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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2009AP1643-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

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REPLY BRIEF OF DEFENDANT-APPELLANT

STEVEN D. PHILLIPS
Assistant State Public Defender
State Bar No. 1017964

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8748
phillipss@opd.wi.gov

Attorney for Defendant-Appellant

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ARGUMENT

I. The State Must Prove That the Person Had Actual Knowledge of the Information he Was Required to Provide.

A. The construction of § 301.45.

The state correctly observes that nothing in the plain language of Wis. Stat. § 301.45 exempts soon-to-be-released sex offenders from complying with the registration requirements. State's brief at 9. Dinkins is not advocating the recognition of such an exemption. Rather, he simply argues that the state must prove the offender's knowledge of the information that is to be provided before it can convict the offender of failing to provide that information. The plain language of the statute supports Dinkins' position. Only those who "knowingly" fail to comply violate the statute. While the Jury Instructions Committee interprets this language as requiring knowledge only of the duty to provide the information, neither the Committee nor the state explains why such a narrow interpretation is warranted.

Even the state concedes that not all of the information that § 301.45 requires to be reported will exist or will be known to the offender in every case. For example, even though every offender is required to report where he "is or will be employed," § 301.45(2)(a)8, some offenders are not, and do not expect to be, employed. The state implies that such persons could not be prosecuted for this offense if they failed to provide the address of an employer, or if they simply reported they were unemployed. State's brief at 11-12. But strict application of the pattern instructions would seemingly require a conviction in this situation. For the offender to

avoid conviction under these circumstances, the statute would have to be interpreted to require proof that the offender knew he was or would be employed, and that he knew the employer's address, but failed to provide it. The state does not explain why the same accommodation should not be made for those who lack knowledge of a residence when they are required to report it.

Most of the state's argument is devoted to the claim that requiring proof of the offender's knowledge would be "unworkable and contrary to legislative intent." The state's expressed concerns are exaggerated.

The state notes that knowledge of one's residence is within the peculiar knowledge of the offender, and that it would accordingly be unfair to require the state to prove that knowledge. State's brief at 10. But "knowledge," like "intent," is almost *always* within the peculiar knowledge of the accused. Nonetheless, most criminal statutes place the burden on the state to prove that the defendant acted with a particular mental state when committing the crime. The burden has not proven to be too onerous thus far. In most instances, "knowledge" and "intent" can be inferred from the circumstances of the offense. Moreover, the state asserts throughout its brief that the location where one expects to live and sleep is "something every soon-to-be-released sex offender *necessarily* must know." State's brief at 11 (emphasis added). If that assertion is true, the state should *never* encounter difficulty in satisfying its burden.

Most of the information the statute requires the offender to provide is, as the state points out, either known to the offender (*e.g.*, his name, birth date, gender, etc.) or readily capable of discovery with the assistance of DOC or the court (*e.g.*, date of conviction, statute violated, supervising agency,

etc.). Few offenders will fail to report this information, and when they do, it will not be difficult to prove their knowledge of it. The most problematic item on the list of reportable information is undoubtedly residence address. But a great many sex offenders will be able to comply with this requirement as well, either because they already have an established residence, or because they will be on supervision, and the supervising agent will arrange for a suitable residence. Very few offenders are, like Dinkins, released directly from the prison to the community without any supervision whatsoever. And of that group, one would anticipate that most soon-to-be-released offenders either have a residence to which they could return, or plan to stay with family and/or friends until a more permanent arrangement can be made. This fact perhaps explains why the issue raised in this case is one of first impression, despite sex offender registration laws having been enacted more than 15 years ago.

Thus, adopting Dinkins' position would result in very, very few persons "slipping through the cracks." As to those persons, the state would still have at its disposal ways to keep track of the offender's whereabouts. Under § 301.45(2)(f), the department could require an offender who claimed lack of knowledge of his residence to report in person to a local police station immediately upon his release from prison, and to continue to report in person on a daily basis until the offender secured a residence. Once released to the community, such an offender could be required to report where he has been residing and where he intends to reside for the foreseeable future. This obligation would likely be sufficiently intrusive so that few persons would feign homelessness simply to evade the registration requirements, and most persons would likely be motivated to quickly establish more permanent residences. Those who intended to evade registration would likely find it easier to simply list a

false address, or merely leave the residence they have listed without notice. While the state correctly observes that par. (2)(f) does not expressly "excuse noncompliance" with the reporting requirements, it does *anticipate* that strict compliance will in some circumstances be impossible, and it provides a mechanism for monitoring those who cannot comply.

Of course, nothing would prevent the legislature from also adopting the various corrective measures that other states have adopted to address the problem of homeless sex offenders. *See* Dinkins' brief-in-chief at 21-23.

