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STATE OF WISCONSIN **09-09-2019**

COURT OF APPEALS **CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

Appeal No. 2019AP1209 CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

TODD N. TRIEBOLD,

Defendant-Appellant

On appeal from the Circuit Court for Pierce County,

The Honorable Joseph D. Boles, presiding

BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT

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III. Statement of issues presented for review.

This appeal presents the following issues for review:

First, did the State of Wisconsin have territorial jurisdiction to prosecute Triebold for failing to provide notification of his change in residence from one Minnesota address to another Minnesota address?

The circuit court held that the State of Wisconsin had territorial jurisdiction to prosecute Triebold's alleged crime.

Second, was Triebold's prosecution barred by Wisconsin Statutes, section 939.71, after his conviction in Minnesota for a registry violation involving the same change in residence from one Minnesota address to another Minnesota address?

The circuit court held that Triebold's successive prosecution in Wisconsin was not barred by Wisconsin Statutes, section 939.71.

IV. Statement on oral argument and publication.

The question of whether the State of Wisconsin has territorial jurisdiction to prosecute a citizen of another state for a sex offender registry violation, when his violation consists of a failure to provide the State of Wisconsin with notice of an intra-state change in residence, is an issue that has not previously been addressed by any Wisconsin court. This case also raises an issue concerning whether factually identical violations of Wisconsin and Minnesota sex offender registry laws, are legally identical for purposes of Wisconsin Statutes, section 939.71. This court's decision should be published. And this court would benefit from oral argument.

V. Statement of Case and Facts.

A. Proceedings below and jurisdiction.

On September 27, 2017, Todd N. Triebold was convicted, after a bench trial, of one count of knowingly failing to comply with sex offender registry notification requirements, in violation of Wisconsin Statutes, section 301.45(6)(a)1. (R.43:1; Appx. 1). On December 4, 2017, the Pierce County Circuit Court, the Honorable Joseph D. Boles presiding, withheld sentence and placed Triebold on probation for two years. *Id.* He now appeals his conviction on the grounds that the State of Wisconsin lacked territorial jurisdiction to prosecute a crime for acts which were committed solely within the State of Minnesota; and further that his conviction violated the provisions of Wisconsin Statutes, section 939.71, which forbids successive prosecution for acts which form the basis of a crime punishable by a statutory provision of this state and the laws of another jurisdiction, unless each provision requires proof of a fact for conviction which the other does not require. He requests that his conviction be vacated, and the case remanded for entry of a Judgment of Acquittal

This is an appeal from a final judgment and sentence of a circuit court in a criminal case. This court has jurisdiction under the Wisconsin Constitution, article VII, section 5; and Wisconsin Statutes, sections 808.03(1) and 809.30. See also, *State v. Scherreiks*, 153 Wis.2d 510, 451 N.W.2d 759 (1989).

B. Facts of the case.

On May 5, 1994, Todd N. Triebold was convicted of 2nd Degree Sexual Assault of a Child, in violation of Wisconsin Statutes, section 948.02(2). (R.73:25; See also CCAP entries for Pierce County Case no. 1993CF27).¹ As a

¹ This court may take judicial notice of facts which are contained on CCAP. See, Wis. Stat. § 902.01; *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

consequence of his conviction, Triebold is a lifetime registrant under the Wisconsin Sex Offender Registration law. (R.75:25; *See also*, Wis. Stats §§ 301.45(1g)(a) and (5)(b)1m).

On September 22, 2014, Triebold was charged with knowingly failing to comply with Sex Offender Registry notification requirements, in violation of Wisconsin Statutes, section 301.45(6)(a)1. (R.1 and R.7). A bench trial was held on September 20, 2017. (R.73:1). At the bench trial the following facts were established:

Triebold had been convicted of a registrable offense in 1994, in Pierce County, Wisconsin. (R.73:28). It was further established that, among other things, he was required to provide the Wisconsin Sex Offender Registry with information concerning his place of residence. (R.73:25; *see also* Wis. Stat. § 301.45(2)(a)5). Testimony was presented that he was also required to provide notifications to the Registry within ten days of any change in his residence. (R.73:25; *see also* Wis. Stat. § 301.45(4)(a)).² Because he had a period of incarceration to serve, he was not actually required to provide information to the Registry until he was released from prison in 1999. (R.73:28 *See also*, Wis. Stats § 301.45(3)(a)2). Triebold apparently refused to sign the initial registration form, however, he was informed at that time about a ten-day notification requirement concerning any changes in his residence. (R.73:38-39 and 45-46; *See also*, Wis. Stats § 301.45(3)(b) subdivisions 2, 3m, and 4). Triebold also received yearly warnings concerning a ten-day notification requirement in annual confirmation letters from the Registry demanding that he confirm his current address. (73:40 and 44-45 and R.36; *See also*, Wis. Stats. § 301.45(3)(b)1). Triebold apparently

² The statute also requires ten days *prior* notice of changes from a Wisconsin residence to an out-of-state residence, to be given to both the Wisconsin Department of Correction and the appropriate department in the state to which the registrant is moving. Wis. Stats. § 301.45(4m).

received and returned these confirmation letters from 1999, after his release from prison, through August 20, 2013. (R.73:38-39).

