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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2009AP001643-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM DINKINS, SR.,

Defendant-Appellant.

Appeal from the Judgment of Conviction and the
Order Denying Defendant's Postconviction Motions
Entered in the Dodge County Circuit Court,
The Honorable Andrew P. Bissonnette, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. To convict a person for failing to provide information required by the sex offender registration statute, must the state prove that the person had actual knowledge of the information he was required to provide?

The trial court answered: No, denying the defendant's postconviction motion which raised this issue.

II. Was the evidence insufficient to support the defendant's conviction because the state failed to prove at trial that Dinkins knew where he would be residing upon his release from prison?

The trial court answered: No, denying the defendant's postconviction motion which raised this issue.

III. In the alternative, should this court order a new trial in the interest of justice because the real controversy was not fully tried?

The trial court did not answer this question, but refused to exercise its corresponding authority to grant a new trial in the interest of justice.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Because this appeal involves an issue of first impression concerning the elements of a criminal offense, the undersigned attorney believes that oral argument will assist the court in deciding the case, and that the court's decision is likely to warrant publication.

STATEMENT OF THE CASE

The state charged William Dinkins, Sr. with failing to provide information required by the Sex Offender Registration Law, Wis. Stat. § 301.45 (2007-08).[1] (3). On November 18, 2008, after the trial court had denied his motions to dismiss the complaint, Dinkins waived his right to a jury trial, and the parties agreed to have the court determine his guilt or innocence based on the testimony and exhibits introduced at the defendant's preliminary hearing. (31:3-18). After considering that evidence, Dodge County Circuit Judge Andrew P. Bissonnette found Dinkins guilty of the charged offense, withheld sentence, and placed him on probation for 30 months, with the condition that he serve 90 days in the county jail. (31:18-19, 34-37; 27).

Pursuant to Wis. Stat. § 974.02 and (Rule) § 809.30(2)(h), Dinkins moved the trial court to vacate his conviction, or in the alternative, for a new trial. (32). The trial court heard and denied the motion on June 9, 2009. (39:21-23; 35). Dinkins now appeals from the judgment of conviction and from the order denying his postconviction motions, renewing the challenges to his conviction that he raised in the trial court.

The following facts, developed at the preliminary hearing, are pertinent to the issues raised in this appeal.

The Department of Corrections is required by Wis. Stat. § 301.45(2)(a) (2007-08) to maintain a registry of sex offenders. William Dinkins was convicted of first-degree sexual assault of a child on February 4, 1999, and was

[1] For the court's convenience, the complete text of Wis. Stat. § 301.45 is reprinted in the Appendix at 104-09. Dinkins will paraphrase or quote various portions of the statute as necessary throughout the brief.

sentenced to ten years in prison. (20:15-17). He is therefore subject to the sex offender registration requirements. Wis. Stat. § 301.45(1d)(b) and (1g)(a).

The registry must include the registered offender's identifying information and must be updated on a regular basis. Paragraph (2)(a) of § 301.45 specifies the information which the registry must contain. Subdivision 5 of paragraph (2)(a) requires the registry to contain, "The address at which the person is or will be residing."

Dinkins's ten-year sentence was due to expire, and he was scheduled to be released from prison, on his maximum discharge date of July 20, 2008. (9:1; 20:15-17). Thus, Dinkins would not have been on supervision after July 20, 2008. Paragraph (2)(d) of § 301.45 specifies that a person not under supervision of the either the Department of Corrections or the Department of Health Services is responsible for reporting the information required by paragraph (2)(a) to the Department of Corrections.

Under subdivision 4 of paragraph (2)(e) of this statute, a person being released from prison because he or she has reached the expiration date of his or her sentence must report the required information "no later than 10 days before being released from prison."

Under paragraph (6)(a) of the statute, "Whoever knowingly fails to comply with any requirement to provide information under subs. (2) to (4)" is guilty of a Class H felony, with certain exceptions not relevant to this case. The state charged Dinkins with this offense when he failed to report to the department by July 10, 2008, the address at which he would be residing upon his release from prison. (3).

The complaint was actually filed on July 17, 2008, three days *before* Dinkins was due to be released from prison. *Id*. Following the execution of a writ of habeas corpus *ad prosequendum*, Dinkins was transported directly from the Oshkosh Correctional Institution to the Dodge County Jail for his initial appearance on July 18, 2008. (1) At that hearing, the court set cash bail of $10,000, which Dinkins was unable to post. (4:3; 30:2). Thus, Dinkins remained confined throughout the proceedings in the trial court. (31:25).

At the preliminary hearing on July 31, 2008, Dinkins's prison social worker, Myra Smith, testified that every prison inmate is asked to complete a five-page document called a "reintegration plan" approximately six months before his release from prison. Smith stated that the document addresses "where you're going to live, how you're going to support yourself, [and] what help you might need" upon release. (20:19-20). The form did not contain any information regarding Dinkins's obligation to register as a sex offender. (20:35).

In February or March, 2008, Smith asked Dinkins to complete the reintegration plan. Dinkins told Smith that he was checking with his daughter about a place to live, and that when he received an answer, he would fill out the document and return it to her. (20:20). On May 28, 2008, Dinkins returned the form, telling Smith that he was refusing to complete it because he was serving until maximum discharge, and as a result, would not be on supervision. (20:21, 36, 47).

