstrong J. Robin Hunt

UNPUBLISHED OPINION

Thomas Gibson appeals his conviction of failing to register as a sex offender, arguing various grounds for reversal and dismissal. The State concedes that the charging document is deficient. We reverse and remand for dismissal without prejudice.

FACTS

Gibson had two convictions that required sex offender registration under RCW 9A.44.130. He registered as a sex offender in Shelton, Mason County.

On March 15, 2003, Shelton police dispatch received an anonymous tip that Gibson did not live in Shelton. The tipster said that Gibson lived with his girlfriend, Jennifer McDonough, in her Tenino, Thurston County home.

In response, a Shelton police officer contacted Tenino officers, who reported back that they observed Gibson's car parked in front of Jennifer McDonough's residence several times. Also, the officers had seen Gibson getting out of McDonough's vehicle and walking toward her house. And a detective saw Gibson's car parked at the residence overnight more than once.

Executing a warrant on April 3, authorities searched Gibson's Shelton trailer home and found no evidence of recent use. No footprints in fresh mud led to the trailer. The trailer had no power, water, or toilet facilities. And there were no trash cans or garbage nearby.[1]

On April 4, under another warrant, authorities searched McDonough's residence. They found and arrested Gibson. When asked why Gibson had not registered in Thurston County, Gibson replied that he still lived in Shelton and just visited McDonough. But Nicholas McDonough, Jennifer's 18-year-old son, told a detective that, to his knowledge, Gibson had been living at his mother's residence for approximately two weeks.

The State charged Gibson with failing to register as a sex offender under RCW 9A.44.130.[2] At trial, Nicholas McDonough testified that his mother started dating Gibson a few weeks after she moved into her Thurston County residence. Nicholas stated that Gibson occasionally spent the night at his

mother's house; on other occasions, his mother would go to Gibson's trailer in Mason County. When asked if Gibson had any of his belongings at his mother's house, Nicholas responded: 'Just clothes for, like, the next day.' Report of Proceedings (RP) at 152.

McDonough testified that Gibson began visiting her residence a couple of weeks after she moved in. Between then and April 4, she approximated that Gibson stayed at her house six to ten times and that she stayed with him at his trailer twice. McDonough testified that, when Gibson came to her house, he did not always stay overnight. She stated that Gibson did not keep any clothing at her home and he did not contribute to the rent payments. When asked whether Gibson was residing with her, she replied, 'No.' RP at 181.

Luanne Smith, Gibson's mother, testified that her son lived in his Shelton trailer. Smith also stated that, during spring 2003, Gibson's trailer lacked water so he took showers, did his laundry, and ate at her house. Gibson also received his mail at his mother's home.

Gibson testified that, during the relevant period, he lived in his Shelton trailer but that he cooked, received his mail, and did his laundry at his mother's house. He stated that sometimes he stayed at his mother's house and that he stayed at McDonough's home approximately 10 times. Gibson agreed that he had not registered any change of address with the authorities.

A jury convicted Gibson as charged and he appeals.

ANALYSIS

Information

Gibson first contends that the information charging him with failure to register as a sex offender failed to include all the offense elements. The State concedes error and argues that the remedy is to reverse and dismiss without prejudice. Gibson counters that we must nevertheless review his insufficiency of the evidence argument and reverse and dismiss with prejudice. To do otherwise, he argues, grants the State a benefit from its improper charging.

Our court and our Supreme Court have addressed this issue. In Rodgers, a consolidated case, the State charged co-defendants Eddie Locklear and Jesse Rodgers with a drive-by shooting, but it later amended the information to charge only Locklear. State v. Rodgers, 146 Wn.2d 55, 58, 43 P.3d 1 (2002). On appeal, the State conceded that it had not validly charged Rodgers and we vacated his conviction. Rodgers, 146 Wn.2d at 58. We did not address Rodgers' insufficiency of the evidence argument. On review, our Supreme Court affirmed Rodgers, noting that we properly declined to review the sufficiency argument because Rodgers had never been validly charged and the court obtained no subject matter jurisdiction. Rodgers, 146 Wn.2d at 59. Likewise in McGary, when faced with a defective information, we declined to review for sufficiency of the evidence. State v. McGary,

122 Wn. App. 308, 318, 93 P.3d 941 (2004) (''{A} court may not consider a challenge to the sufficiency of the evidence supporting a conviction for an offense that was not validly charged.'') (citing Rodgers, 146 Wn. 2d at 59-60). Although we are sensitive to Gibson's argument, we must follow this precedent. Thus, we do not review the sufficiency of the evidence here.

Constitutionality of RCW 9A.44.130

Gibson also contends that the sex offender registration statute, RCW 9A.44.130, is unconstitutionally vague. He asserts that the statute does not 'clearly indicate to what extent a person is permitted to sleep over.' Appellant's Brief at 18.

We review the constitutionality of a statute de novo as a question of law. State v. Shultz, 138 Wn.2d 638, 643, 980 P.2d 1265 (1999), cert. denied, 529 U.S. 1066 (2000). We presume a statute constitutional, and the party asserting otherwise must demonstrate unconstitutionality beyond a reasonable doubt. State v. Groom, 133 Wn.2d 679, 691, 947 P.2d 240 (1997).

Where the statute does not address First Amendment rights, we evaluate a vagueness challenge by examining the statute as applied to the particular facts of the case. State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992). A statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct. State v. Prestegard, 108 Wn. App. 14, 21, 28 P.3d 817 (2001). 'This test does not demand 'impossible standards of specificity or absolute agreement''; it permits some statutory imprecision. Coria, 120 Wn.2d at 163.

Gibson's vagueness challenge centers on the term 'move.' The statute does not define this term. Accordingly, we give it its ordinary meaning. State v. Wentz, 149 Wn.2d 342, 352, 68 P.2d 282 (2003).

The word 'move' is a word of common understanding that, in this context, means a change of residence. To 'move' means 'to settle in a new or different place (as of residence, business) usu. abandoning a former one: change one's abode or location.' Webster's Third New International Dictionary 1479 (1976). RCW 9A.44.130 limits the registration requirements to instances where a convicted sex offender changes residences. This requirement does not apply when a sex offender merely 'sleeps over.' Thus, this statute is not unconstitutionally vague.[3]

Accepting the State's concession, we reverse and remand for dismissal without prejudice.

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

Houghton, P.J.

We concur: Armstrong, J., Hunt, J.

1. The police observed the same condition of the trailer during earlier observations on March 31 and April 2.

2. Before trial, Gibson stipulated that he was a sex offender.

3. Because we reverse and remand, we do not address Gibson's other arguments made through counsel and in his Statement of Additional Grounds. RAP 10.10.