At some point prior to 2013, Triebold had moved from the State of Wisconsin to the State of Minnesota.³ (R.73:30-31). On August 20, 2013, Triebold returned the annual confirmation letter, reporting to the Wisconsin Sex Offender Registry that he was residing 750 Point Douglas Road, St. Paul, Minnesota. (R.73:28 and R.36).

On May 20, 2014, Officer Patrick Daly of the City of St. Paul, Minnesota, Police Department, executed an Internet Crimes Against Children (ICAC) search warrant on a residence located at 259 English Street, St. Paul, Minnesota. (R.73:54). At that residence he found Triebold. (R.73:54). Triebold presented to Officer Daly a Minnesota state identification card which listed his address as being 259 English Street, St. Paul, Minnesota. (R.73:55). The card was issued in March of 2014. *Id.* Officer Daly also observed that Triebold had a bedroom in the residence. (R.73:56). During the execution of the search warrant, a St. Paul police officer assisted Triebold in preparing a notice of address change to the Minnesota Bureau of Criminal Apprehensions (BCA). (73:56-57). Triebold did not send a notification to the Wisconsin Sex Offender Registry informing them of the move to 259 English Street. (73:44).

On June 18, 2014, Sarah Aho, a Department of Corrections Sex Offender Registry program specialist, received a report from Officer Daly that Triebold had moved from his last reported address of 750 Point Douglas Road, St. Paul, Minnesota, to 259 English Street, St. Paul, Minnesota. (R.73:29 and 44-45). Ms.

³ Sarah Aho, the Department of Corrections program specialist who testified at trial, was unable to put a specific date on the move to Minnesota, but confirmed that Triebold had been in Minnesota since at least December of 2012, and possibly for years before that. (R.73:31-33 and R.30:2).

Aho testified that Triebold had gone approximately five months without reporting his change of address. (R.73:53).⁴

On June 17, 2014, prior to Triebold's Wisconsin prosecution, a criminal complaint was filed in the Ramsey County, Minnesota, District Court, Case No. 62-CR-14-4390. That complaint charged Triebold with violation of the Minnesota Predatory Offender Registration Act, Minn. Stat. § 243.166.5(a), for "knowingly fail[ing] to register an address or change of information as required." (R.30:1). The timeframe alleged in the criminal complaint was "on or about the 24th day of December 2013 to the 20th day of May 2014." *Id.* The statement of probable cause attached to the complaint alleged that Triebold was required to register his address with the Minnesota BCA, for the duration of his life, owing to the Pierce County, Wisconsin, conviction for second degree sexual assault of a child. (R.30:2). The statement alleged that Triebold began registering with the BCA on May 5, 1994, and around April 10, 2013, Triebold submitted a change of address with the BCA indicating his address was 750 Point Douglas Road, St. Paul, Minnesota. *Id.* The statement further alleged that on May 20, 2014, law enforcement executed a search warrant at 259 English Street, St. Paul, Minnesota, during which "Sergeant Keller and Officer Daly spoke to Triebold in a non-custodial interview outside of the residence. Triebold said he had been living at 259 English Street since December 24, 2013. He admitted he knew he was supposed to change his address and said it was on his to-do list. Triebold said 750 Point Douglas Road is his mother's address and he said he goes over there sometimes." *Id.* On March 3, 2015, Triebold entered a plea of guilty to the charge. (R.30:12-13). And on April 14, 2015, Triebold was convicted of the charge and sentenced to fourteen months prison with credit of 188 days served. (R.30:8-9).

⁴ The probable cause section of the criminal complaint indicates that Triebold reported that he moved from 750 Point Douglas Road to 259 English Street on December 24, 2013. (R.81:4). However, that specific fact was not offered in testimony at the bench trial.

The criminal complaint in this case was filed in Pierce County, Wisconsin, on September 22, 2014. Triebold was charged with knowingly failing to comply with Sex Offender Registry notification requirements, in violation of Wis. Stat. § 301.45(6)(a)1. (R.1:2). The timeframe alleged in this complaint was “on Friday, January 3, 2014,” that is, ten days after December 24, 2014. *Id.* The probable cause portion of the criminal complaint alleged that Triebold had violated the requirements of the Wisconsin Sex Offender Registry law by failing to provide notice within ten days of his change in residence from 750 Point Douglas Road, St. Paul, Minnesota, to 259 English Street, St. Paul, Minnesota. (R.1:3-4). Prior to the bench trial, Triebold filed two motions which are relevant to this appeal.