The form was sent to a parole agent, Lisa Gallitz, who had been assigned the task of issuing a special bulletin notice to law enforcement agencies concerning Dinkins's impending release from prison. (20:22, 46-47). On June 2, 2008, at Gallitz's request, Smith informed Dinkins that he needed to

provide the address at which he would be residing and that he would be in violation of the sex offender registration statute if he failed to do so. (20:42-43; 8:1). That same day, Gallitz arranged through Smith to speak with Dinkins by telephone. (20:22-23, 47-48). Gallitz explained to Dinkins that even though he would not be on supervision, he was still required to register under the Sex Offender Registration Program, and that he was also required to register with GPS, because his whereabouts would be tracked by GPS for the rest of his life.[2] (20:48-49). Gallitz also explained to Dinkins that the department needed his address before his release because they "needed to make arrangements to transport him and get the GPS hook-up." (20:48). Gallitz told Dinkins that he could be charged with a crime if he failed to provide the required information. (20:48-49).

Dinkins told Gallitz that he planned to live with his daughter, but he didn't know her address and the phone number that he had for her had been disconnected. (20:48). After the phone call, Dinkins reiterated to his social worker that he wished to reside with his daughter. (20:23). He told Smith that he had written to his daughter several times, but had received no answer. *Id*. With Smith's help, Dinkins called his daughter the next day, but the phone was disconnected. He called the daughter's boyfriend, but was told he had the wrong number. He tried calling his ex-wife, but received a busy signal. (20:24).

On June 4, 2008, Smith provided Dinkins with a Sex Offender Registration form, which notified Dinkins of the statutory registration requirement, and asked for information relating to his identifying characteristics, his conviction, his

[2] GPS tracking of sex offenders is mandated by Wis. Stat. § 301.48.

residence, his employment, his school, and his vehicle. (20:24-25, 36; 9:1). Dinkins signed the form that same day. Above his signature was a preprinted acknowledgment that he had been notified of his duty to register and to supply the required information, as outlined on the reverse side of the form. (20:26-27; 9:1). Smith actually filled out most of the form, obtaining the necessary information from DOC records. (20:25-26). In the space provided for Dinkins's residence, Smith wrote "To be determined by agent," as she had done before when an individual did not have an approved residence. (20:28; 9:1). Smith testified that from her standpoint, she was relying on the agent to determine and approve Dinkins's residence, "essentially throwing the ball into their court." (20:41). Smith stated that in this situation, if the inmate found a residence before getting released, he could submit an updated form. Dinkins never submitted an updated form. *Id*.

On June 10, 2008, Smith offered to help Dinkins by making phone calls in his behalf, but Dinkins declined the offer. (20:30). One week later, Dinkins asked Smith to help him call his ex-wife, but again, her line was busy. (20:30-31). Thereafter, Smith had contact with Dinkins on at least a weekly basis. When asked where he would be living upon his release, Dinkins always stated that he was waiting for a reply from his daughter, and that he could not imagine why she hadn't contacted him. (20:31). Dinkins did not mention any other potential residences, and was never even able to provide Smith with the municipality in which he intended to live. (20:31-32). However, Smith conceded that between receiving the registration form and the projected release date, there was "some continued effort on [Dinkins's] part to try to find a residence." (20:40).

Lisa Gallitz did not speak directly with Dinkins after their June 2nd telephone conversation. (20:59). Gallitz attempted to find Dinkins's daughter, Brianna Dinkins, by consulting CCAP, the white pages of the telephone directory, and police department records. (20:54-55). An agent investigated several addresses in Fitchburg and Madison, and Gallitz left her business cards at two addresses in Sun Prairie, asking Brianna to contact her. But Gallitz did not receive a response to these communications. (20:55; 8:2). Gallitz obtained Brianna's phone number from Brianna's brother, and left messages for her at that number, but again received no response. (8:3). On July 7, 2008, Gallitz finally received another number for Brianna from Brianna's mother, who informed Gallitz that it was not feasible for Dinkins to live with Brianna because she had a three-year-old daughter. *Id*. On July 18, 2008, Brianna Dinkins finally called Gallitz, telling her that while she would like to have her father live with her, her fiancé did not agree to that arrangement, she had a three-year-old daughter, and their landlord would not let Dinkins live there. (20:58; 8:4).

While Gallitz discussed with her supervisor the possibility of Dinkins living at a homeless shelter in Madison or Dodge County, she didn't convey this suggestion or any other option to either Smith or Dinkins. (20:59-60). Gallitz testified that she was not aware of any other options. (20:60). While the department had the responsibility to transport Dinkins to his residence upon his release from prison and to wait until the GPS was hooked up, Gallitz believed that the department lacked the authority to do anything further because Dinkins was not on supervision. (20:60-61). Although she had discussed the situation with her supervisor, the department's Regional Chief, and even the Secretary of the Department of Corrections, "nobody ever mentioned finding him housing." (20:61). Gallitz confirmed that "the

onus was put on [Dinkins] to come up with a residence." (20:60).

After considering this evidence, the trial court found Dinkins guilty of the charged offense. (31:18-19). The court found that the state had proved all three elements listed in the pattern jury instruction for this offense: (1) that Dinkins was required by reason of his prior sexual assault conviction to provide information under § 301.45; (2) that he failed to provide information as required; and (3) that he knew he was required to provide the information. (31:6-8, 18-19). See Wis JI-Criminal 2198 (2005).

