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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2009AP1643-CR

STATE OF WISCONSIN,
Plaintiff-Respondent-Petitioner,

v.

WILLIAM DINKINS, SR.,
Defendant-Appellant.

ON REVIEW OF A COURT OF APPEALS' DECISION
REVERSING A JUDGMENT OF CONVICTION
AND A POSTCONVICTION ORDER
ENTERED IN DODGE COUNTY CIRCUIT COURT,
THE HONORABLE ANDREW P. BISSONNETTE,
PRESIDING

REPLY BRIEF
OF PLAINTIFF-RESPONDENT-PETITIONER

J.B. VAN HOLLEN
Attorney General

JAMES M. FREIMUTH
Assistant Attorney General
State Bar #1012732

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8904
(608) 266-9594 (Fax)
freimuthjm@doj.state.wi.us

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INTRODUCTION

This court should conclude that a convicted sex offender – like Defendant William Dinkins, Sr. – is not exempt from complying with the "address" reporting requirement of Wisconsin's sex-offender registration law on grounds of purported homelessness.

ARGUMENT

A CONVICTED SEX OFFENDER IS NOT EXEMPT FROM COMPLYING WITH THE "ADDRESS" REPORTING REQUIREMENT OF WISCONSIN'S SEX-OFFENDER REGISTRATION LAW ON GROUNDS OF PURPORTED HOMELESSNESS, AND DINKINS VIOLATED THIS REQUIREMENT.

A. Statutory interpretation. Wis. Stat. § 301.45 does not exempt purportedly "homeless" sex offenders from complying with the "address" reporting requirement, and a contrary interpretation is unworkable and undesirable.

1. Both Dinkins' illusory fourth element and the court of appeals' decision are problematic.

The crime of failure to comply with the "address" reporting requirement of the sex-offender registration law (Wis. Stat. § 301.45) consists of the following three essential elements:

- that Dinkins "was required to provide information" to the DOC under Wis. Stat. § 301.45(1g)(a);

- that Dinkins failed to comply with Wis. Stat. §§ 301.45(2)(a)5., (2)(d), and (2)(e)4., which together required him – no later than ten days before being released from prison at the expiration of his sentence – to provide the DOC with "the address at which [he] . . . will be residing" upon release (quoting Wis. Stat. § 301.45(2)(a)5.); and

- that Dinkins "knew that (he) . . . was required to provide the [address] information."[1]

(Quoting Wis. JI-Criminal 2198 (2009), except as otherwise indicated; brackets added).

Dinkins' challenge to the sufficiency of the evidence underlying his conviction derives from his claim that this crime contains a fourth element that the State must prove – namely, that the sex offender *actually knows the address at which he will be residing when changing residence*, whether upon release from prison (as in Dinkins' situation) or upon moving from one non-prison location to another (hereafter referred to in shorthand form as the "actual knowledge" element) (*see* Dinkins' brief at 11-19). Respectfully, Dinkins' challenge lacks merit for the following reasons.

First, Dinkins' challenge is contrary to the pattern jury instructions, and the work of the Wisconsin Criminal Jury Instructions Committee, while not precedential, is persuasive. *See, e.g., State v. Smith*, 2005 WI 104, ¶ 15 n.7, 283 Wis. 2d 57, 699 N.W.2d 508. "The Criminal Jury Instructions Committee comprises highly qualified legal minds whose goal is to uniformly and accurately state the law." *State v. Harvey*, 2006 WI App 26, ¶ 13, 289 Wis. 2d 222, 710 N.W.2d 482.

Second, Dinkins' incorporation of an "actual knowledge" element is impractical and unwise.

- If the State had to prove that a soon-to-be-released sex offender, like Dinkins, *actually knows* where he will be residing upon release from prison, then every such sex offender could evade both the reporting requirement and a conviction for non-reporting by simply not trying to find a residence before release. The State

[1] This *mens rea* element suggests that the crime of knowingly failing to comply with the "address" reporting requirement is not a strict-liability offense.

could never prove *the defendant's* actual knowledge of a living arrangement in the community if the defendant never tried to find one, unless some third party happened to present a viable option to him and he rejected it.[2]

For most crimes, guilty knowledge or intent may be inferred circumstantially from the defendant's own actions or inaction, even though "direct proof of mental state is rare." *State v. Kimbrough*, 2001 WI App 138, ¶ 12, 246 Wis. 2d 648, 630 N.W.2d 752; *see also State v. Hoffman*, 106 Wis. 2d 185, 200, 316 N.W.2d 143 (Ct. App. 1982) ("[i]ntent can . . . be inferred from the circumstances and *from one's acts*" (emphasis added)). This proposition does not readily translate to the present context, however, where Dinkins claims that the State must prove "actual knowledge" of information that a defendant can consciously avoid obtaining by doing nothing.