First, Triebold filed a motion to dismiss for lack of jurisdiction. (R.23). Triebold’s argument was, in essence, that the State of Wisconsin lacked territorial jurisdiction to prosecute this crime because none of the acts complained of occurred or had consequences within the State of Wisconsin. (R.23:5). Triebold actions, and the consequences thereof, he argued occurred solely within the State of Minnesota. *Id.* Triebold further contested Wisconsin’s personal and territorial jurisdiction to require him to continue registering in Wisconsin after he had become a citizen and resident of Minnesota. (R.34:7). Triebold also contested whether Wisconsin’s criminal jurisdiction statute, Wis. Stats. § 939.03, covered “omissions” to act while outside the boundaries of the State of Wisconsin. (R.71:37-39).

Second, Triebold filed a motion to dismiss for statutory double jeopardy under Wisconsin Statutes, section 939.71. (R.29). Triebold argued that the crime for which he was convicted in *State of Minnesota v. Todd Neil Triebold*, Ramsey County Case No. 62-CR-14-4390, was identical in law and fact with the crime charged in *State of Wisconsin v. Todd N. Triebold*, Pierce County Case No. 2014CF158. (R.29:4). Triebold argued that:

Both States [had to] prove that the Defendant was a person required to register by proving the fact of the Defendant’s prior conviction of Second-Degree Sexual

Assault of the Child in Pierce County. Wisconsin, case 1993 CF 27, and by proving that he was still subject to the registration requirement between the dates of December 24, 2013 and May 20, 2014.

(R.29:4). And further:

Both States [had to] prove that the Defendant knowingly violated any of the requirements to register by showing that he had knowledge of the requirement to provide information, as well as by showing that he knew he did not comply with the requirement. In each case, this is shown by Mr. Triebold's alleged statements to law enforcement that he moved to 259 English Street in St. Paul on December 24, 2013; that knew he was supposed to report his new address, and that he knew he had not reported the change of address so as of the date of his contact with law enforcement on May 20, 2014.

(R.29:4-5).

On September 27, 2017, the circuit court, the Honorable Joseph D. Boles presiding, denied both motions in an oral ruling. (R.74; Appx. 2). Regarding the jurisdictional arguments the court wrote, *inter alia*, that:

... the Defense concedes that the purpose of this statute, the sexual registration statute, is to assist law enforcement agencies in investigating and apprehending offenders in order to protect the health, safety, and welfare of the communities and the members of the state. And how do you do that unless you keep track of somebody, and that's what the sexual offender registration is. And that would have no meaning at all if one could simply move out of the state to avoid its application.

And the fact that – that they were in the state when they committed the act, they were in the state when they were convicted of the act, is sufficient, I believe, to meet all the jurisdictional requirements that would require every person, not just Mr. Triebold, but every person that's convicted of an offense required for registration to continue to comply with that when they move out of state.

So it just doesn't make any sense at all to me that a person in Mr. Triebold's shoes could, the day after he's released from custody or the day after he was sentenced, if he wasn't confined, could simply move out of state anywhere in the country, not tell anyone where he lived, and could avoid, legally avoid, the application of Wisconsin law and – and – in terms of keeping track of where he is. It's such a public safety issue that it's clear to me that that was the intent, and that the Court and the State does have jurisdiction over Mr. Triebold, even though he was arguably a Minnesota resident or citizen.

I know it was stated that he was a citizen. I don't know what -- if there's any proof as to what is required for someone to be a citizen of the state of Minnesota, but I don't think citizenship is -- is relevant, it's really residence, and so the Court had jurisdiction to require Mr. Triebold to comply with the

Wisconsin registration law even though he moved to Minnesota. And he knew it, I guess, and that's really the key thing; we'll get to that a little bit later.

So I deny the motion to dismiss based on lack of jurisdiction. ... I do believe that the Court and the State of Wisconsin has jurisdiction over Mr. Triebold, frankly, for the rest of his life. He can't avoid it by moving.

(R.74:8-9; Appx. 9-10). With regard to the double jeopardy claim, the circuit court wrote, *inter alia*:

-it really involves two separate offenses, and -- and that's the nature of the double jeopardy claim, is that it has to be a prosecution for the same offense and -- which would result in multiple punishments for the same offense, and this is strictly not -- just not the same offense.

The Wisconsin offense, the State of Wisconsin requires Mr. Triebold to register with the State of Wisconsin and it sets out certain requirements that he must follow. Those requirements aren't the same as the ones in Minnesota. They aren't the same in terms of when he has to do things or how he has to do things or where he has to do things. In other words, just as far as the reporting his residence, he has to report that, under Wisconsin law, to State Department of Corrections, get a letter, they tell you where you have to send information, where to contact them and to provide that information.

Same with Minnesota, I have to think, that they also -- they don't require that you report your change of address to Wisconsin, so you have to report to the whatever, Bureau of Criminal Apprehension or the State of Minnesota Department of Corrections, whatever it is, you have to report that to Minnesota, and there is not -- they are not the same offenses.

In other words, these are two separate crimes that - that are alleged, and he's been convicted of the one in Minnesota. Totally separate crime here that's being charged because it's different facts have to -- that need to be proven in each case.