In his postconviction motion, Dinkins argued that the statute necessarily requires proof of a fourth element, namely, that the defendant had actual knowledge of the information that he was required to provide. (32). Because the state did not submit proof of this fact, Dinkins argued that the evidence was insufficient to support his conviction. *Id*. In the alternative, Dinkins moved for a new trial in the interest of justice on the ground that the real controversy was not fully tried. (32:10).

The trial court denied the motion from the bench. (31:21-23; App. 101-03). The court initially conceded, "I could see going either way on this. I think some of the arguments that I read in Mr. Phillips' brief earlier this afternoon, I thought, you know, that makes sense, and I could see deciding for Mr. Dinkins." (31:22; App. 102). The court, however, expressed the following concern, which ultimately proved dispositive:

> If an offender is allowed to claim inability to designate an address because they're homeless, they are thereby, I think, depriving the DOC of one of the most critical pieces of information necessary for successful

> supervision of a sex offender in the community; where in the heck is he? Is he living next to a school or living above the three teenage girls? Where is he living? If somebody can say, hey, I'm homeless, I'm not going to tell you where I'm at, I'll go where I want, that is a problem as well. I mean, that's a big problem.

(31:23; App. 103).

Despite acknowledging that Dinkins "has some pretty good arguments," the court accordingly decided, "I am going to side with the DOC saying, if you're a sex offender, you've got to find a place." (31:23; App. 103).

Dinkins now renews the arguments he made in his postconviction motion.

ARGUMENT

I. To Convict a Person for Failing to Provide Information Required by the Sex Offender Registration Statute, the State Must Prove That the Person had Actual Knowledge of the Information he was Required to Provide.

It is undisputed that William Dinkins was required to report the address at which he would be residing upon his release from prison, that he was required to do so at least 10 days before his release, and that he failed to comply with this requirement. Whether, under the circumstances of this case, the defendant's noncompliance with the statute amounts to a crime depends on whether these facts constitute the only elements of the offense. Thus, the court's first task is to determine the elements of the crime proscribed by § 301.45. That determination necessarily involves statutory construction, which presents an issue of law which this court

decides independently, *i.e.*, without deferring to the trial court's ruling. ***State ex rel. Thomas v. Schwarz,*** 2007 WI 57, ¶ 25, 300 Wis. 2d 381, 393, 732 N.W.2d 1.

With certain exceptions not relevant to this appeal, Wis. Stat. § 301.45(6)(a)1 provides, "Whoever knowingly fails to comply with any requirement to provide information under subs. (2) to (4) is … guilty of a Class H felony."

The Jury Instructions Committee construes this statute to include three elements: (1) "The defendant was a person who was required to provide information under section 301.45;" (2) "The defendant failed to provide information as required;" and (3) "The defendant knowingly failed to provide the information." Wis JI-Criminal 2198 (2005). With respect to the latter element, the pattern instruction states, "This requires that the defendant knew that (he) (she) was required to provide the information." *Id*.

Dinkins contends that the Jury Instructions Committee has incorrectly construed this statute. The state must prove not only that the offender knew he was required to *provide* the information, but also that he knew the *information* that he was required to provide. Dinkins bases his arguments on fundamental principles of statutory construction as well as constitutional principles which limit a state's ability to define criminal offenses.

A. The legislature did not intend to punish those who are unable to comply with the reporting requirements because they lack knowledge of the information that must be reported.

It is readily apparent that not all failures to provide information needed for the sex offender registry result in the commission of a crime. Only those who *knowingly* fail to

provide the required information are culpable. Thus, the fundamental question in this appeal is, what does an offender need to "know" to make his failure to comply with the statute criminal?

It is simply illogical to assume, as the Jury Instructions Committee apparently did, that the legislature meant to require proof that that the person knew of his duty to provide the required information, but did not require proof of that person's knowledge of the information itself. That is, there is no logical reason for requiring knowledge of one fact and not the other. Ignorance of the required information makes its reporting truly impossible, and presumably, less culpable than if the offender had withheld known information. The legislature, by limiting criminal liability to "knowing" noncompliance, obviously intended *not* to punish those whose failure to report required information was attributable to mere lack of knowledge. But as the Jury Instructions Committee has construed this statute, that is exactly what the legislature has done: one's ignorance of the information required to be provided would not excuse his failure to report that information. This construction is simply illogical.

The Latin term for the word "knowingly" is *scienter*. BLACK'S LAW DICTIONARY 1373 (8th ed. 2004). As our Supreme Court recognized long ago, "the element of *scienter* is the rule rather than the exception in our criminal jurisprudence." ***State v. Alfonsi***, 33 Wis. 2d 469, 476, 147 N.W.2d 550 (1960). The Jury Instructions Committee's interpretation of Wis. Stat. § 301.45 undermines this "rule" by requiring knowledge only of the duty to provide information, and failing to require knowledge of the information itself. The interpretation essentially makes this a strict liability offense, contrary to legislative intent.

A cardinal rule of statutory construction is that statutes must be construed "reasonably, to avoid absurd or unreasonable results." ***State ex rel. Kalal v. Circuit Court for Dane County,*** 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663, 681 N.W.2d 110. It would be absurd to convict a person of a Class H felony, which carries a maximum punishment of six years in prison, for failing to provide information which he doesn't have or which may not even exist. Yet, the Jury Instructions Committee's construction of this statute permits exactly that result, not only with respect to one's prospective address, but with respect to other potentially unknown facts as well.