Thus, Dinkins' reliance on *State v. Lossman*, 118 Wis. 2d 526, 348 N.W.2d 159 (1984), is misplaced (Dinkins' brief at 12-13). To convict the defendant of obstructing an officer in *Lossman*, 118 Wis. 2d at 536-43, the State had to prove the defendant's guilty knowledge of the status and conduct of *a third party* – a police officer – where circumstantial evidence would be available outside of the defendant's own conduct.

In effect, Dinkins' argument for an "actual knowledge" element – and the court of appeals' related recognition of a "homelessness" exemption – discourages

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[2] Under Wis. Stat. § 301.45(2)(e)4., a convicted sex offender who is completing a sentence in prison must report his new address "no later that 10 days before being released from prison." Under Wis. Stat. § 301.45(2)(e)3., a convicted sex offender who is being terminated or discharged from a commitment must report his new address "[n]o later than 10 days before" termination or discharge. And under Wis. Stat. § 301.45(4)(b), a convicted sex offender on parole or extended supervision who "knows that [his address] will be changing" must furnish the updated information "before the change in his or her address occurs." All such individuals are in the same status as Dinkins for complying with the "address" reporting requirement in advance of actually living at the new location.

soon-to-be-released sex offenders from actively seeking and choosing an available community living arrangement.[3]

- On the other hand, if Dinkins' "actual knowledge" element means that the State must prove the existence of an address at which the sex offender "*could have reasonably predicted* he would have been able to reside," *State v. Dinkins*, 2010 WI App 163, ¶ 24, 330 Wis. 2d 591, 794 N.W.2d 236 (emphasis added), then the State routinely could meet its burden by presenting evidence that a friend, relative, homeless shelter, motel, park bench, or heating grate could have accommodated the sex offender, at least temporarily, if the sex offender had bothered even minimally to investigate such options (*see* Dinkins' brief at 18, employing the "reasonably should have known" language).

In fact, applying such a reasonableness component to the present case, the trial court, as fact-finder at trial, could reasonably have concluded that Dinkins did *not* try hard enough to comply with the "address" reporting requirement. Was it reasonable for Dinkins to rely exclusively on a daughter or ex-wife whom he could not reach and who did not return messages (20:23-24, 31)? Was it reasonable for Dinkins to decline his social worker's repeated offers over the six weeks before the release date to help Dinkins find a living arrangement (20:30-32)?

Third, the court of appeals' decision only compounds the foregoing problems by interpreting the "address" reporting requirement as embodying an "extended period of time" component – that is, that the sex offender need only report an address or residence at which he expects to live and sleep for an "*extended period* of time." *Dinkins*, 330 Wis. 2d 693, ¶ 20 (emphasis

[3] The legislature could have provided, but did not provide, for an affirmative defense of "homelessness" or "impossibility," with the burden on the sex offender. *Cf.* 18 U.S.C. § 2250(b).

added). What does "extended" mean? A week? A month? Longer? The interjection of such an imprecise additional requirement into the statute makes it difficult, if not impossible, to know whether a sex offender is complying with the "address" reporting requirement. And it provides a ready loophole for evading it.

Fourth, contrary to Dinkins' suggestion at pages 8-9 of his brief, the Dinkins situation of purported homelessness is not limited to sex offenders who are leaving a confined setting. Rather, both the court of appeals' decision and Dinkins' "actual knowledge" element create similar problems with respect to monitoring *sex offenders already living in the community* – that is, sex offenders who are *not* required to provide the DOC with a new address before leaving an old one. Although Wis. Stat. § 301.45(4)(a) requires such sex offenders to "provide the [DOC] with the updated [address] information within 10 days *after* the change occurs," a change in address might never occur if, for example, the sex offender chooses to become transient and not establish a new residence that fits the "extended period of time" definition. Similarly, if such a sex offender chooses not to seek out a new residence within ten days after leaving a former one, the State would rarely, if ever, be able to prove that the sex offender "actually knew" what his new address would be within the ten-day period for reporting it.

