IN THE SUPREME COURT OF OHIO
2008

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

ANDREW J. FERGUSON,

Defendant-Appellant.

Case No. 07-1427

On Appeal from
the Cuyahoga County
Court of Appeals, Eighth
Appellate District

Court of Appeals
No. 88450

BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTOR RON O'BRIEN IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO

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STATEMENT OF *AMICUS* INTEREST

The Office of the Franklin County Prosecutor prosecutes thousands of cases every year, including sex-offender cases in which defendants have been classified as sexual predators. Current Franklin County Prosecutor Ron O'Brien therefore has a strong interest in issues related to the classification and registration of sex offenders and sexual predators and issues related to appropriate notification to the community for sexual predators. In the interest of aiding this Court's review of sexual predator Andrew Ferguson's appeal, Franklin County Prosecutor Ron O'Brien offers the following amicus brief in support of the State of Ohio.

STATEMENT OF FACTS

Amicus Franklin County Prosecutor Ron O'Brien adopts by reference the statement of facts set forth in the brief of plaintiff-appellee State of Ohio.

ARGUMENT

PROPOSITION OF LAW

A SEX OFFENDER APPEALING A PREDATOR DETERMINATION DOES NOT HAVE STANDING TO COMPLAIN ABOUT THE RESIDENCY RESTRICTION IN FORMER R.C. 2950.031.

Amicus will not engage in full briefing of the constitutionality of R.C. Chapter 2950 as amended by Senate Bill 5 effective on July 31, 2003. This Court's decisions in *State v. Cook* (1998), 83 Ohio St.3d 404, and *State v. Williams* (2000), 88 Ohio St.3d 513, provide ample support for upholding the amended version of R.C. Chapter 2950 as a non-punitive regulatory scheme designed to help protect and inform the public about sexually oriented offenders, habitual sex offenders, and sexual predators like defendant Ferguson. *Cook* and *Williams* are buttressed by the United States Supreme Court's 2003 decision in *Smith v. Doe* (2003), 538 U.S. 84, which upheld against ex post facto challenge Alaska's system of lifetime, quarterly registration and its internet registry. For a sexual predator like this defendant, the public-protective and public-informational purposes of the law easily allow R.C. Chapter 2950, as effective July 31, 2003, to overcome ex post facto and retroactivity challenges, including the 1,000-foot residency restriction as might be applicable to sexual predators like this defendant.

Instead of briefing the constitutional issues, amicus wishes to focus on the narrow and unusual procedural posture in which this case comes to this Court. Most of defendant's arguments are directed toward the 1,000-foot residency restriction, but that restriction is not properly before this Court. The best outcome here would be to dismiss this appeal as improvidently allowed.

A. Narrow Posture

Defendant is appealing from the trial court's journal entry finding him to be a sexual predator, but he briefs the case as if all of R.C. Chapter 2950 is before this Court. In fact, only a narrow slice of R.C. Chapter 2950 can be before this Court, given the limited reach of the judgment being appealed.

"Appeal lies only on behalf of a party aggrieved *by the final order appealed from.* Appeals are not allowed for the purpose of settling abstract questions, but only to correct errors injuriously affecting the appellant." *Ohio Contract Carriers Assn. v. PUCO* (1942), 140 Ohio St. 160, syllabus (emphasis added). "It is a fundamental rule that to be entitled to institute appeal or error proceedings a person must have a present interest in the subject-matter of the litigation and must be aggrieved or prejudiced *by the judgment*, order or decree." Id. at 171 (internal quotation marks omitted; emphasis added).

In some respects, of course, defendant is aggrieved by the trial court's sexual predator determination. That determination triggered special legal requirements, i.e., lifetime registration with quarterly periodic verification and with community notification. But defendant's briefing here raises matters that bear no relationship to the trial court's predator determination. The residency restriction added by Senate Bill 5 applied to those convicted of any sexually-oriented or child-victim-oriented offense, see former R.C. 2950.031, regardless of any predator determination, since defendant's 1990 rape conviction constituted a "sexually oriented offense" as a matter of law. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, ¶ 16. Defendant concedes that the residency restriction applied to those convicted of sexually oriented offenses as a matter of law, not just predators. See Defendant's Brief, at 3. Similarly, the internet database provision also applied to all

sexually-oriented and child-victim-oriented offenders, not just predators. See former R.C. 2950.13(A)(11).