Under paragraph (2)(a) of the statute, the sex offender registry must contain the following information:

> 1. The person's name, including any aliases used by the person.
>
> 2. Information sufficient to identify the person, including date of birth, gender, race, height, weight, and hair and eye color.
>
> 3. The statute the person violated that subjects the person to the requirements of this section, the date of conviction, adjudication or commitment, and the county or, if the state is not this state, the state in which the person was convicted, adjudicated or committed.
>
> 4. Whichever of the following is applicable:
>
> a. The date the person was placed on probation, supervision, conditional release, transfer or supervised release.
>
> b. The date the person was or is to be released from confinement, whether on parole,

extended supervision or otherwise, or discharged or terminated from a sentence or commitment.

c. The date the person entered the state.

d. The date the person was ordered to comply with this section.

5. The address at which the person is or will be residing.

6. The name of the agency supervising the person, if applicable, and the office or unit and telephone number of the office or unit that is responsible for the supervision of the person.

8. The name and address of the place at which the person is or will be employed.

9. The name and location of any school in which the person is or will be enrolled.

9m. For a person covered under sub. (1g)(dt), a notation concerning the treatment that the person has received for his or her mental disorder, as defined in s. 980.01(2).

10. The most recent date on which the information in the registry was updated.[3]

Paragraph (2)(d) of this section requires a person not under supervision by either the Department of Corrections or the Department of Health Services to provide all of the information listed above, without exception. Under the Committee's interpretation, if the person did not know and

[3] In its original form, subdiv. 7 required a description of the offender's vehicle. 1995 Wis Act 440, § 58. Subdivision 7 was repealed by 1999 Wis Act 89, § 25.

therefore did not provide the "most recent date on which the information in the registry was updated,"—information required by subdiv. 10—he could be prosecuted for failing to provide that date, even though that information would be readily available to the state.

More analogous to this case, perhaps, is the following scenario. Under subdiv. 8, the person must provide the "name and address of the place at which the person is or will be employed." That information, like all other information required to be reported by a person who is about to be released from prison after completing his entire sentence, must be provided at least ten days in advance of his release. Subdiv. (2)(e)4. Under the Committee's interpretation, if the person had not yet secured employment, or if he did not even intend to seek employment upon his release from prison, he could *still* be prosecuted for failing to provide the employment information. The employment information, of course, would not even *exist* under this scenario, but nonetheless, the offender would have to provide it, or suffer a felony conviction.

These are indeed absurd results, but no more absurd than prosecuting a person for failing to provide at least ten days in advance the address of a residence which has not yet been established or which the offender does not even know. Notably, subdivisions 5 (pertaining to one's address) and 8 (pertaining to one's employment) are stated in identical terms: "is or will be residing" and "is or will be employed." In this regard, it is interesting that the state did not charge Dinkins with having failed to provide the name of his prospective employer, most likely because Dinkins indicated on the registration form that he was "unemployed." (9:1). The state undoubtedly recognized the absurdity of requiring Dinkins to provide the name and address of a non-existent

employer. Unfortunately, it did not employ that same reasoning when it charged Dinkins for failing to provide the address of his non-existent residence. Dinkins did not have a residence waiting for him any more than he had a job lined up.

Another rule of statutory construction is that statutory language must be "interpreted in the context in which it is used; not in isolation but as part of a whole; [and] in relation to the language of surrounding or closely-related statutes." ***Kalal****, supra*, 271 Wis. 2d at 663, ¶ 46. It is noteworthy that § 301.45 contains several provisions which reveal that the legislature expected there to be instances where an offender would be unable to provide required information. Significantly, the legislature sought to deal with these situations without imposing criminal liability.

For example, paragraph (2)(d) of § 301.45, which places the duty on an unsupervised person to report the required information, provides in pertinent part:

> If the person is unable to provide an item of information specified in par. (a), the department of corrections may request assistance from a circuit court or the department of health services in obtaining that information. A circuit court and the department of health services shall assist the department of corrections when requested to do so under this paragraph.

Thus, in the situation covered by the above language, the legislature has indicated that the offender's inability to provide the required information should not automatically result in his prosecution for a crime. Rather, the department may request the assistance from the court or the Department of Health Services (DHS) in obtaining the information, and if

that assistance is requested, the court or DHS must provide that assistance.

Likewise, paragraph (2)(f) provides an alternative method for obtaining information which the person has not previously provided. That paragraph provides:

> (f) The department may require a person covered under sub. (1g) to provide the department with his or her fingerprints, a recent photograph of the person and any other information required under par. (a) that the person has not previously provided. The department may require the person to report to a place designated by the department, including an office or station of a law enforcement agency, for the purpose of obtaining the person's fingerprints, the photograph or other information.

Thus, the department has at its disposal alternative methods for dealing with the offender who is unable to provide required information. The legislature did not intend criminal prosecution to automatically occur whenever the offender fails to provide all the information that he is required to provide. Consistent with that notion, the legislature did not intend that those who lack actual knowledge of the information they are required to provide would be guilty of this offense.