Notice requirements exist regarding Minnesota's registration obligations and Wisconsin's. There was not evidence of record; although, Wisconsin -- or Minnesota statutes, I'm sure, set that forth, but Wisconsin's statutes are different, at least in somewhat.

So because they're separate and require providing information to two separate, distinct law enforcement entities in each state, that they're different legal requirements in terms of providing proof and different facts, that these are two separate offenses, and so the double jeopardy argument also fails.

(R.74:10-11; Appx. 11-12). The circuit court then found Triebold guilty of the crime of knowingly failing to comply with sex offender registry notification requirements, in violation of Wisconsin Statutes, section 301.45(6)(a)1. (R.74:15; Appx. 16). This appeal follows upon Triebold's conviction.

VI. Argument.

A. The State of Wisconsin lacked territorial jurisdiction to prosecute Triebold for failing to provide notification of his intra-state change in residency from one Minnesota address to another Minnesota address.

1. Standard of Review.

Whether a court has jurisdiction presents an issue of law, which this Court reviews *de novo*. *State v. Randle*, 2002 WI App 116, ¶ 18, 252 Wis. 2d 743, 647 N.W.2d 324, *citing State v. Webster*, 196 Wis. 2d 308, 316, 538 N.W.2d 810 (Ct.App.1995). “It is elementary that a court may act only upon crimes committed within the territorial jurisdiction of the sovereignty seeking to try the offense.” *Id. citing Hotzel v. Simmons*, 258 Wis. 234, 240, 45 N.W.2d 683 (1951). Without jurisdiction, criminal proceedings “are a nullity.” *Id.*

2. The registry requirements for sex offenders who reside in another state are controlled by the Federal Sex Offender Registration and Notification Act, 34 U.S.C.A. § 20901 *et. seq.*, which does not require dual notifications for intra-state changes in residency.

The State of Wisconsin has taken the position that it can require sex offenders who reside outside the State of Wisconsin, to make continuing direct notifications to the Wisconsin Sex Offender Registry, even though the offender has ceased to have any contacts with the State of Wisconsin. This is in error. The notification requirements for sex offenders who relocate from one state to another state are controlled by the Federal Sex Offender Registration and Notification Act, 34 U.S.C.A. § 20901 *et. seq.*, which does not require dual notifications for intra-state changes in residence.

The Federal Sex Offender Registration and Notification Act, 34 U.S.C.A. § 20901 *et. seq.*⁵ was enacted by Congress for the purpose of “protect[ing] the

⁵ formerly cited as 42 U.S.C.A. § 16901, enacted July 27, 2006 (Pub.L. 109-248, Title I, § 102).

public from sex offenders and offenders against children” by “establish[ing] a comprehensive national system for the registration of those offenders.” 34 U.S.C.A. § 20901. The Act requires that “[e]ach jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter.” 34 U.S.C.A. § 20912(a).

Laws of the United States, made pursuant to the United States Constitution, are the “supreme law of the Land; and the Judges in every State shall be bound thereby.” U.S. Const. Art. VI cl. 2. the “Supremacy Clause.” “The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by congress to carry into effect the powers vested in the national government.” *M’Culloch v. Maryland*, 17 U.S. 316, 317 (1819). “State laws that ‘interfere with, or are contrary to the laws of congress, made in pursuance to the constitution,’ are invalid.” *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) *quoting Gibbons v. Ogden*, 22 U.S. 1 (1824). The language of the Federal Sex Offender Registration and Notification Act expressly preempts state statutes which do not “conform[] to the requirement of this subchapter.” 34 U.S.C.A. § 20912(a); *See also Wisconsin Public Intervenor*, 501 U.S. at 604-05 (“Congress’ intent to supplant state authority in a particular field may be expressed in the terms of the statute”). Moreover, the expressed purpose of the Act, “to establish a comprehensive national system for the registration of those offenders,” 34 U.S.C.A. § 20901, is such that any regulatory scheme which did not conform with the requirements of the Act, would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Wisconsin Public Intervenor*, 501 U.S. at 605, *quoting Hines v. Davidowitz*, 312 U.S. 52 (1941).

In short, Wisconsin statutes must conform to the Federal Sex Offender Registration and Notification Act. That Act requires that each state’s sex-registry

laws conform with following requirements:

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

34 U.S.C.A. § 20913(a). Thereafter, with regard to “keeping the registration current,” the Act requires that:

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register

34 U.S.C.A. § 20913(c). The Act further requires that “[e]ach jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.” 34

U.S.C.A. § 20913(e). When a sex offender fails to comply:

An appropriate official shall notify the Attorney General and appropriate law enforcement agencies of any failure by a sex offender to comply with the requirements of a registry and revise the jurisdiction’s registry to reflect the nature of that failure. The appropriate official, the Attorney General, and each such law enforcement agency shall take any appropriate action to ensure compliance.

