

## ***State v. Burbey***

**Citation:** No. CR-16-0390-PR, 2017 WL 4558218 (Ariz. Oct. 13, 2017),

**Date Filed:** October 13, 2017

**Author:** Justice Bolick

**Joined by:** Chief Justice Bales, Vice Chief Justice Pelander, Justices Brutinel, Timmer, and Gould, and Judge McMurdie.\*

**Facts:** Defendant Burbey had registered as a sex offender in April 2014, when he was released from prison into a halfway house. Upon registering, Burbey listed the address of the halfway house as his residence. In September 2014, Burbey left the halfway house and became homeless. Living outdoors at a Tucson intersection, Burbey did not notify the Pima County Sheriff's Department about the change in his living situation. Within the month, Burbey was arrested for violation of A.R.S. § 13-3822(A), a class four felony, which states that registered sex offenders must notify law enforcement of their new "residence" or address within seventy-two hours of moving.<sup>1</sup> Additionally, the statute requires a person who does not have an address or permanent residence to notify law enforcement of his or her transient status not less than every ninety days.

**Procedural history:** At his trial, Burbey proposed an instruction regarding the meaning of "registration," which Judge Scott Rash rejected. Instead, the trial court instructed the jury that the statute required notice within seventy-two hours of moving. Subsequently, Burbey was convicted of the class four felony and sentenced to seven years in prison.

The Court of Appeals affirmed on the grounds that the statute's plain meaning imposes a duty on transient sex offenders to notify law enforcement of their transient status not less than every ninety days as well as to notify law enforcement within seventy-two hours of moving out of a previously-registered residence.

The Arizona Supreme court granted review to determine whether the statute, A.R.S. § 13-3822(A), requires a registered sex offender to register a new address or residence within seventy-two hours of becoming homeless. The Arizona Supreme court held that the law does not require transient sex offenders to register a new residence within seventy-two hours of becoming homeless, thereby reversing Burbey's conviction and vacating the Arizona Court of Appeals' opinion.

**Issue:** A.R.S. § 13-3822(A) states that "[w]ithin seventy-two hours . . . after moving from the person's residence . . . a [registered sex offender] shall inform the sheriff in person and in writing of the person's new residence [or] address . . . . If the person has more than one residence or does not have an address or a permanent place of residence, the person shall register as a transient not less than every ninety days with the sheriff . . . ." <sup>2</sup> In addition to the

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\* Justice Lopez recused himself.

<sup>1</sup> See ARIZ. REV. STAT. ANN. § 13-3822(A) (2017).

<sup>2</sup> *Id.*

statute's requirement that a homeless, or transient, sex offender notify law enforcement of his or her transient status not less than ninety days of becoming homeless, does the statute require a registered sex offender who becomes homeless to notify law enforcement of his or her new "residence" within seventy-two hours of becoming homeless?

**Holding:** No, the full statute provides a context for the meanings of "residence" and "transient," indicating that a person cannot both have a residence and be a transient under the statute. Because a transient would have no residence to report to law enforcement within seventy-two hours of becoming homeless, a transient sex offender cannot be subject to the portion of A.R.S. § 13-3822(A) that requires such notice. Additionally, this interpretation is consistent with the legislative intent behind the statute's 2006 amendment requiring transient sex offenders to register their transient status every ninety days because it makes it easier for homeless sex offenders to comply with reporting requirements.

**Disposition:** The trial court's conviction and sentencing of Burbey is reversed, and the court of appeals' opinion, which affirmed the trial court's conviction, is vacated.

**Rule:** A transient person cannot register a new residence with law enforcement within seventy-two hours of becoming homeless because the transient person, by definition under A.R.S. § 13-3822(A), has no residence.

**Reasoning:**

- **Anomalous Results Under Either Contending Interpretation:** The court first reviewed the result to which each proposed interpretation might lead. Under Burbey's proposed interpretation, which would require homeless sex offenders to register as transient *only* every ninety days, there might be registered sex offenders who "slip through the cracks" and evade law enforcement surveillance for up to ninety days.<sup>3</sup> Under the State's interpretation, which would require both the ninety-day notice of transient status *and* a seventy-two-hour notice of a new "residence," the statute would require a homeless person to register a new address every time the person moved from one street to the next. The court reasoned that the latter interpretation would defeat the purpose of the 2006 amendment<sup>4</sup> to the statute, which was added "to ease compliance for homeless persons."<sup>5</sup>
- **Effect Should Be Given to Every Word in the Statute:** The court admitted that if the statute merely required a registered sex offender to register with law enforcement within seventy-two hours of moving from a previous residence, the State's

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<sup>3</sup> State v. Burbey, No. CR-16-0390-PR, 2017 WL 4558218, at \*2 (Ariz. Oct. 13, 2017) (citing State v. Burbey, 381 P.3d 290, 295 (Ariz. Ct. App. 2016)).