The Jury Instructions Committee is not infallible, and this court is therefore not required to accept its statutory interpretations. ***State v. Beets,*** 124 Wis. 2d 372, 383 n.7, 369 N.W.2d 382 (1985); ***State v. Harvey***, 2006 WI App 26, ¶ 13, 289 Wis. 2d 222, 234, 710 N.W.2d 482. In this particular instance, the Committee's interpretation is incorrect and ought be rejected. When the legislature proscribed the "knowing" failure to report required information, it could only have intended that the offender at least *know* the

information he failed to report before he could be found guilty of this crime.

B. Unless § 301.45 is construed to require proof of the person's actual knowledge of the information he failed to report, the statute would be unconstitutional.

Courts must "interpret statutes to be constitutional if possible." ***Kenosha County Department of Human Services v. Jodie W. (In re Termination of Parental Rights to Max G.W.)*****,** 2006 WI 93, ¶ 50, 293 Wis. 2d 530, 560, 716 N.W.2d 845; ***State v. Weidner***, 2000 WI 52, ¶ 41, 235 Wis. 2d 306, 323-24, 611 N.W.2d 684. Unless § 301.45 is construed to require proof of the defendant's actual knowledge of the information he failed to report, a conviction under the statute would violate his due process rights.

"Substantive due process rights are rooted in the Fourteenth Amendment of the United States Constitution, and Article I, Sections 1 and 8 of the Wisconsin Constitution." ***Jodie W.,*** 293 Wis. 2d 530, ¶ 39. "The right of substantive due process protects against a state act that is arbitrary, wrong or oppressive, regardless of whether the procedures applied to implement the action were fair." *Id*.

A statute which criminalizes the failure to perform an act which the actor is incapable of performing is arbitrary and oppressive, and thereby deprives the actor of substantive due process. As a leading authority on criminal law observes, "Just as one cannot be criminally liable on account of a bodily movement which is involuntary, so one cannot be criminally liable for failing to do an act which he is physically incapable of performing." 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, § 6.2(c) at 445 (2d ed. 2003).

That the source of this principle is the substantive due process doctrine is demonstrated by ***Lambert v. California***, 355 U.S. 225 (1957), where a municipal ordinance required all convicted felons living in the city of Los Angeles to register with the police. The Supreme Court struck down Lambert's conviction for failing to register on due process grounds, noting that the circumstances rendered it highly improbable that Lambert was aware of her obligation to register, and that she was accordingly afforded "the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it." 355 U.S. at 229.

United States v. Dalton, 960 F.2d 121 (10th Cir. 1992) provides another example of a conviction being overturned on due process grounds where the defendant was incapable of performing an act the law required him to perform. Dalton was convicted of possessing and transferring an unregistered firearm, even though the law prevented him from registering the firearm in question. Sustaining Dalton's due process challenge, the court concluded, "Because the crimes of which Dalton was convicted thus have as an essential element his failure to do an act that he is incapable of performing, his fundamental fairness argument is persuasive." 960 F.2d at 124. And in the civil context, our own Supreme Court has concluded that the termination of one's parental rights based solely on her failure to meet conditions that were impossible for her to meet violated the parent's substantive due process rights. ***Jodie W.*** 293 Wis. 2d 530, ¶ 56.

It is certainly "impossible" for a person to report a fact to the requisite authorities if he has no knowledge of that fact. Again, Professor LaFave has observed that "one cannot be said to have a duty to report something of which he has no knowledge." 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL

LAW, § 6.2(b) at 443-44 (2d ed. 2003). Ignorance of the fact to be reported negates not only one's *duty* to report it, but the *ability* to do so. If § 301.45 is construed to require a person to provide information of which he has no knowledge, that person's compliance with the statute would be impossible, and substantive due process would bar his prosecution.

There is another constitutional principle implicated by the construction of § 301.45. Unless the statute is interpreted in the manner suggested by the defendant, it also violates due process because it is impermissibly vague. As the United States Supreme Court declared in ***City of Chicago v. Morales***, 527 U.S. 41, 55 (1999):

> Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.

A person subject to the statute's reporting requirements who, like Dinkins, expects to be homeless upon his imminent release from prison, is not given adequate notice of what conduct is required of him. More particularly, the person must guess as to how to comply with the statute's reporting requirements. A person in Dinkins's position might reasonably ask, "what address should I report, if I do not know where I will live upon my release?" Moreover, in this situation, the statute fails to provide clear guidelines to authorities charged with its enforcement regarding what specific information the offender is required to report. In other words, is it sufficient to report that the address is "to be determined," or that the person merely anticipates living in a particular municipality or within a particular zip code? At least one state, construing a similar sex offender registration

statute, has ruled that its statute is unconstitutionally vague when applied to a homeless person who was required to give notice of his new address 72 hours prior to leaving his former residence. ***Santos v. State,*** 284 Ga. 514, 516, 668 S.E.2d 676 (2008).

For all these reasons, § 301.45 must be construed to require proof of the offender's actual knowledge of the information that he failed to provide before the person may be convicted of violating this statute.

C. Requiring proof of the offender's knowledge of the information that he failed to provide will not thwart the objectives of the statute.