While defendant claims a grievance against these statutory provisions, the grievance does not arise out of the judgment being appealed here. The trial court only made the predator determination. It did not impose the residency restriction or the internet registry; the statutes did that. Since defendant's complaint was with the statutes and not the judgment in these respects, he cannot legitimately pursue challenges to those provisions here.

This conclusion is confirmed by Ohio case law recognizing that "sexually oriented offenders" could not appeal regarding their status as sexually oriented offenders. Based on the *Ohio Contract Carriers* syllabus, the Tenth District in *State v. Zerla*, 10th Dist. No. 04AP-1087, 2005-Ohio-5077, recognized that the defendant's "status arose by operation of law, and not as a result of the trial court's * * * judgment." Id. at ¶ 7. "Other than 'the ministerial act of rubber-stamping the registration requirement on the offender,' the trial court plays no role in the imposition of the sexually oriented offender designation." Id. at ¶ 7, quoting *Hayden*, at ¶ 16. Thus, even when the trial court referenced the defendant's sexually oriented offender classification in the judgment and referenced the duty to register, such references created no ground for appeal, as they "merely reiterate[] the label and requirements already imposed by operation of law." *Zerla*, at ¶ 8. Other Ohio case law applied the same analysis. *State v. Moyers* (2000), 137 Ohio App.3d 130, 134; *State v. Hampp* (2000), 4th Dist. No. 99CA2517. Since sexually oriented offenders could not complain on appeal regarding their registration duties as sexually oriented offenders, it follows that sexually oriented offenders – even those adjudicated as sexual predators --

similarly could not complain about residency restrictions flowing from their status as someone convicted of a sexually oriented offense. Such duties and restrictions were imposed by statutory law, not by a court judgment that was subject to appeal.

Also relevant here is this Court's prohibition against rendering advisory opinions. Even if this Court vacated the predator determination or modified it to "habitual sex offender" -- a status that would also apply to this defendant -- the residency restriction and internet database provision would remain, as those provisions depend only on defendant having been convicted of a sexually oriented offense and did not depend on predator or habitual sex offender status. The predator determination made no difference to the applicability of those provisions to defendant. To vacate or modify the predator determination would be pointless vis-à-vis these matters. Since "the issue being appealed to us does not emanate from an order which is final and appealable," "any opinion we would render on an issue which is not the subject of a final judgment would be, at best, advisory in nature. It is, of course, well settled that this court will not indulge in advisory opinions." *North Canton v. Hutchinson* (1996), 75 Ohio St.3d 112, 114.

Defendant implicitly concedes the problem. Defendant does not ask that this Court reverse or vacate or modify the trial court's predator determination, even though that determination is the only judgment before this Court. Instead, defendant asks for the equivalent of declaratory relief that he is not subject to the Senate Bill 5 amendments. See Defendant's Brief, at 17, 18. In short, he asks for relief from the statutes, not relief from the predator determination that is being appealed here. This appeal from a predator determination is simply the wrong proceeding in which to raise challenges to SORN provisions that have no relationship to the predator determination.

Given the limits of this appeal, defendant *can* properly complain about amendments from Senate Bill 5 triggered by the predator determination, i.e., the addition of places of work and employment to the registration scheme, and the removal of the provision that allowed predators to seek a modification of a predator finding. Those matters affect predators and therefore could be remedied by the reversal or modification of the judgment finding defendant to be a predator.

B. Unusual Circumstances Weigh Against Review

By all indications, defendant has remained in prison since his 1990 conviction for rape. According to the ODRC website, defendant is due for parole consideration in 2009. But, with parole having been denied now for eighteen years, there is a good possibility that defendant will remain in prison until the maximum expiration of his sentence in 2015.

Review here is complicated by the fact that, when defendant is released in 2009 or thereafter, he would be registering pursuant to R.C. Chapter 2950 as recently amended by Senate Bill 10, parts of which were effective on July 1, 2007 and other parts effective on January 1, 2008. At best, it would appear to be a largely academic exercise to review the constitutionality of the regulatory scheme as applicable from July 31, 2003, to January 1, 2008, when defendant remained in prison that entire time, when defendant may never need or want to live within 1,000 feet of a school, and when, as stated above, the judgment being appealed does not allow full review of the issues defendant is raising.

C. Constitutional Review

Although amicus will not engage in full briefing of the constitutional issues being raised by defendant, amicus wishes to address a few key points.