<sup>4</sup> In 2006, the Arizona legislature added a provision to the statute for homeless persons: "If the person does not have an address or a permanent place of residence, the person shall register as a transient not less than every ninety days with the sheriff . . ." 2006 Ariz. Sess. Laws ch. 184 (codified as amended at ARIZ. REV. STAT. ANN. § 13-3822(A) (2017) (amended 2012)).

<sup>5</sup> Burbey, 2017 WL 4558218, at \*2 (citing State v. Burbey, 381 P.3d 290, 295 (Ariz. Ct. App. 2016)).

interpretation would prevail.<sup>6</sup> However, the statute states that a registered sex offender must register *a new address or residence* within seventy-two hours of moving from the previous residence.<sup>7</sup> Furthermore, the statute provides for registered sex offenders who have no address or permanent residence in subsequent sentences.<sup>8</sup> When put into the context of the full statute, the court reasoned that a person cannot be both a residence- or address-holder and a transient simultaneously.<sup>9</sup> From a point of logical consistency, it follows that a homeless person is not required to register a new address within seventy-two hours of becoming homeless, because the person simply cannot do so.

- **“Residence” as Defined in the Statute:** In § 13-3822(D), a person’s “residence” is defined as “the person’s dwelling place, whether permanent or temporary.”<sup>10</sup> Using the meaning of “dwelling” as defined by Webster’s dictionaries and *Schwarz v. City of Treasure Island*,<sup>11</sup> the court concluded that “dwelling” has both structural and temporal elements.<sup>12</sup> Thus, a transient has no address or residence to report upon becoming homeless. The court noted that even if a homeless person’s settlement area constituted a “residence” for the purposes of the statute, the seventy-two-hour moving requirement would almost constantly be triggered.<sup>13</sup> This would render the ninety-day reporting requirement “largely pointless.”<sup>14</sup>
- ***In Pari Materia* Statutes:** The statute, § 13-3821(I), pertains to the initial registration of sex offenders.<sup>15</sup> The statute requires persons who lack an address or permanent residence to list “a description and physical location of any temporary residence” and to register as a transient not less than every ninety days.<sup>16</sup> The court found no reason to treat the transient-status reporting requirement differently in § 13-3822(A) than in its related statute, § 13-3821(I).<sup>17</sup>
- **The Court Of Appeals’ Legislative Intent Reasoning Is Unpersuasive:** The court of appeals reasoned that the statute’s purpose, which is to facilitate law enforcement’s location of child sex offenders, is inconsistent with the interpretation of § 13-3822(A) proposed by Burbey.<sup>18</sup> The Arizona Supreme court, however, found that the overriding purpose of the statute is served by making it easier for registered sex offenders to comply with the registration statutes.<sup>19</sup> Citing the House Judiciary

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<sup>6</sup> *Id.*

<sup>7</sup> ARIZ. REV. STAT. ANN. § 13-3822(A) (2017).

<sup>8</sup> *Id.*

<sup>9</sup> *Burbey*, 2017 WL 4558218, at \*3.

<sup>10</sup> ARIZ. REV. STAT. ANN. § 13-3822(D) (2017).

<sup>11</sup> *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1214 (11th Cir. 2008).

<sup>12</sup> *Burbey*, 2017 WL 4558218, at \*3.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See* ARIZ. REV. STAT. ANN. § 13-3821(I) (2017).

<sup>16</sup> *Id.*

<sup>17</sup> *Burbey*, 2017 WL 4558218, at \*3.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

Committee's hearing on the 2006 amendment, the court reasoned that adding an additional requirement for transient sex offenders, as opposed to replacing the original seventy-two-hour reporting requirement, is inconsistent with the stated policy purpose, which was to create a way for homeless sex offenders to comply with the reporting laws.<sup>20</sup>

- **The Statute May Be Unconstitutionally Void for Vagueness if Not For Burbey's Proposed Interpretation:** Because the statute, on its face, does not give adequate notice of the seventy-two-hour reporting requirement to a person who moves from a residence to homelessness, the statute may violate the person's due process rights.<sup>21</sup> For example, the Arizona Department of Public Safety form that Burbey was required to sign upon his release distinguished between "residence" changes and "physical location" changes.<sup>22</sup> The latter designation applied to persons who had no permanent residence or address, which would lead a reasonable person to think that he or she was in compliance with the reporting laws so long as the person notified the courts of his or her transient status within ninety days of becoming homeless. Burbey's interpretation was reasonable, which allowed the court to construe the statute in a constitutional manner.<sup>23</sup> The court noted that the legislature may amend the statute to clearly set forth compliance criteria for newly-transient sex offenders if the legislature disagree with the holding.<sup>24</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> The court believes this law could be a violation of a person's due process rights because the vague statute is ripe for arbitrary or discriminatory application, and it does not provide fair warning to people of the conduct it criminalizes. *Id.* at \*4.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*