34 U.S.C.A. § 20924.

To summarize, the Act requires an “initial registration” in every state where the offender resides, is an employee, or a student; and in the state where the offender committed the crime. 34 U.S.C.A. § 20913(a). The requirement to “keep the registration current,” however, applies only to those “jurisdiction[s] where the offender resides, where the offender is an employee, and where the offender is a student.” *Id.* The offender is not required to “keep the registration current” in the state where he was convicted, but is only required to provide information to that state “for initial registration purposes only.” *Id.* Under the Act, a non-residence sex offender is not required to provide dual notifications for subsequent intra-state

changes in residence. Rather the offender is required inform “at least one jurisdiction” of any changes in “name, residence, employment, or student status.” *Id.* The jurisdiction so notified is then required to “provide that information to all other jurisdictions in which the offender is required to register.” *Id.* To enforce the requirements of the Act, each jurisdiction (other than a Federally recognized Indian tribe), is required to provide a criminal penalty that “includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply” with registry requirements. 34 U.S.C.A. § 20913(e).

In Triebold’s case, he could only be charged with failing to keep his “registration current” in the State of Minnesota, because the Federal Sex Offender Registration and Notification Act, only requires that registration be kept “current” in jurisdictions “where the offender resides, where the offender is an employee, and where the offender is a student.” 34 U.S.C.A. § 20913(a). The evidence in Triebold’s case failed to establish that Triebold was residing, employed, or a student in the State of Wisconsin. In fact, Triebold’s change in residence was entirely an intra-state affair within the State of Minnesota. (R.73:28, 54-56 and R.36). The only jurisdiction to which Triebold was required to provide notice and keep his registration current with was the State of Minnesota. Triebold failed to provide notice of his intra-state change in residence to the State of Minnesota, and was subsequently charged, convicted and punished for that failure. (R.30). The record reflects that the “comprehensive national system for the registration of [sex] offenders” established by the Federal Sex Offender Registration and Notification Act worked exactly as Congress had intended. The State of Wisconsin lacks territorial jurisdiction to exact any further punishment for Triebold’s acts and omissions which occurred solely within the State of Minnesota.

3. The Wisconsin Legislature lacks territorial jurisdiction to command the citizen of another State to perform notifications in addition to those required by the federal Sex Offender Registration and Notification Act, 34 U.S.C. § 20901 *et. seq.*

Although it is not generally presented to a jury as an element of a crime, "the State is obligated in all prosecutions to establish its territorial jurisdiction over a defendant for charged crimes." *State v. Brown*, 2003 WI App 34, ¶25, 260 Wis.2d 125, 659 N.W. 2d 110. Further, "[i]t is elementary that a court may act only upon crimes committed within the territorial jurisdiction of the sovereignty seeking to try the offense." *Hotzel*, 258 Wis. at 240. This, then, is also an 'element' of every crime: that the State of Wisconsin should be found to have jurisdiction. In this appeal, Triebold challenges Wisconsin's territorial jurisdiction to convict him for failing to notify the Wisconsin Registry of an intra-state change in residences, when he was solely a resident of the State of Minnesota.

Regarding territorial jurisdiction, the United States Constitution requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...." U.S. Const. Amend. VI. Questions of territorial jurisdiction also invoke the protections of the Due Process Clauses of the United States and Wisconsin Constitutions. U.S. Const. Amends. IV and XIV; Wis. Const. Art. 1 § 8; *See also, United States v. Cabrales*, 524 U.S. 1, 5, (1998) ("the Constitution requires that a person be tried for an offense where that offense is committed"); and *Randle*, 2002 WI App 116, ¶14 fn.4. ("[t]erritorial jurisdiction is part of the due process restrictions on the power of a court to exercise its jurisdiction over a given individual...."). "[T]he *locus delicti*⁶ must be determined from the nature of the crime alleged and the location of the act or acts constituting

⁶ *locus delicti*. [Latin "place of the wrong"] The place where an offense was committed.... Black's Law Dictionary, 9th Ed. (2009).

it.” *Cabrales*, *supra*, quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946).

In Wisconsin, the limits of territorial jurisdiction over a crime are defined by Wisconsin Statutes, Section 939.03, which provides, among other things, that:

(1) A person is subject to prosecution and punishment under the law of this state if any of the following applies:

- (a) The person commits a crime, any of the constituent elements of which takes place in this state.
- (b) ...
- (c) While out of this state, the person does an act with intent that it cause in this state a consequence set forth in a section defining a crime.

...

(The other bases of jurisdiction listed in the statute are clearly inapplicable). In *Randle*, 2002 WI App 116 at ¶ 12, this Court held that Section 939.03 applies to both personal and territorial jurisdiction. Thus, if the State of Wisconsin is to have territorial jurisdiction over the crime alleged in the Information, it must seek that jurisdiction under Section 939.03, in compliance with the dictates of the United State and Wisconsin Constitutions.

Triebold's conduct took place entirely within the State of Minnesota. None of the constituent elements of his crime 'took place' within the State of Wisconsin. In fact, there was no evidence presented for Triebold committing any act or omission while located in the State of Wisconsin. (Other than committing the crime which required his initial registration in Wisconsin, which, of course, occurred long before the timeframe alleged in the Information). Consequently, the State cannot base territorial jurisdiction upon Wisconsin Statutes, Section 939.03(1)(a).