1.

First, absent First Amendment concerns, constitutional claimants are generally limited to claiming that a statute is unconstitutional as applied in the claimant's particular case, *New York v. Ferber* (1982), 458 U.S. 747, 767-68, and defendant here appears to be making an as-applied challenge to the statutory scheme. Even if defendant were pursuing a facial challenge, such facial challenges rarely succeed, since the challenger must establish that no set of circumstances exists under which the provision would be valid. *East Liverpool v. Columbiana Cty. Budget Comm.*, 114 Ohio St.3d 133, 2007-Ohio-3759, ¶ 30; citing *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶ 37; citing *United States v. Salerno* (1987), 481 U.S. 739, 745.

2.

In light of defendant's burden of proving that the statutory scheme is unconstitutional as applied to him, defendant's status as a sexual predator weighs heavily in favor of the public-protective and public-informative purposes of the law and weighs heavily against a finding of unconstitutionality. Defendant represents the definitive sexual predator, literally grabbing victims from public places and raping them. He was convicted of rape and robbery in one grab-and-rape case in 1980, (State's Ex. 3 & 8), convicted of robbery in another case in 1980 (where the woman successfully resisted his efforts to abduct her), (State's Ex. 4 & 9), and he was suspected of rape in another grab-and-rape case in 1980 that the victim refused to prosecute. (State's Ex. 14) Then, after serving time in prison for the 1980 convictions, defendant committed new rapes in 1990 by grabbing another victim and raping her at least three times. (State's Ex. 7, *State v. Ferguson* (1990), 8th Dist. No. 60713) Unfortunately, the sentencing court merged the three rape counts and

sentenced him to only 15 to 25 years, (id.), when he should have received a much longer sentence for three unmerged rape counts. See *State v. Nicholas* (1993), 66 Ohio St.3d 431 (merger inappropriate for multiple sex acts). Now, under psychological testing in 2006 using the Static 99 instrument for evaluating sex-offender recidivism, defendant has been determined to be in the "high risk" category of sex offenders. (Court's Ex. 1, at 8-9) Defendant is also diagnosed with antisocial personality disorder "based on the defendant's juvenile misconduct, and pervasive and persistent personality features of disregarding the rights of others, drug selling, repeated sexual offenses, impulsivity, reckless behavior, and failure to conform to lawful behavior as an adult." (Id. at 8)

Ferguson's sexual predator status should substantially color the constitutional analysis of the SB 5 amendments. For example, even if the residency restriction were viewed as "excessive" or not "narrowly tailored" for some sexually oriented offenders, it certainly would be highly justified in relation to a sexual predator like this defendant, who literally grabs victims off the street to rape them. And Ferguson cannot raise the third-party rights of sexually oriented offenders.

Even as to sexually oriented offenders, the "narrow tailoring" argument lacks merit in light of *Smith*, which recognized that "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the non-punitive aims it seeks to advance" and that "[t]he excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy." *Smith*, 538 U.S. at 103, 105.

Smith also recognizes that individualized risk assessments are not required to regulate sex offenders, as the states can regulate based on the existence of convictions

alone. Such categorical regulations "are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." Id. at 102. "Sex offenders are a serious threat in this Nation." *Conn. Dept. of Public Safety v. Doe* (2003), 538 U.S. 1, 4 (quoting another case). "The risk of recidivism posed by sex offenders is frightening and high," see *Smith*, 538 U.S. at 103 (internal quotation marks omitted), and a state legislature could conclude that "a conviction for a sex offense provides evidence of substantial risk of recidivism." Id. "The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specific crimes should entail particular regulatory consequences." Id. The State can "legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness," and "can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions * * *." Id. at 104. "We have upheld against *ex post facto* challenges laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment." Id. "Narrow tailoring" is not the standard.

3.

The complaint about defendant having to possibly verify in three different counties four times a year is also substantially weakened in light of his demonstrated propensity for grabbing victims and raping them. *Cook* recognized that "the more frequent verification requirement * * * is justified to enhance law enforcement's ability to monitor the whereabouts of the most dangerous classification of sexual offender." *Cook*, 83 Ohio St.3d at 421. But such verification would ill-serve this monitoring of whereabouts if the predator would need only to verify his place of residence and not his place of work and school,

where the predator could very well spend a large number of hours each day.