Fifth, the fact that Wis. Stat. § 301.45(2)(a), (d), and (e) requires sex offenders to report nine other items of information to the DOC, in addition to "address," does not support construing the statute as incorporating an "actual knowledge" element into the crime of failure to report such information (*see* Dinkins' brief at 14-15).

Rather, the other enumerated items in Wis. Stat. § 301.45(2)(a) are readily distinguishable from the "address" reporting requirement. Unlike the fact that a sex offender must live and sleep somewhere in the community and, thus, can report such expected location,

there is nothing more that a sex offender can possibly report under § 301.45(2)(a)8. if he will be unemployed when released, or under § 301.45(2)(a)9., if he will not be enrolled in school. All of the remaining items listed in Wis. Stat. § 301.45(2)(a) are either known to the sex offender (such as name, aliases, birth date, gender, race, height, weight, and hair and eye color), or readily capable of discovery from the offender's DOC file or with the assistance of a circuit court or the Department of Health Services, as provided in § 301.45(2)(d) (such as statute, date, and county or state of conviction, adjudication, or commitment; and information about any supervising agency).

Moreover, it is highly unlikely that the DOC would recommend prosecution or that a prosecutor would file charges for non-reporting of employment if the sex offender truly lacked a job (and Dinkins cites no examples of such prosecutions). The quintessential item to be reported is "address" or "residence" – the location where the sex offender expects to live and sleep and be monitored, especially those sex offenders, like Dinkins, who require GPS ("global positioning system") tracking, with the establishment of a primary "inclusion zone" from which the offender is prohibited from leaving. *See* Wis. Stat. § 301.48.[4]

Sixth, Wis. Stat. § 301.45(2)(f) does not provide an alternative method for a sex offender to satisfy the "address" reporting requirement (*see* Dinkins' brief at 19, 26-27). Rather, subd. (2)(f) simply authorizes the DOC to require a sex offender to provide such *additional* identifying information as "fingerprints, a recent photograph of the person, and any other information

[4] Verification of a purportedly "homeless" sex offender's address under Wis. Stat. § 301.45(2)(g) would not be made any easier by adding an "actual knowledge" element to the crime of failure to report, as Dinkins argues, or by exempting such offenders altogether from the "address" reporting requirement for alleged inability to identify a location that meets the court of appeals' "extended period of time" criterion (*see* Dinkins' brief at 17).

required under par. (a) that the person has not previously provided." It does not excuse noncompliance with the "address" reporting requirement in the first instance.[5]

For the foregoing reasons, both Dinkins' illusory "actual knowledge" element and the court of appeals' decision are problematic. In turn, these problems undermine the compelling state interest underlying the sex-offender registration statute – to facilitate the monitoring of sex offenders by law enforcement and, thereby, to protect the public. *See State v. Smith*, 2009 WI App 16, ¶ 11, 316 Wis. 2d 165, 762 N.W.2d 856.

2. Conversely, the statute correctly assumes that every sex offender is capable of complying with the "address" reporting requirement.

The foregoing problems engendered by Dinkins' argument for an "actual knowledge" element and by the court of appeals' exemption for purported homelessness are avoidable if the statute is understood as assuming that every sex offender is inherently capable of complying with the "address" reporting requirement – that is, by telling the DOC where he *expects* to live and sleep upon release into the community (or upon moving from one non-prison location to another), even if only by reference to a neighboring street address. As discussed at pages 18-21 of the State's brief-in-chief, this assumption underlies both the federal sex-offender registration laws and the laws of several other states.

[5] In cases of purportedly "homeless" sex offenders who report a non-traditional residence, *e.g.*, by reference to a neighboring street address, the DOC could choose to augment the "address" reporting requirement by requiring the sex offender to report to a law enforcement agency or other designated place under Wis. Stat. § 301.45(2)(f).

Moreover, if the sex offender proves to be mistaken about his ability to stay at the location that he reported to the DOC, the sex offender easily can remedy the mistake (and avoid prosecution) by reporting to the DOC the actual location where the sex offender is living and sleeping in the community – again, even if by reference to a neighboring street location.