Any territorial jurisdiction would have to be based upon Section 939.03(1)(c), namely that Triebold “while out this state ... [did] an act with intent that it cause in this state a consequence set forth in a section defining a crime.” However, Triebold performed no act which had a consequence in the State of

Wisconsin, much less performed an act with the intent that it cause a consequence in the State of Wisconsin. Triebold moved from one address in the City of St. Paul, Minnesota, to another address in the same city, without providing “at least one jurisdiction” notice of his change in residence.⁷ (R.73:28, 54-56 and R.36). This was an act which, without question, had a consequences in the State of Minnesota. Interest persons in the vicinity 259 English Street, St. Paul, Minnesota, were denied notice that a sex offender had relocated into their community. That was a real consequence for law enforcement, schools, and concerned citizens in the St. Paul, Minnesota, community. And Triebold was punished for that act, by the jurisdiction which suffered the consequences of that act, namely, the State of Minnesota. (R.30).

But Triebold’s action had no consequences in the State of Wisconsin, and the State of Wisconsin presented no evidence to show that Triebold intended to cause any consequence in the State of Wisconsin. There were no schools in the State of Wisconsin deprived of notice that a sexual offender had moved into their community. Local law enforcement in Wisconsin was not deprived of notice that a known sexual offender had relocated into their community. There were no concerned citizens in Wisconsin who were not alerted that a sexual offender had moved into their neighborhood. All the consequences of Triebold’s acts were confined to the State of Minnesota.

The only sense in which Triebold’s acts might conceivably be said to have any consequence in the State of Wisconsin, was that the Wisconsin Sex Offender Registry was not “kept current” with regard to Triebold’s current residence in the

⁷ Trial counsel for Triebold argued that Section 939.03 requires an affirmative act, not simply an omission, in order for there to be jurisdiction under the statute. (R.71:37-39). Since Triebold’s crime was one of omission, i.e. failure to provide notice, trial counsel argued that there could be no jurisdiction under the statute. Whatever the merits of this argument, the undersigned counsel would concede that Triebold’s physically moving his residences from one location to another location would satisfy the “act” requirement under the statute. The question is, did that “act” have a consequence in the State of Wisconsin?

State of Minnesota. However, as stated above, the Federal Sex Offender Registration and Notification Act, only requires that registration be kept “current” in jurisdictions “where the offender resides, where the offender is an employee, and where the offender is a student.” 34 U.S.C.A. § 20913(a). Triebold obligations with regard to the State of Wisconsin related to “initial registration purposes only.” *Id.* Under the Act, a non-resident sex offender is not required to make dual notifications for subsequent intra-state changes in residence. As such, even in this sense, Triebold’s move from one neighborhood to another in St. Paul, Minnesota, had no consequence in the State of Wisconsin, as Triebold was not obligated to keep his residence “current” with the Wisconsin Sex Offender Registry in the first place. 34 U.S.C.A. § 20913(a).

B. Triebold’s prosecution was barred by Wisconsin Statutes, section 939.71.

1. Standard of Review.

Whether a prosecution is barred by Wisconsin Statutes, section 939.71 is a question of statutory interpretation, not one of constitutional rights. *State v. Lasky*, 2002 WI App 126, ¶ 10, 254 Wis.2d 789, 646 N.W.2d 53. Accordingly, this Court considers the application of section 939.71, independently of the circuit court, while benefiting from its analysis. *Id.*

2. Triebold’s prosecution in Wisconsin was identical in law and fact to his Minnesota prosecution, and therefore violated his statutory double jeopardy rights under Wisconsin Statutes, section 939.71.

The United State Supreme Court recently reaffirmed the longstanding dual-sovereignty doctrine according to which two offenses “are not the ‘same offence’ for double jeopardy purposes if ‘prosecuted by different sovereigns.’” *Gamble v. United States*, ___ U.S. ___, 139 S.Ct. 1960, 1964, 204 L.Ed.2d 322 (2019) *quoting Heath v. Alabama*, 474 U.S. 82, 92 (1985). The dual-sovereignty doctrine, the Court explained, is not an exception to the Double Jeopardy Clause, but rather

“follows from the text that defines that right in the first place. “[T]he language of the Clause ... protects individuals from being twice put in jeopardy ‘for the same *offence*,’ not for the same *conduct* or *actions*.”” *Id.* at 1965, quoting *Grady v. Corbin*, 495 U.S. 508, 529 (1990) (J. Scalia dissenting) (emphasis in the original). The term “[o]ffence” was commonly understood in 1791 to mean ‘transgression,’ that is, ‘the Violation or Breaking of a Law.’” *Id.* “As originally understood, then, an ‘offence’ is defined by a law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws, and two ‘offences.’” *Id.*

The dual-sovereignty doctrine is not without its dissenters. *See, Gamble*, 139 S.Ct. at 1989 (J. Ginsberg dissenting); *and Gamble*, 139 S.Ct. at 1196:

A free society does not allow its government to try the same individual for the same crime until it’s happy with the result. Unfortunately, the Court today endorses a colossal exception to this ancient rule against double jeopardy. My colleagues say that the federal government and each State are “separate sovereigns” entitled to try the same person for the same crime. So if all the might of one “sovereign” cannot succeed against the presumptively free individual, another may insist on the chance to try again. And if both manage to succeed, so much the better; they can add one punishment on top of the other.

