

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

09-0477

Appellee

-vs-

THOMAS DUNLAP

Appellant

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 91165

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT THOMAS DUNLAP

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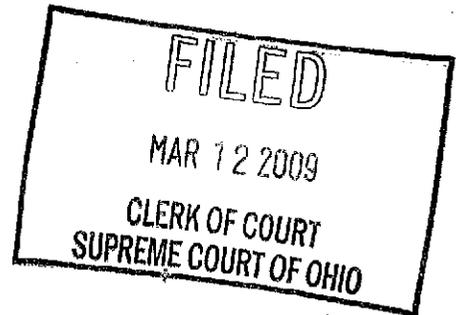


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**EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND AN ISSUE OF GREAT GENERAL AND
PUBLIC INTEREST:**

Proposition of Law I in this case presents this Court with an important constitutional issue which lower courts have incorrectly decided: Is there a mens rea attendant to the offense of gross sexual imposition against a child under 13? Lower courts that have decided this issue have held that this is a strict liability offense. It is not. To the contrary, a correct interpretation of R.C. 2907.05 should make clear that there is no mens rea required with respect to the victim's age, i.e., the offender need not know that the victim is under 13, but there is a reckless mens rea with respect to the sexual contact, itself.

This is an important distinction. There is a constitutionally-based presumption that criminal offenses, particularly ones where punishment can include imprisonment, are not strict liability offenses. See, *Liparota v. United States* (1985), 471 U.S. 419. While the General Assembly has made it explicit in R.C. 2907.05 that the offender need not know the age of the victim, there is no legislative expression of an intention to make the act of engaging in sexual contact one that need not be accompanied by a mens rea.

Nor is this analysis affected by the fact that sexual contact, as defined in R.C. 290101, occurs for purposes of sexual gratification. The "purpose" referenced in R.C. 2901.01 is actually a motive. It does not describe the mental state attendant to the action. By accepting this case, this Court will also clarify that "purpose" references a motive and not an element – which is important in ensuring that the mens rea for gross sexual imposition not become higher than the General Assembly intended.

Under the Eighth District's reading of the statute, a hug between two twelve year olds who are in puppy love can become a felony juvenile offense if, while both are fully clothed, any

portion of the boy's body grazes against the girl's breast -- because the hug was for purposes of sexual gratification and the incidental touching is a question of strict liability. While, to be sure, many of us would prefer not to see our 12-year old children engage in any romantic activity, but would any of us really consider the innocent hug to be a crime?

Moreover, there is nothing in R.C. 2907.05 that makes the "sexual contact" of a victim under 13 any different than the "sexual contact" in adult-victim cases. Once again, clumsy romance can morph into a criminal offense -- without any criminal intent.

Undersigned counsel realizes that, in this case, the defendant was not a juvenile. To the contrary, the evidence at trial proved that the adult defendant fondled the victim who was under the age of 13. But, in determining the correct interpretation of the statute, the individual facts of this case are irrelevant.

By accepting this case, this Court will address the proper interpretation of this statute which is the subject of litigation every day throughout this State.

Propositions II and III present the Court with the opportunity to resolve two questions regarding the constitutionality of the retroactive application of the adult version of Ohio's newest sex offender law, the Adam Walsh Act ("AWA" or "SB 10"). A determination of the constitutionality of this law will impact more than two thousand cases in Cuyahoga County alone and thousands more legal challenges pending throughout the State of Ohio. This Court has already accepted a case involving the retroactive application of the juvenile version of the Adam Walsh Act. *In re Smith*, Sup. Ct. Case No. 2008-1624. This Court also has pending before it a request for jurisdiction in a case raising challenges to the retroactive application of the adult version of the Adam Walsh Act. *State v. Bodyke*, Sup. Ct. Case No. 2008-2502. For the same

reasons that *Bodyke* should be accepted, the final three propositions of law in this case should be accepted.