Purported "homelessness" among sex offenders poses a difficult monitoring problem for law enforcement authorities – especially in view of local restrictions on where sex offenders are allowed to live in the community. The difficulty is not insurmountable, however, and the "address" reporting requirement can reasonably be understood as encompassing such sex offenders without adopting the exemption that both Dinkins' argument and the court of appeals' decision promotes.

In the present case, for reasons set forth at pages 13-29 of the State's brief-in-chief, the trial court correctly found that Dinkins violated the "address" reporting requirement of Wis. Stat. § 301.45.

B. Constitutionality. Construing Wis. Stat. § 301.45 as not exempting purportedly "homeless" sex offenders from the "address" reporting requirement is constitutionally sound.

1. Due process.

The State has addressed Dinkins' due process arguments at pages 30-36 of its brief-in-chief and respectively refers the court to that discussion, supplemented as follows.

Contrary to Dinkins' "impossibility" argument (Dinkins' brief at 20-22), *every* soon-to-be-released sex offender can tell the DOC where he expects to live and

sleep upon release into the community, even if only by reference to a neighboring street address. "[T]he sex offender registration statutes operate on the premise that everyone does, at all times, have an 'address' of some sort, even if it is a homeless shelter, a location under a bridge or some similar place." *State v. Worley*, 679 S.E.2d 857, 864 (N.C. Ct. App. 2009). Moreover, a sex offender will know of the duty to report his address to the DOC if given notice in accordance with Wis. Stat. § 301.45(3)(b)2.-3m. Dinkins received such notice.[6]

2. Equal protection and cruel and unusual punishment.

The Equal Protection Clause provides that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Also, a punishment may be unconstitutionally "cruel and unusual" if it punishes "status," rather than "conduct." *See Robinson v. California*, 370 U.S. 660, 667 (1962)). Both of these constitutional protections are satisfied in the present case.

Applying the "address" reporting requirement to sex offenders who purportedly lack a traditional "fixed" residence does not single out that group of sex offenders for disparate treatment, because *every* sex offender can tell the DOC where he expects to live and sleep upon release into the community, even if only by reference to a neighboring street address. Such sex offenders are not

[6] For these reasons, Dinkins' reliance on *Lambert v. California*, 355 U.S. 225 (1957), and *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992), is misplaced (Dinkins' brief at 20-21). In *Lambert*, 355 U.S. at 229, the ordinance violated due process as applied, because the defendant had no knowledge of the requirement that felons register with police, and because "circumstances which might move one to inquire as to the necessity of [such] registration [we]re completely lacking." In *Dalton*, 960 F.2d at 124, *the law itself* prevented the defendant from complying with the registration requirement for firearms.

penalized for any purported indigence. To comply with the "address" reporting requirement, they are *not* required to "have . . . funds with which to secure lodging and to obtain an address upon release from prison." *State v. Adams*, 2010 WL 4380236 at *10 (Ala. Crim. App. Nov. 5, 2010).

Moreover, requiring *every* sex offender, including one who is purportedly "homeless," to report his "address," serves the compelling state interest of protecting the public, because homelessness has been found to "increase the risk of recidivism." Lindsay A. Wagner, *Sex Offender Residency Restrictions: How Common Sense Places Children at Risk*, 1 Drexel L. Rev. 175, 195 (2009).

Construing Wis. Stat. § 301.45 as not exempting purportedly "homeless" sex offenders from the "address" reporting requirement is constitutionally sound.

CONCLUSION

For the reasons set forth in its two briefs, the State respectfully asks this court to reverse the decision of the court of appeals and reinstate Dinkins' conviction of violating the "address" reporting requirement of the sex-offender registration law.

Dated at Madison, Wisconsin: May 9, 2011

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

JAMES M. FREIMUTH
Assistant Attorney General
State Bar #1012732

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8904
(608) 266-9594 (Fax)
freimuthjm@doj.state.wi.us

BRIEF CERTIFICATION

I certify that this reply 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. The length of the reply brief is 2,772 words.

_____
JAMES M. FREIMUTH

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 at Madison, Wisconsin: May 9, 2011.

_____
JAMES M. FREIMUTH
Assistant Attorney General