The objective of this statute, and indeed, all sex offender registration statutes, is to "assist law enforcement agencies in investigating and apprehending offenders in order to protect the health, safety, and welfare of the local community and members of the state." ***State v. Bollig,*** 2000 WI 6, ¶ 20, 232 Wis. 2d 561, 573-74, 605 N.W.2d 199. Registration enables law enforcement to know where sex offenders are living, so that their activities can be monitored, thereby discouraging or preventing them from reoffending. *See,* ***People v. North***, 112 Cal. App. 4th 621, 5 Cal Rptr. 3d 337, 342-43 (2003).

In denying the defendant's postconviction motions, the trial court expressed the concern that if it adopted the defendant's position, homeless sex offenders would be able to evade the registration requirements with impunity, and as a result, the department would not be able to monitor their activities. (31:23; App. 103).

The concern is not justified. With the passage of the Jacob Wetterling Act in 1994, Congress required the states to

adopt sex offender registration laws in order to receive federal law enforcement funding. ***Bollig***, 232 Wis. 2d 561, ¶ 18 n.4. Every state in the union has now enacted a registration law. *Id*., ¶ 19. Consequently, this is hardly the first case to involve the application of a registration law to a homeless offender. Courts and legislatures throughout the country have already addressed the problem presented by homeless or transient sex offenders, and the solutions they have adopted could easily be adopted in this state.

As one court has observed, "the inherently transitory nature of homelessness makes it difficult to apply to homeless sex offenders the same considerations of residence applied to offenders who are not homeless." ***Commonwealth v. Bolling***, 72 Mass. App. 618, 893 N.E.2d 371, 378 (2008). Thus, some states have chosen to establish special rules for persons who identify themselves as transient or homeless, and other states have tailored their reporting requirements to encompass those without a true residence.

Four states, in particular, have enacted comprehensive provisions pertaining to homeless offenders.

Washington requires "offenders who lack a fixed residence" to provide information about where "he or she plans to stay" within "48 hours after ceasing to have a fixed residence," and must then report weekly, in person, to the sheriff of the county in which he or she is registered. WASH. REV. CODE ANN. § 9A.44.130(3)(b) and (6)(a)-(b) (LexisNexis 2009).

Illinois requires that persons who lack a "fixed residence or temporary domicile … must notify, in person, the agency of jurisdiction of his or her last known address within three days after ceasing to have a fixed residence," must register with the new agency of jurisdiction within three

days of leaving the last jurisdiction, and must "report weekly, in person, to the appropriate law enforcement agency where the sex offender is located." 730 ILL. COMP. STAT. ANN. 150/6 (LexisNexis 2009).

Minnesota requires persons who leave a primary address but do not have a new primary address to register with "the law enforcement authority that has jurisdiction in the area where the person is staying within 24 hours of the time the person no longer has a primary address," and again within 24 hours of entering another jurisdiction. MINN. STAT. § 243.166(3a)(a) and (c) (2008). Such a person must "describe the location of where the person is staying with as much specificity as possible," and must then report to the appropriate law enforcement authority "in person on a weekly basis." § 243.166(3a)(d) and (e).

California has enacted special provisions applicable to a person "living as a transient," a term defined as one "who has no residence." CAL. PENAL CODE § 290.011(g) (Deering 2009). Transients must register as a "transient" with the chief of police of the city in which he or she is physically present within five working days of acquiring that status, and then every 30 days thereafter. § 290.011(a) and (b). A "transient" must provide the information required of other registrants, as well as "list the places where he or she sleeps, eats, works, frequents, and engages in leisure activities." § 290.011(d).

Other states have decided to expand the ordinary definition of "residence," or have otherwise attempted to accommodate those without an established residence.[4] *E.g.*,

[4] The term "residence" (or, as used in § 301.45, "reside") "generally requires both physical presence and an intention to remain." ***Martinez v. Bynum***, 461 U.S. 321, 330 (1983). Thus, "the ordinary meanings of 'residence' and 'address' connote some degree of

some states permit the listing of homeless shelters in which the offender occasionally resides, but require more frequent verifications of data from such persons. MASS. ANN. LAWS ch. 6, §§ 178F and 178F 1/2 (LexisNexis 2009). California defines "residence" as the address at which one regularly resides, and the definition specifically includes, among other things, "homeless shelters, and recreational and other vehicles." CAL. PENAL CODE § 290.011(g) (Deering 2009). Kentucky defines "residence" as "any place where a person sleeps." KY. REV. STAT. ANN. § 17.500(7) (LexisNexis 2009). New Hampshire's statute provides, "If an offender cannot provide a definite address, he or she shall provide information about all places where he or she habitually lives." N.H. REV. STAT. ANN. § 651-B:4(III)(b) (LexisNexis 2009). Similarly, Ohio requires an offender without a fixed address to provide "a detailed description of the place or places at which the offender or delinquent child intends to stay," and to again notify the sheriff within one business day of obtaining a "fixed residence address." OHIO REV. CODE ANN. § 2905.05(A) (LexisNexis 2009).