STATEMENT OF THE CASE AND FACTS

Thomas Dunlap, the Defendant-Appellant, preceded to trial on his indictment for allegations of two counts of gross sexual imposition with victims both of whom were less than 13 years of age during the commission of the act, and both of which carried sexual violent predator specifications under R.C 2907.05(A)(4) and R.C. 2971.01 respectively, felonies of the third degree; one count of kidnapping with sexual motivation and sexually violent predator specifications, R. C . 2905.01(A)(2), 2941,147 and 2971.01 respectively, a felony of the first degree; and one count of disseminating obscene matter to juveniles under R. C 2907.31, a felony of the fourth degree.

The gross sexual imposition counts merely alleged that the defendant "had sexual contact" with the alleged victim, without an accompanying mens rea. The jury was similarly instructed that it need find that the defendant engaged in sexual contact, which was further defined consistently with R.C. 2901.01. At no time was the jury instructed that the act of sexual contact had to be recklessly performed.

The trial court acquitted Mr.. Dunlap of the kidnapping count upon the defense's Crim. R. 29(A) motion.. The jury convicted Mr.. Dunlap of both counts of gross sexual imposition and the remaining count of disseminating obscene matter to juveniles Mr.. Dunlap waived a jury hearing on the determination of the verdicts for the sexually violent predator specifications and had the same tried to the bench which resulted in a finding of not guilty on said specifications.

The court found Mr. Dunlap to be a Tier III offender. Mr. Dunlap was sentenced to a total of two years as follows: two years on each of the gross sexual impositions, felonies of the third

degree; and 16 months on the disseminating obscene matter to juveniles, a the felony of the fourth, degree with credit for time served

ARGUMENT

Proposition of Law I: Gross sexual imposition against a child under 13 is not a strict liability offense. The act of sexual contact must be recklessly performed.

The trial of the Appellant on the gross sexual imposition counts was structurally flawed because, throughout the proceedings, the essential mens rea of “recklessly,” attendant to the act of sexual contact was omitted. This occurred in both the indictment and the jury instruction. As a result, the error is structural and the convictions must be reversed. *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, clarified, 119 Ohio St.3d 204, 2008-Ohio-3748.

The Eighth District erroneously concluded that the gross sexual imposition counts were strict liability offenses. R.C. 290121(B) states that [w]hen the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a per son to be guilty of the offense.. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense..”

Here, the General Assembly explicitly stated that there would be no mens rea attendant to the element of the victim’s age. But the General Assembly made no similar statement regarding the element of sexual contact. Under the principle of inclusion unius est exclusion alterius, this Court must conclude that the General Assembly intended that only the element of the victim’s age be a strict liability component. This is in keeping with the Model Penal Code (on which the Ohio Revised Code was based), which similarly creates strict liability in certain sex offenses – but only regarding the age of certain child victims.

Accordingly, under *Colon*, a structural error has occurred and the gross sexual imposition convictions must be vacated.

Proposition of Law II: Application of Senate Bill 10 to offenders whose crimes occurred before its effective date violates the Ex Post Facto Clause of the United States Constitution.

The retroactive application of Senate Bill 10 to crimes that occurred before January 1, 2008 violates the Ex Post Facto Clause of the United States Constitution.

The *Ex Post Facto* Clause of Article I, Section 10 of the United States Constitution prohibits, among other things, any legislation that “changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed.” *Miller v. Florida* (1987), 482 U.S. 423, 429 (quoting *Calder v. Bull* (1798), 3 Dall. 386, 390). The purpose of the *Ex Post Facto* Clause is to ensure that legislative acts “give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.” *Weaver v. Graham* (1981), 450 U.S. 24, 28-29. “Subtle ex post facto violations are no more permissible than overt ones.” *Collins v. Youngblood* (1990), 497 U.S. 37, 46. Moreover, the *Ex Post Facto* Clause applies to “punitive conditions outside the sentence.” *Weaver*, 450 U.S. at 32.

