

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 65457-8-1
Respondent,)	
)	DIVISION ONE
v.)	
)	
LEE ANTHONY BUTLER,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: <u>September 19, 2011</u>

Spearman, J. — The sole issue before us is whether the information charging Lee Butler with felony failure to register as a sex offender was defective because it did not state a day of the week on which he was required to report to the sheriff’s office. We hold that where, as here, the county sheriff’s office did not require Butler to register on a specific day of the week, the information was not defective, and affirm.

FACTS

As a result of his 1993 conviction for rape of a child in the first degree, Butler was required to register as a sex offender. He signed multiple sex offender registration forms informing him of his duty to register, the registration requirements, and the penalties for failing to register. He registered with the

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King County Sheriff's Office (KCSO) beginning in March 1999 and filed eight change-of-address forms over the years. On March 5, 2008, he filed the last form in which he declared that he was homeless and living in Tukwila. That form stated, "I understand while I'm homeless I must sign in weekly with the King County Sheriff's Office."

From the beginning of 2009, Butler was supervised by community corrections officer (CCO) Jacob Ward. Ward explained the weekly reporting requirements to Butler were he to become homeless. Butler provided proof of his weekly registration to Ward before May 4, 2009, and did not express confusion about the requirements or report transportation problems. But beginning from the week of May 4, 2009, Butler stopped reporting weekly at KCSO. KCSO detective Michael Luchau reviewed the weekly sign-in sheets from May 4, 2009 to July 10, 2009 and noticed that Butler had not signed in at all during those weeks. Luchau confirmed that Butler was neither incarcerated nor reporting elsewhere during that time.

Butler was charged with felony failure to register as a sex offender. The State alleged that, between May 4, 2009 and July 10, 2009, Butler knowingly failed to report weekly with the sheriff's office. At trial, Butler admitted to knowing that he had to register. He testified that the reason he did not report during May to July 2009 was because he was a disabled veteran and had

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worsening problems with his feet that made it difficult for him to get around. Nonetheless, he admitted that during that period, he was able to get from Tukwila to the Veterans Affairs hospital in Seattle nearly every day. A jury found Butler guilty as charged. He was given a standard-range sentence.

DISCUSSION

Butler claims that the information was constitutionally defective because it did not allege that he failed to register weekly on a specific day of the week. The State responds that where KCSO required Butler to report on a weekly basis but not on a specific day, his argument fails because the information specifically alleged that he failed to “report weekly.” It also argues that Butler cannot demonstrate that he was actually prejudiced by the wording of the information. We agree with the State.

A charging document is constitutionally defective under the Sixth Amendment to the United States constitution and article I, section 22 of the Washington state constitution if it fails to include all “essential elements” of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The rationale underlying this rule is that a defendant must be apprised of the charges against him and allowed to prepare a defense. Id. “An ‘essential element is one whose specification is necessary to establish the very illegality of the behavior’ charged.” State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

Where, as here, the adequacy of a charging document is challenged for the first time on review, “it will be construed liberally and will be found sufficient if the necessary elements appear in any form, or by fair construction may be found, on the face of the document.” State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). But “[i]f the document cannot be construed to give notice of or contain in some manner the essential elements of a crime, the most liberal reading cannot cure it.” State v. Moavenzadeh, 135 Wn.2d 359, 363, 956 P.2d 1097 (quoting State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185)). We employ a two-part test: (1) do the necessary elements appear in any form, or can they be found by fair construction, in the information and, if so, (2) can the defendant show he was actually prejudiced by the inartful language. McCarty, 140 Wn.2d at 425 (citing State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991)). If the necessary elements are not found or fairly implied, prejudice is presumed. McCarty, 140 Wn.2d at 425.

Butler was charged with felony failure to register as a sex offender. The information stated:

That the defendant LEE ANTHONY BUTLER in King County, Washington, during a period of time intervening between May 4, 2009 through July 10, 2009, having been convicted of a sex offense that would be classified as a felony under the laws of Washington, to-wit: Rape of a Child in the First Degree, and being required to register pursuant to RCW 9A.44.130, did knowingly fail to comply with the requirements of RCW 9A.44.130, to-wit: the requirement that the defendant, lacking a fixed residence, must report weekly, in person, to the sheriff of the county where the defendant is registered;

Contrary to RCW 9A.44.130(11)(a), and against the peace and dignity of the State of Washington.