Dissenters in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 45, contended that the change from one county to potentially three had crossed over from protection to punishment because the periodic verification provision at that point was no longer comparable to the slight inconvenience of renewing a driver's license. But this contention did not carry the day in *Wilson*, in which the majority adhered to the *Cook-Williams* view that sex-offender classification proceedings are civil in nature. Id. at ¶ 32.

Although *Cook* did reference the inconvenience of registering as the equivalent of the de minimis act of renewing a driver's license, see *Cook*, 83 Ohio St.3d at 418, it is clear from *Cook* that the "renewing driver's license" reference was never meant to be a benchmark in the matter. Sexual predators even then were required to verify four times a year, and there is no known quarterly "renewal of license" requirement, and yet *Cook* upheld the quarterly verification requirement. Thus, *Cook* itself shows the insignificance of the "renewing driver's license" example.

A full reading of *Cook* also reveals that this Court found that the real benchmark was *Kansas v. Hendricks* (1997), 521 U.S. 346, in which the United States Supreme Court had rejected an ex post facto challenge to the involuntary civil commitment of sexually violent predators. This Court found that "the registration/notification provisions of R.C. Chapter 2950 are far less restrictive and burdensome than the commitment statute" in *Hendricks*. *Cook*, 83 Ohio St.3d at 422. This Court reasoned that, if the involuntary commitment of a predator was proper as a non-punitive measure, then the registration and notification provisions of R.C. Chapter 2950 were proper as well. Id. at 422-23. Similarly here, in comparison to involuntary civil commitment, a verification requirement that

potentially reaches three counties easily passes constitutional muster, particularly when the offender would be traveling to and from such counties on a regular basis because of the locations of his home, work, and school. In the final analysis, the test is not governed by the relative convenience of making a trip to the BMV; far more inconvenient measures can qualify as non-punitive, including quarterly verification, see *Cook*, including barring offenders from certain jobs, see *Smith*, 538 U.S. at 100, and including involuntary civil commitment. Since this Court has upheld R.C. Chapter 2950 as a public-protective measure as to the place of the predator's residence, it is a very small step to conclude that it is proper to extend the law to other places where the predator would spend a lot of time, i.e., the workplace and the school. Given Ferguson's demonstrated high risk predator status, it would have been foolhardy for the General Assembly not to extend the registration requirements to those potential locations.

There is no likelihood that defendant himself would need to periodically verify in three counties anyway. And the facial constitutionality of a law is not governed by speculative "worst case scenarios." *Ohio v. Akron Center for Reproductive Health* (1990), 497 U.S. 502, 514.

4.

As for the permanence of the predator finding, defendant fails to note that Senate Bill 5 added a provision that allowed the predator to apply for removal of the community notification requirement after registering for twenty years. R.C. 2950.11(H). By such application process, the predator, if successful, would just face lifetime quarterly registration. Since lifetime quarterly registration can be based just on the offense of conviction without any proven likelihood to reoffend, see *Smith*, subjecting the predator

to lifetime quarterly registration is easily upheld. Nor is there a requirement that the General Assembly allow an offender to prove that he is unlikely to reoffend. "'Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application * * *.'" *Smith*, 538 U.S. at 104, quoting *Hawker v. New York* (1898), 170 U.S. 189, 197.

In light of the foregoing, this Court should dismiss this appeal as having been improvidently allowed.

CONCLUSION

For the foregoing reasons, amicus curiae Franklin County Prosecutor Ron O'Brien supports plaintiff-appellee State of Ohio and urges that this Court dismiss this appeal as having been improvidently allowed, or, in the alternative, that this Court affirm the judgment of the Eighth District Court of Appeals.

Respectfully submitted,

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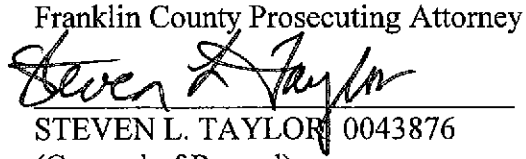

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed by regular U.S. mail on this 26th day of Feb., 2008, to the following known counsel of record:

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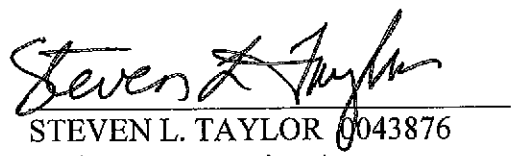

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