In analyzing whether a challenged statute imposes retroactive punishment in violation of the federal prohibition on *ex post facto* laws, this Court must apply the intents-effect test. *State v. Cook* (1998), 83 Ohio St. 3d 404, 415. If the express or implied intent of the General Assembly was to create criminal punishment, that “ends the inquiry” and the retroactive application of the statute is unconstitutional. *Smith v. Doe* (2003), 538 U.S. 84, 92. If, however, the intention of the General Assembly was to enact a regulatory scheme that was civil and non-punitive, this Court must further consider whether the statutory scheme is “so punitive in effect as to negate the State’s intention to deem it civil.” *Id.* (citations and internal quotations omitted).

The fundamental question presented by this Assignment of Error is whether Ohio’s

current sex offender law (Adam Walsh Act), *taken as a whole*, is punitive. In so doing, this Court must look at the entirety of the legislation including, but not limited to, the changes worked by the Adam Walsh Act. Although this is an issue of first impression for this Court, this Court's recent decision in *State v. Ferguson* (2008), 120 Ohio St.3d 7 suggests that the Adam Walsh Act is unconstitutional.

In *Ferguson*, this Court addressed an ex post facto challenge to the retroactive application of the 2003 amendments to Ohio's Megan's Law. Although this Court upheld the 2003 amendments in a 4-3 decision, *Ferguson* illustrates that Megan's Law, as amended in 2003, pushed the limits of what was constitutionally permissible in terms of retroactive sex offender legislation and that the Adam Walsh Act, which is significantly more burdensome, crosses the threshold of punitive legislation. The following chart highlights many of the qualitative and quantitative differences between Ohio's Megan's Law, as reviewed by this Court in *Ferguson*, and the Adam Walsh Act:

OHIO'S MEGAN'S LAW (As Reviewed in <i>State v. Ferguson</i>)	OHIO'S ADAM WALSH ACT
<p>1. Three classification levels:</p> <ul style="list-style-type: none"> - Sexual Predator (Register Every 90 Days for Life) - Habitual Sex Offender (Register Annually for 20 Years) - Sexually Oriented Offender (Register Annually for 10 Years) <p>2. Individualized judicial classification after a hearing where the State carries the burden</p> <p>3. Classification based on an individual's actual risk of sexual recidivism and risk to the community</p> <p>4. Community notification via postcard only for</p>	<p>1. Three classification levels:</p> <ul style="list-style-type: none"> - Tier III (Register Every 90 Days for Life) - Tier II (Register Every 6 Months for 25 Years) - Tier I (Register Annually for 15 Years) <p>2. Categorical classification based on offense of conviction (no individualized hearing)</p> <p>3. An individual's actual risk of sexual recidivism and risk to the community is irrelevant</p> <p>4. Community notification sent without regard to</p>

the individuals likely to commit future sex offenses	likelihood of re-offending sexually
5. No restrictions on where offenders can live	5. Severe residency restrictions (not within 1000 feet of a school, pre-school, or daycare)
6. Disclosure of minimal personal information	6. Disclosure of an immense amount of highly personal information
7. Criminal penalties for non-compliance (maximum of 5 years in prison)	7. Enhanced criminal penalties (maximum of 10 years in prison; mandatory minimum sentences in certain cases)

Ohio's Adam Walsh Act operates to impose punishment on offenders for the commission of specific crimes by disregarding a prior judicial determination that appellant does not represent a significant ongoing risk to the community, by tying sex offender classification decisions and obligations directly and solely to the crime of conviction, and by imposing obligations which are excessive in relation to, and even counterproductive to, any purported remedial objective. As such, the retroactive application of the law violates the *Ex Post Facto* Clause.

Proposition of Law III: Application of Senate Bill 10 to offenders whose crimes occurred before its effective date violates the Retroactivity Clause of the Ohio Constitution.