Under former RCW 9A.44.130(11), “A person who knowingly fails to register or who moves within the state without notifying the county sheriff as required by this section is guilty of a class C felony.”¹ RCW 9A.44.130(6)(b) provides, in relevant part, “A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff’s office, and shall occur during normal business hours.”

Butler argues that under RCW 9A.44.130(6)(b), the day of the week—for example, Monday or Tuesday—for a person to report is an essential element of the crime. He contends that the information’s omission of such day of the week was akin to omission of the reporting deadline, which he argues is an essential element, citing dicta in State v. Peterson, 168 Wn.2d 763, 771 n. 7, 230 P.3d 588 (2010) that “[c]ommon sense suggests the statutory deadline is part of the State’s burden of proof.”

We disagree and conclude the information gave Butler notice of the essential elements of the offense with which he was charged. RCW 9A.44.130(6)(b) requires a person lacking a fixed residence to report weekly, in

¹ Laws of 2006 ch. 129 § 2 (effective Sept. 1, 2006). All statutory references to RCW 9A.44.130 are to the version in effect at the time of Butler’s offense.

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person, to the county sheriff where he or she is registered. The statute also states that the “weekly report shall be on a day specified by the county sheriff’s office.” But here, KCSO did not specify a day of the week for Butler to report.

Detective Luchau testified as to KCSO’s reporting procedure as follows:

offenders came in each week, looked for their names on an alphabetical list, and signed next to their printed names. Records staff initialed the offenders’

signatures, indicated the time, and affixed a date stamp next to the signatures.

The signatures represented the offenders who signed in that week. Given that KCSO did not specify a day of the week for Butler to report, he was required only to report “weekly” under RCW 9A.44.130, and the information’s lack of reference to a specific day was proper.²

We need not decide whether the reporting deadline is an essential element of the offense of failure to register, because here, the information specified the precise weeks during which Butler failed to “report weekly” to KCSO. The State specifically alleged that Butler failed to report on a weekly basis from May 4 to July 7, 2009. The to-convict instruction required the jury to find that Butler failed to “report weekly.” CCO Ward testified that homeless sex

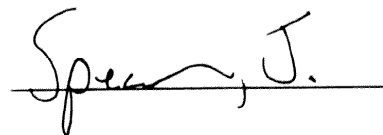
² The State contends that Butler’s argument stems from the statutory provision allowing county sheriffs’ offices to choose the specific day of the week that homeless, convicted sex offenders must report in their county. It contends that the statute’s grant of discretion does not amount to an essential element. We agree and note that accepting Butler’s argument would have us order KCSO to pick a specific day for homeless, convicted sex offenders to report. In the absence of any clear authority that county sheriff’s offices must choose a specific day of the week, we will not do so.

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offenders “have to register not less than once a week,” and Detective Luchau testified that such offenders must “check in with us once a week every week.” The information’s lack of reference to a specific day of the week did not, as Butler contends, permit him to be convicted for failing to report during some unspecified period.

Furthermore, Butler fails to show that he was actually prejudiced by the information’s omission of a specific day of the week. The prejudice analysis may look beyond the face of the charging document to determine if the accused actually received notice of the charges against him. Kjorsvik, 117 Wn.2d at 106. It is apparent that Butler received notice of the charge that he had to defend against. There was testimony that Butler was familiar with the sex offender registration process and the weekly reporting requirement, as evidenced by his previous compliance. Moreover, the defense’s closing argument focused on the physical and economic barriers that prevented him from registering, and did not suggest that he was unaware of or confused by the weekly registration requirements. Given the record, Butler cannot show that the information failed to apprise him of the nature of the charge against him or hindered his ability to prepare a defense.

Affirmed.

A handwritten signature in black ink, appearing to read "Sperry, J.", written over a horizontal line.

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WE CONCUR:

Dupre, C. S.

Schiveller, J.