(J. Gorsuch dissenting).

With similar concerns in mind, the Wisconsin State Legislature enacted Wisconsin Statutes, section 939.71, which alters the dual-sovereignty doctrine in the State of Wisconsin. That statute provides that:

If an *act* forms the basis for a crime punishable under more than one statutory provision of this state or under a statutory provision of this state and the laws of another jurisdiction, a conviction or acquittal on the merits under one provision bars a subsequent prosecution under the other provision unless each provision requires proof of a fact for conviction which the other does not require

(emphasis added). Unlike the Double Jeopardy Clauses of the United States and Wisconsin Constitutions, section 939.71 is not premised upon “offenses,” but rather protects individuals from being twice put in jeopardy for the same “act.” *See Gamble*, 139 S.Ct. at 1965 (“[T]he language of the [Double Jeopardy] Clause ... protects individuals from being twice put in jeopardy ‘for the same *offence*,’ not

for the same *conduct* or *actions*.’”). The statute nonetheless continues to adhere to the principles of “multiplicity” to the extent that it allows “... a subsequent prosecution ... if each [statutory] provision requires proof of a fact for conviction which the other does not require, even if the same conduct was involved in the two prosecutions.” *State v. Swinson*, 2003 WI App 45, ¶ 49, 261 Wis.2d 633, 660 N.W.2d 12. In essence this is the *Blockburger*⁸ test for determining if two statutory provisions are legally identical, with the nuance that two statutory provisions will not automatically be deemed legally distinct simply because they were enacted by separate sovereigns.

Thus there are two questions to be answered. First, was the act for which Triebold prosecuted factually identical in the two prosecutions? And second, are the Minnesota and Wisconsin statutes under which Triebold was prosecuted legally identical, or did either statutory provision “requires proof of a fact for conviction which the other does not require”?

With regard to factual identity, the criminal complaint in Triebold’s Minnesota prosecution alleged a timeframe for the crime of “on or about the 24th day of December 2013 to the 20th day of May 2014.” (R.30:1). The statement of probable cause attached to the complaint alleged that Triebold last reported his address was 750 Point Douglas Road, St. Paul, Minnesota. (R.30:2). The statement further alleged that on May 20, 2014, law enforcement executed a search warrant at 259 English Street, St. Paul, Minnesota, during which a “Sergeant Keller and Officer Daly spoke to Triebold in a non-custodial interview outside of the residence. Triebold said he had been living at 259 English Street since December 24, 2013. He admitted he knew he was supposed to change his address and said it was on his to-do list. Triebold said 750 Point Douglas Road is

⁸ *Blockburger v. United States*, 284 U.S. 299 (1932). “The *Blockburger* test requires us to consider whether each of the offenses in this case requires proof of an element or fact that the other does not. If, under this test, the offenses are identical in law and fact, then charging both is multiplicitous and therefore unconstitutional.” *Swinson*, 2003 WI App 45 at ¶ 28.

his mother's address and he said he goes over there sometimes.” *Id.* The criminal complaint in Triebold’s Wisconsin prosecution alleged a timeframe for the crime of “on Friday, January 3, 2014,” that is, ten days after December 24, 2014. *Id.* The probable cause portion of the criminal complaint alleged that Triebold had violated the requirements of the Wisconsin Sex Offender Registry law by failing to notify the Registry of his change in residence within ten days of his move from 750 Point Douglas Road, St. Paul, Minnesota, to 259 English Street, St. Paul, Minnesota, on December 24, 2014. (R.1:3-4). Factually, Triebold’s acts alleged in the two prosecutions are identical.

With regard to legal identity, the crime of Failure to Register as a Predatory Offender under Minnesota Statutes, section 243.166, subd. 5(a), provides that:

A person required to register under this section who knowingly violates any of its provisions or intentionally provides false information to a corrections agent, law enforcement authority, or the bureau is guilty of a felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both.

(R.33). The element of the Minnesota offense are:

- First, defendant is a person required to register as a predatory offender;
- Second, the defendant knowingly violated any of the requirements to register. The requirements to register include [specific requirement violated];
- Third the time period during which the defendant was required to register has not elapsed; and
- Fourth, the defendant's (act) (failure to act) took place on (or about) [a specified timeframe], in [a specified] County.

(R.31; Minnesota Jury Instruction Guide, CRIMJIG 12.100).