Dinkins recognizes that the solutions suggested in the above paragraph would not provide the state with ten days *advance* notice of the offender's whereabouts, as § 301.45(2)(e)4 appears to require. But *advance* notice is not an indispensable component of the statutory scheme. It is noteworthy that offenders not on supervision need not give the department advance notice when they *change* their address. Under § 301.45(4)(a), an unsupervised offender whose address changes "shall provide the department with the updated information within 10 days *after* the change occurs." (Emphasis added).

If the department had deemed it critically important to know where Dinkins would be living in advance of his release, it presumably would have taken more steps to actually help him secure a residence while he was in prison. While Agent Gallitz *did* attempt to contact Dinkins' daughter, she had to know that this option was not particularly viable due to her inability to even locate the daughter until days before the release date; and yet, Gallitz apparently made no attempt to identify homeless shelters, apartments or motels

which might have been willing to house Dinkins upon his release.

Finally, the state notes that Dinkins is subject to GPS monitoring under Wis. Stat. § 301.48, implying that advance notification of one's whereabouts is necessary to facilitate that monitoring. State's brief at 16. But the state's interest in facilitating GPS monitoring can hardly be viewed as compelling, given the fact that § 301.48 exacts no penalties for one who either fails to cooperate with the monitoring itself, or violates the established inclusion or exclusion zones.

B. Due process limitations on the construction of the statute.

The state insists that its construction of the statute would not result in punishing homelessness. However, what it is really arguing is that no one is genuinely "homeless." The state reasons that because every person necessarily lives and sleeps *somewhere*, every person must *know* where that location will be. Thus, the state blithely contends, "*every* soon-to-released sex offender is inherently capable of telling the DOC where he will live and sleep upon release into the community—whether in a house, in a motel, at a shelter, or on a park bench." State's brief at 21 (emphasis in original). Because, in the state's view, every offender possesses this capability, it would never be impossible for an offender to provide the address of his expected residence, and the offender's due process rights would not be implicated by a statute that did not require the state to prove the offender's knowledge of that address.

The fundamental flaw in the state's reasoning is that while every person is certainly capable of knowing where he *has* lived and slept, every person does *not* necessarily know where he *will reside* in the future. There is simply no denying

that, just as some persons don't know where their next meal is coming from, some persons also don't know where their next home—whether permanent or temporary—will be. While even homeless persons eventually land *somewhere* on any given night, that certainly does not mean that they will necessarily know *ten days in advance* where that "somewhere" will be.

The problem of identifying a future residence is particularly acute for sex offenders who are still incarcerated at the time the law requires them to report their future address: because they are incarcerated, they possess a limited ability to investigate potential residences in the community. Even if they were somehow provided an accurate and up-to-date list of every homeless shelter, motel, park bench and freeway underpass in the area in which they hoped to reside, not every offender could be certain that any particular place would be available to him. Would a homeless shelter reserve a space for the offender ten days in advance? Some shelters do not even allow registered sex offenders to reside there, even if "reservations" were practical. Would a motel reserve a room for an incarcerated sex offender, who likely lacks either cash or a positive credit history? How does one know, ten days in advance, whether a park bench or freeway underpass will be occupied, or whether the police will roust the person from sleeping there? The state's argument unrealistically assumes a prophetic skill beyond that which most homeless offenders, including Dinkins, could possibly possess.

The state would apparently require the soon-to-be-released offender to merely guess where he *might* live. But if the offender guesses wrong, and for example, is not able to secure a room in the shelter he had selected, or the park bench he imagines to be his future home turns out to be occupied

and he is forced to sleep somewhere else, that offender could presumably be arrested for having provided *false* information in his previous registration.[1] Regardless of whether the offender could be successfully prosecuted for this offense, encouraging offenders to guess when reporting required information to the DOC hardly advances the state's interest in tracking the whereabouts of those offenders.

The genuinely homeless offender's ability to comply with the statute's reporting requirement is only made even more difficult by the language of the statute itself. While the state repeatedly refers to the offender's obligation to report where he "expects to live and sleep," *e.g.*, see state's brief at 16, the statute does not use these words. The soon-to-be-released offender is required to list the address of where he "will be residing." § 301.45(2)(a)5. The language requires a greater degree of certitude than merely an "expectation." The offender must state where he *will* live, not where he "expects" to live. And the term "residing," connotes a certain degree of permanence. It "generally requires both physical presence and an intention to remain." *See* Dinkins' brief-in-chief at 22-23, n. 4. It is therefore doubtful that the legislature had in mind such ephemeral locations like park benches and freeway underpasses when it enacted the legislation requiring offenders to report the address at which they "will be residing."