Thus, many states have been able to cope with the unique problem presented by homeless sex offenders, so as to retain their ability to monitor those offenders. Dinkins has never suggested, and is not suggesting now, that sex offender registration laws can never apply to homeless offenders. Indeed, the experience in other states proves otherwise. This court need not fear that adoption of Dinkins's argument will

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permanence or intent to return to a place." ***Twine v. State***, 395 Md. 539, 910 A.2d 1132, 1138 (2006); ***State v. Pickett,*** 95 Wn. App. 475, 975 P.2d 584, 586-87 (1999); ***Commonwealth v. Wilgus***, 2009 Pa. Super. 116, ¶ 13, ___ A.2d ___.

ultimately result in homeless offenders being able to evade sex offender registration laws.[5]

It is important to emphasize, however, that the approaches listed above are *legislative* solutions to the problem. To the extent that § 301.45 fails to account for the problem presented by homeless sex offenders, it is the *legislature's* responsibility to solve the problem. As the California Court of Appeal has recognized, "It is uniquely within the legislative province to collect information and ideas for developing a more comprehensive registration system for transient sex offenders." ***North***, 5 Cal. Rptr. 3d at 348.

This court must interpret the statute as it is written. Wisconsin's sex offender registration statute requires that a person "knowingly" fail to comply with the reporting requirements before he may be convicted of violating the statute. The only reasonable construction of this statute is that a person must not only know of his *duty* to provide specified information, but he must actually know the information that he failed to provide before he may be convicted of failing to provide it.

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[5] Dinkins acknowledges that some persons who consider themselves to be homeless may even be able to comply with § 301.45, if they are regularly residing with friends or family, or at a homeless shelter. *See,* ***Commonwealth v. Wilgus***, 2009 Pa. Super. 116, ¶ 16 n.8, ___ A.2d ___; ***State v. Iverson***, 664 N.W.2d 346, 353 (Minn. 2003); ***Twine v. State***, 395 Md. 539, 910 A.2d 1132, 1141 (2006).

II. Because the State Failed to Prove at Trial that Dinkins Knew Where he Would be Residing Upon his Release from Prison, the Evidence was Insufficient to Support his Conviction.

If the court concludes, as Dinkins has argued above, that a person may be convicted of violating § 301.45 only upon proof that he had actual knowledge of the information that he failed to provide, then the evidence was insufficient to support Dinkins's conviction.

The evidence in this case was undisputed. Even when viewed in a light most favorable to the verdict, that evidence failed to establish that Dinkins had secured a residence before his release from prison and that he knew the address of that residence.

When he was charged with this offense, Dinkins had been continuously confined for ten years. It is hardly surprising that there is no indication in the record that Dinkins's former residence was still available to him. The record does not even indicate where Dinkins had lived prior to his incarceration. Nor is there any indication that Dinkins had managed to purchase a home or rent an apartment while he was in prison. When Dinkins first learned of his obligation to provide the address at which he would be residing, he expressed the hope that he could live with his daughter, and he continued to cling to that hope until his release date. Unfortunately, it is clear from the record that living with his daughter was never a viable option. There is no indication in the record that Dinkins had arranged to live with any other family member, or that living with another relative was even a possibility. As Agent Gallitz conceded in an email to SORP Specialist Erich Wuerslin, "he really does not have much for family." (8:3). Nor does the record

contain any evidence that Dinkins had planned to live with a friend or acquaintance, or that such persons had offered their assistance.

Because Dinkins did not know where he would be residing, and knowledge of this fact is required to obtain a conviction for this offense, the evidence was insufficient to support his conviction.

A number of courts have overturned convictions of sex offenders who failed to report a change of address upon becoming homeless. These courts have generally held that an offender who becomes homeless does not have a "residence" or a "residence address" to report, and therefore, cannot comply with the statute's reporting requirement. *E.g.*, ***State v. Pickett***, 95 Wn. 475, 975 P.2d 584, 586-87 (Wash. App. 1999); ***State v. Iverson***, 664 N.W.2d 346, 353-55 (Minn. 2003); ***Twine v. State***, 395 Md. 539, 910 A.2d 1132, 1138-41 (2006); ***Santos v. State,*** 284 Ga. 514, 668 S.E.2d 676, 680 (2008)*;* ***Commonwealth v. Wilgus***, 2009 Pa. Super. 116, ¶¶ 16-19, ___ A.2d ___. The courts essentially ruled in these cases that, under the circumstances, compliance with the applicable statute was impossible, and they implied that the law cannot require the performance of an impossible act, as Dinkins has argued in the above section of this brief. Also pertinent in this regard is ***State v. Ascoine***, 2003 Ohio 4145, 2003 Ohio App. LEXIS 3689, where the court concluded that a person who was suddenly evicted from his residence could not provide the 20 days advance notice of his change of residence required by the statute, and therefore, could not be convicted of failing to comply with the statute.

Compliance with § 301.45 was just as impossible for William Dinkins as it was for the defendants in the above-cited cases.

It was impossible for Dinkins to report his anticipated address because he didn't have a residence to report. In other words, if he had secured a residence before his release from prison, he would presumably have known that fact, and he could easily have complied with § 301.45.

In denying Dinkins's postconviction motions, the trial court appears to have ruled that the registration statute obligated Dinkins to actually *establish* a residence before his release from prison when it concluded, "I am going to side with the DOC saying, if you're a sex offender, you've got to find a place." (31:23; App. 103).

However, neither § 301.45 nor any other statute expressly mandates that unsupervised sex offenders actually establish a residence. As the California Court of Appeal observed in rejecting an argument similar to the trial court's ruling in this case:

> At oral argument, the Attorney General suggested [the sex offender registration law] requires a transient offender to establish a regular sleeping place. We reject that notion. Nothing in the statute indicates the Legislature intended to make transient offenders confine their nightly sojourns to particular "locations," nor is it practical or reasonable for a court to impose such a requirement by way of statutory construction.