The retroactive application of Senate Bill 10 to crimes that occurred before January 1, 2008 violates the Retroactivity Clause of the Ohio Constitution.

Article II, Section 28 of the Ohio Constitution expressly forbids the enactment of retroactive laws. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 106. With this guarantee, the Ohio Constitution affords its citizens greater protection against retroactive laws than does the Ex Post Facto Clause of the United States Constitution. *Van Fossen*, 36 Ohio St.3d at 105. This constitutional bar on retroactive laws has been interpreted to apply to laws affecting substantive rights but not to procedural or remedial aspects of such laws. *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 137. A statute is substantive—and

therefore unconstitutional if applied retroactively--if it "impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation or liabilities as to a past transaction, or creates a new right." *Cook*, 83 Ohio St. 3d at 411.

The AWA is a substantive law because it imposes additional burdens and obligations by, among other things, providing that offenders cannot reside within 1000 feet of a day-care center and pre-school in addition to schools as under the prior law. R.C. 2950.034. Because Senate Bill 10 is a substantive law, it is unconstitutional as applied to appellant, whose criminal conduct preceded the effective date of its restrictions.

CONCLUSION

For the foregoing reasons, Defendant-Appellant respectfully asks this Court to accept jurisdiction over this matter as it presents substantial constitutional questions for review.

Respectfully Submitted,



 JOHN T. MARTIN, ESQ.
 Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum In Support of Jurisdiction was served upon WILLIAM D. MASON, ESQ., Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 12th day of March, 2009.



 JOHN T. MARTIN, ESQ.
 Counsel for Appellant

JAN 26 2009

Judge J. Butala

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FILED Court of Appeals of Ohio

2009 FEB -4 A 0:47

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY



JOURNAL ENTRY AND OPINION
No. 91165

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

THOMAS DUNLAP

A 543 390

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-499122

BEFORE: McMonagle, P.J., Stewart, J., and Celebrezze, J.

RELEASED: January 15, 2009

JOURNALIZED: JAN 26 2009

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**FILED AND JOURNALIZED
PER APP. R. 22(E)**

JAN 26 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(E), 22(D) AND 26(A)
RECEIVED**

JAN 15 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

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CHRISTINE T. McMONAGLE, P.J.:

Defendant-appellant, Thomas Dunlap, appeals from the trial court's judgment, rendered after a jury verdict, finding him guilty of two counts of gross sexual imposition involving victims under the age of 13 at the time of the offenses, in violation of R.C. 2907.05(A)(4), and one count of disseminating obscene matter to juveniles, in violation of R.C. 2907.31. Dunlap asserts four assignments of error.

Dunlap first contends that the journal entry of sentencing did not correctly reflect his convictions. This assignment of error is overruled as moot, as the docket indicates the trial court corrected the journal entry to properly reflect the convictions.

Next, Dunlap argues that counts one and three of the indictment, which charged him with gross sexual imposition in violation of R.C. 2907.05(A)(4), were defective, because they did not include the mens rea element of recklessness. Dunlap bases this argument on *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, in which the Ohio Supreme Court found an indictment that failed to include the mens rea of the offense, one of the essential elements of the crime, to be defective, and held that such error may be raised for the first time on appeal.

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With respect to what mental state must be included in the indictment, the Supreme Court concluded in *Colon* that recklessness is the "catchall culpable mental state for criminal statutes that fail to mention any degree of culpability ***." *Id.*, ¶13. The court reasoned, "the mental state of the offender is a part of every criminal offense in Ohio, except those that plainly impose strict liability. *** '[W]hen the [statutory] section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.'" *Id.* at ¶¶11-12, quoting *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, ¶19.

In light of *Colon*, Dunlap argues that the indictment in his case was defective, because it did not include recklessness as the mens rea element. However, this court, and others, have repeatedly held that R.C. 2907.05, gross sexual imposition involving a victim under the age of 13, is a strict liability offense and requires no precise culpable state of mind. All that is required is a showing of the proscribed sexual contact. *State v. Aiken* (June 10, 1993), 8th Dist. No. 64627; *State v. Laws* (Dec. 22, 1998), 10th Dist. No. 98AP-306.