In the case *sub judice*, Wisconsin Statutes, section 301.45(6)(a)1, provides that: “[w]hoever knowingly fails to comply with any requirement to provide information under subs. (2) to (4) is subject to the following penalties: 1. Except as provided in subd. 2., the person is guilty of a Class H felony.” The element of the Wisconsin offense are:

- 1. The defendant was a person who was required to provide information under section 301.45. A person who [describe the applicable criterion set forth in subs. (1g) of § 301.45] is required to provide information under section 301.45.
- 2. The defendant failed to provide information as required. Section 301.45___ provides that persons required to provide information under section 301.45 must [describe the requirement set forth in subs. (2)-(4) of 301.45]
- 3. The defendant knowingly failed to provide the required information. This requires that the defendant knew that (he) (she) was required to provide the information.

Wis. JI-Criminal 2198 “Failure to Comply with Sex Offender Registration Requirement - § 301.45.”

The crime for which Triebold was convicted in *State of Minnesota v. Todd Neil Triebold*, Ramsey County, Minnesota, case number 62-CR-14-4390, is identical in law and fact to the crime for which Triebold was convicted in the case *sub judice*. Element 1 of the Wisconsin crime combines the first and third elements of the Minnesota crime. Both statutes require proof that Triebold was person who was required to register as a sexual offender at the time of the violation. These requirements that Triebold register as a sex offender are not unrelated idiosyncrasies of Wisconsin or Minnesota law. All states in the Union are required under the Federal Sex Offender Registration and Notification Act, 34 U.S.C.A. § 20901 et. seq., to “maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter.” 34 U.S.C.A. § 20912(a). Under the Act, Triebold is required to register as sex offender in every jurisdiction in which he resides, works, or is a student. 34 U.S.C.A. § 20913(a). This is all part of “a comprehensive national system for the registration of those offenders.” 34 U.S.C.A. § 20901. In Triebold’s Minnesota and Wisconsin prosecutions, the proof for this element was factually identical. Both states cited Triebold’s prior conviction for Second Degree Sexual Assault of the Child in Pierce County,

Wisconsin case number 1993CF27, as proof that he was person required to register as a sexual offender. (R.30:2 and R.1:4).

The second element of the Minnesota crime combines elements 2 and 3 of the Wisconsin crime, and their proof was factually identical. Both States had to prove that Triebold knowingly violated a registry requirement by showing that he had knowledge of the requirement to provide information, as well as by showing that he knew he did not comply with the requirement. In each case, this was shown by Mr. Triebold's statements to law enforcement that he moved to 259 English Street in St. Paul on December 24, 2013; that knew he was supposed to report his new address, and that he knew he had not reported the change of address as of the date of his contact with law enforcement on May 20, 2014. (73:54-57 and R.30:2). The fourth element of the Minnesota crime merely establishes the jurisdiction of the State. As noted above, although jurisdiction is not typically submitted to the Jury in Wisconsin, it is nevertheless the State's obligation to prove jurisdiction in all cases. *Brown*, 2003 WI App 34 at ¶25. In both cases, the factual basis for jurisdiction was asserted by showing that while residing in St. Paul, Minnesota, Triebold failed to report a change in residence.

The Minnesota and Wisconsin crimes are identical in law and in fact. In both cases Triebold was convicted and punished for failing to provide notice of a change in residence from 750 Point Douglas Road, St. Paul, Minnesota, to 259 English Street, St. Paul, Minnesota. Contrary to the State's assertions, Triebold was not required to provide dual notifications. He was required to notify changes in residence to "at least one jurisdiction" in which he was required to register. 34 U.S.C.A. § 20913(c). Moreover, his obligation to keep his registration current was limited to those "jurisdiction[s] where the offender resides, where the offender is an employee, and where the offender is a student." 34 U.S.C.A. § 20913(a). Under the framework of the Act, had Triebold notified the state of his residence, i.e. Minnesota, he would have fulfilled his notification obligations, and Minnesota would then notify Wisconsin of the change in residence. 34 U.S.C.A. § 20913(c).

Triebold was not required to provide dual notifications. *Id.* Triebold failed to keep his registration current in Minnesota, and he failed to notify Minnesota of his change in residence. For this violation he was convicted and punished by the State of Minnesota. He should not be convicted and punished by the State of Wisconsin as well.

VII. Conclusion.

Wherefore, Mr. Triebold respectfully requests that this Court vacate his Judgment of Conviction on the charge of Felony Sex Offender Registry Violation, in violation of Wisconsin Statutes, section 301.45(6)(a)1, and remand this case to the circuit court for the entry of a Judgment of Acquittal on that same charge.

Respectfully submitted September 6, 2019.

This brief has been electronically signed by:

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VIII. Certifications.

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 7141 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Respondent, with three copies of this brief the same day it was filed with this court.

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 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.

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. 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 September 6, 2019.

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CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by priority mail on September 6, 2019. I further certify that the brief was correctly addressed and postage was pre-paid.

Date: September 6, 2019.

Signature: _____