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[1] Although § 301.45 merely requires the offender to "provide information," and does not expressly prohibit the provision of *false* information, it must be assumed that the provision of false information would be punished as a failure to comply with the reporting requirements. If it were otherwise, the statute would be rendered a nullity. Moreover, if the offender listed location A as his expected residence, but actually resided at location B, he presumably could be prosecuted merely for having failed to provide the address for location B.

Thus, while Dinkins concedes that *some* nominally "homeless" offenders could conceivably provide advance notice of their expected whereabouts upon being released from prison—and for that reason, no "homeless exception" to the statute is warranted—not all will be able to do so. As to those persons, the statute requires them to do the impossible. Convicting such persons for failing to fulfill an impossible duty violates their due process rights. The only way to prevent an unconstitutional conviction is to require the state to prove that compliance *was* possible, *i.e.*, that the offender *did* know the information that he failed to provide.

The state nonetheless suggests that compliance with the statute would not be difficult, because "it would be a simple proposition for a soon-to-be-released sex offender who purports not to know where he will be residing upon release simply to ask the department official about the 'address' requirement when the notification is given." State's brief at 25. While asking for assistance may be a "simple proposition," there is certainly no guarantee that a "department official's" assistance would necessarily result in the offender securing a residence before his release, as this case in fact demonstrates.

The state concedes that "one cannot be said to have a duty to report something of which he has no knowledge," but then contends that "a sex offender, like Dinkins, will have actual knowledge of *the duty to report his address to the DOC* if the sex offender is given the notice of this duty" as required by statute. State's brief at 21 (emphasis in original). Once again, the logic is flawed: the address of the residence—not the duty to report it—is the fact which must be reported, and of which the person must have knowledge for the statute to survive constitutional scrutiny. In other words, as applied to this situation, the conceded proposition

is, "one cannot have a duty to report *an address* of which he has no knowledge." That, of course, is precisely Dinkins' argument.

The inconsistency of the state's argument is reflected by its willingness to convict one who genuinely does not know where he will reside upon his release from prison, while at the same time conceding that one who lists an address "that proves to be *legally* impossible to maintain presumably cannot and should not be subject to prosecution." State's brief at 30, n. 6 (emphasis in original). Thus, under the state's argument, a person could evade the reporting requirements by listing as his residence a location at which he knew he could not reside. It is unclear why such a person would be more deserving of protection under the Due Process Clause than a genuinely homeless person.

Finally, the state argues that the statute, as it and the Jury Instructions Committee have construed it, does not criminalize homelessness, "rather, it holds every soon-to-be-released sex offender to the *same* reporting standard." State's brief at 17 (emphasis in original). The argument reminds this attorney of the following ironic observation, "The law, in its majestic equality, forbids the rich as well as the poor, to sleep under bridges, to beg in the streets and to steal bread." Anatole France, *The Red Lily*, Ch. 7 (1894).

II. The Evidence Was Insufficient to Support Dinkins' Conviction.

Dinkins concedes that if this court adopts the state's argument, the evidence adduced at his trial was sufficient to support his conviction. Other than to suggest that all soon-to-be-released sex offenders necessarily know where they will reside upon their release from prison, the state makes no attempt to argue that Dinkins actually knew where would

reside. Consequently, if the court agrees with Dinkins' argument that the state was required to prove Dinkins' actual knowledge of his residence, the evidence was insufficient to support his conviction.

III. The Real Controversy Was Not Fully Tried.

For the most part, Dinkins will rely on the argument presented in his brief-in-chief on this issue. But one comment in the state's brief deserves refutation. The state contends that the "real controversy" prong of the interest-of-justice test has been applied only to "evidentiary errors." State's brief at 31. This court rejected the same argument nearly 20 years ago. ***State v. Harp***, 161 Wis. 2d 773, 780-82, 469 N.W.2d 210 (Ct. App. 1991), based on the Supreme Court's discussion in ***Vollmer v. Luety***, 156 Wis. 2d 1, 19-21, 456 N.W.2d 797 (1990).

CONCLUSION

For the reasons stated in the briefs he has filed, 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 10th day of November, 2009.

Respectfully submitted,

STEVEN D. PHILLIPS
Assistant State Public Defender
State Bar No. 1017964

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8748

Attorney for Defendant-Appellant

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 2,823 words.

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 10th day of November, 2009.

Signed:

STEVEN D. PHILLIPS
Assistant State Public Defender
State Bar No. 1017964

Office of State Public Defender
Post Office Box 786
Madison, WI 53707-7862
(608) 266-8748
phillipss@opd.wi.gov

Attorney for Defendant-Appellant