People v. North, 112 Cal. App. 4th 621, 5 Cal. Rptr. 3d 337, 346 (2003). In a footnote to this statement, the court commented, "Whether a statute requiring transients to occupy regular sleeping locations would survive a constitutional challenge is a question we leave for another day." *Id*., n.10.

It is certainly doubtful that the legislature possesses the constitutional authority for issuing such a mandate, particularly if it intends to enforce that mandate through penal

sanctions. If the state punishes one for simply failing to establish a residence, it is doing nothing less than criminalizing homelessness.

In ***Robinson v. California***, 370 U.S. 660, 667 (1962), the United States Supreme Court ruled that a state law which made it a crime "to be addicted to the use of narcotics" was unconstitutional, as it "inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment." The court reasoned that narcotic addiction was a mere status, an illness "which may be contracted innocently or involuntarily." Though not an illness, "homelessness" too is a status, and one which usually is acquired both innocently and involuntarily. Using the criminal law to punish this status would represent a shocking abuse of the state's police power.

Of course, Dinkins was not actually homeless when he was alleged to have committed this offense. He was, in fact, never released from confinement. He was not charged with failing to report the address of his *current* residence, but rather, with the failure to report *ten days in advance* where he *expected* to live. Thus, it was his *prospective* homelessness that the state essentially punished. Whatever might be said about the state's power to punish one who is *currently* homeless, it would be even more pernicious for the state to criminalize *prospective* homelessness.

The circumstances of this case demonstrate the fundamental unfairness of such a policy. The department apparently expected Dinkins, while still confined to his prison cell, to somehow secure a residence in the community. One can assume that his financial resources were, at best, extremely limited. He had just served nearly ten consecutive years in prison. As far as the record reveals, purchasing a home would certainly have been out of the question. Renting

an apartment would even be problematic. What landlord would rent an apartment, sight unseen, to an unemployed sex offender who had been incarcerated for the past ten years, and who therefore had no recent residential or credit history?[6] Homeless shelters might provide another option, but these shelters do not operate like hotels: one can hardly reserve a room at a homeless shelter, or be guaranteed that there will be space available on a date certain. Without friends or relatives to rely on, Dinkins could hardly be blamed for not being able to anticipate where he would live upon his release from prison.

The evidence adduced at the preliminary hearing, and reintroduced at the abbreviated trial, supports only one conclusion: that as of July 10, 2008, when he was required to report the address at which he would reside upon his release from prison, William Dinkins had not found a place to live, not even on a temporary basis. Because he had not secured a residence, he had no address or residence to report, and no actual knowledge of the address at which he would reside. No reasonable fact-finder could conclude that this evidence established beyond a reasonable doubt that Dinkins knew where he would be living, but chose to withhold that fact from the department. Therefore, the evidence was insufficient to support the defendant's conviction, and the

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[6] This court's decision in ***State ex rel. Olson v. Litscher***, 2000 WI App 61, 233 Wis. 2d 685, 608 N.W.2d 425, illustrates the difficulties a sex offender encounters in securing a residence. In that case, the DOC was unable to find a residence for Olson, a sex offender who was due to be released from prison on parole. While this court stated, "We realize that it is difficult for the DOC to find a neighborhood that will accept a paroled sex offender in its midst," the court rejected the state's argument that it could confine Olson beyond his mandatory release date until a residence could be found. 233 Wis. 2d 685, ¶ 5.

conviction must be reversed. ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 152 (1990).

III. In the Alternative, the Court Should Order a New Trial in the Interest of Justice Because the Real Controversy Was Not Fully Tried.

Under Wis. Stat. § 752.35, this court possesses the discretionary authority to grant a new trial in the interest of justice whenever it concludes that the "real controversy has not been fully tried." The statute is to be "liberally construed," and affords this court "substantial discretion" to achieve justice in an individual case. ***Vollmer v. Luety***, 156 Wis. 2d 1, 15, 456 N.W.2d 797 (1990). Nonetheless, the statutory power is to be exercised "only in exceptional cases." 156 Wis. 2d at 11.

This *is* an exceptional case. The real controversy was *not* fully tried here. Relying on the pattern jury instruction, the trial court and the parties assumed that there were only three elements to this crime. As a result, they neglected to address the fourth element of this offense: whether Dinkins knew where he would reside upon his release from prison.

In another case where pattern jury instructions misstated one of the elements of the offense, our supreme court concluded that the real controversy was not fully tried and accordingly ordered a new trial in the interest of justice. ***State v. Perkins***, 2001 WI 46, 243 Wis. 2d 141, 626 N.W.2d 762. Here, the element in question was not merely misstated: there was no reference to it at all. As in ***Perkins***, if this court concludes that the evidence adduced at trial was sufficient to support the defendant's conviction, it nonetheless ought to order a new trial in the interest of justice.

CONCLUSION

For the reasons stated in this brief, William Dinkins, Sr. respectfully urges the court to reverse his conviction and to remand the case to the circuit court with instructions to dismiss the complaint. In the alternative, Dinkins urges the court to reverse the conviction and remand the case to the circuit court for a new trial.

Dated this 8th day of September, 2009.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 8,240 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of September, 2009.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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