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The Ohio Supreme Court expressly stated in *Colon* that the mens rea element need not be included in an indictment charging a strict liability offense. Accordingly, Dunlap's argument has no merit and his second assignment of error is overruled.

Dunlap next raises two constitutional challenges to Senate Bill 10. The Ohio General Assembly recently enacted Senate Bill 10, which amended numerous sections of Ohio's Revised Code, including R.C. Chapter 2950, which contains the sexual offender classification system used in Ohio. Senate Bill 10 modified R.C. Chapter 2950 so that it would be in conformity with the federal Adam Walsh Child Protection and Safety Act (the "Adam Walsh Act.") Under Senate Bill 10, labels such as sexually oriented offender, habitual sex offender, or sexual predator are no longer used. An offender who commits a sexually oriented offense is found to be either a "sex offender" or a "child-victim offender" and depending on the crime, is placed in Tier I, Tier II, or Tier III, which dictate the registration and notification requirements.

At sentencing, the trial court informed Dunlap that he would be subject to the notification and registration requirements set forth in Senate Bill 10. In his third and fourth assignments of error, Dunlap argues that Senate Bill 10 (which he calls "Ohio's Adam Walsh Act") violates the ex post facto clause of the

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United States Constitution and the retroactivity clause of Section 28, Article II of the Ohio Constitution.

We reject Dunlap's ex post facto challenge on the basis of this court's holding in *State v. Holloman-Cross*, 8th Dist. No. 90351, 2008-Ohio-2189, in which this court considered and rejected the same argument.

We likewise reject Dunlap's retroactivity challenge. In *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, the Ohio Supreme Court addressed whether R.C. Chapter 2950 et seq., Ohio's sex offender statutes prior to Senate Bill 10, violated the retroactivity clause of the Ohio Constitution. The court reasoned that the registration and address verification provisions of R.C. Chapter 2950 were de minimis procedural requirements that were necessary to achieve the goals of R.C. Chapter 2950. The court explained that if the law did not apply to previously-convicted offenders, "notification would provide practically no protection now, and relatively little in the near future. *** Had the Legislature chosen to exempt previously-convicted offenders, the notification provision of the law would have provided absolutely no protection whatsoever on the day it became law, for it would have applied to no one. The Legislature concluded that there was no justification for protecting only children of the future from the risk of reoffense by future offenders, and not today's children from the risk of reoffense by previously-convicted offenders, when the nature of those risks were

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identical and presently arose almost exclusively from previously-convicted offenders ***." Id., at 412-413, quoting *Doe v. Portiz* (1995), 142 N.J. 1, 662 A.2d 367. Consequently, the Ohio Supreme Court found that the provisions of R.C. Chapter 2950 were remedial in nature and did not violate the ban on retroactive laws set forth in Section 28, Article II of the Ohio Constitution.

Although there are some differences between R.C. Chapter 2950 and Senate Bill 10, we are not persuaded that the Ohio Supreme Court would view the retroactivity issue as applied to R.C. Chapter 2950 in the *Cook* decision any differently with regard to the provisions of Senate Bill 10. Accordingly, applying the reasoning set forth in *Cook*, we hold that Senate Bill 10 does not violate the retroactivity clause of Ohio's Constitution. Accord *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051; *State v. Gooding*, 5th Dist. No. 08 CA 5, 2008-Ohio-5954; *In re Smith*, 3rd Dist. No. 1-07-58, 2008-Ohio-3234; *In re Gant*, 3rd Dist. No. 1-08-11, 2008-Ohio-5198.

Appellant's third and fourth assignment of error are overruled.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's

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conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



CHRISTINE T. McMONAGLE, PRESIDING JUDGE

MELODY J. STEWART, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

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