

NO. 09-0593

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 90890

STATE OF OHIO,
Plaintiff-Appellant

-vs-

LAWRENCE TOWNSEND,
Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

Counsel for Plaintiff-Appellant

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

PAMELA BOLTON (0071723)
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Defendant-Appellee

MICHAEL P. MALONEY
24461 Detroit Road, Suite 340
Westlake, OH 44145

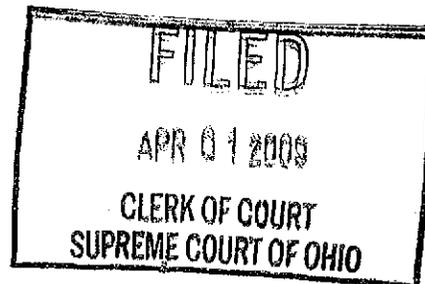


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State v. Townsend, Cuyahoga App. No. 90890, 2009-Ohio-467

**REQUEST THAT THIS HONORABLE COURT GRANT LEAVE TO REVIEW
AND SUMMARILY REVERSE A CLEARLY ERRONEOUS APPELLATE
COURT DECISION IN A FELONY CASE**

In finding not only that Appellant, Lawrence Townsend, is not required to periodically register, but arbitrarily vacating his classification as well, the Eighth District muddled the basic tenets of Chapter 2950. In doing so, it disregarded the precedent established by this Court in *State v. Bellman*, 86 Ohio St.3d 208, 1999-Ohio-95 and *State v. Taylor*, 100 Ohio St.3d 172, 2003-Ohio-5452, wherein this Honorable Court found that registration, classification and community notification, while all codified under Chapter 2950, are distinct provisions: “adjudication as a sexual predator is distinct from the duty to register.” *Taylor* at ¶ 10. In so holding, this Court concluded that a sex offender may be classified without being subjected to the attendant registration duties. But the lower court, in ruling, comingled the classification of a sex offender with an offender’s duty to periodically register, essentially finding the classification, without the attendant registration duties, is superfluous. But based on this Court’s precedent, Townsend’s classification as a sexual predator must be restored.

The State requests that this Honorable Court grant leave to exercise its appellate jurisdiction in a felony case and reverse this case, without opinion, as a clear violation of *Bellman*, *Taylor* and its progeny. The Ohio Constitution allows this Honorable Court to exercise its jurisdiction and summarily reverse without opinion an erroneous appellate court judgment. Ohio Constitution Art. IV, § 2(B)(2)(e). The ends of public justice would be well served by summary reversal because the Eighth District’s opinion was a clearly erroneous application of controlling law. The trial court erroneously vacated Townsend’s sexual predator adjudication in contravention of the aforementioned cases. While Townsend may not be subjected to the registration requirements under Ohio’s

former Megan's Law, his classification was not in error. Because the Eighth District failed to adhere to this Court's precedent, the State respectfully requests that this Honorable Court grant leave to appeal and summarily reverse the vacation of Townsend's sexual predator adjudication.

STATEMENT OF THE CASE AND FACTS

On August 17, 1972, Lawrence Townsend was convicted of rape, armed robbery and numerous other charges. The trial court imposed sentence on May 22, 1973. The trial court imposed an indefinite term of imprisonment of 18 to 75 years. His conviction was affirmed. *State v. Townsend* (Feb. 7, 1974), Cuyahoga App. No. 32801. On August 31, 1984, he was paroled.

In a separate case in 1987, he was convicted of aggravated burglary and having a weapon while under disability. The trial court imposed an indefinite sentence of ten to 25 years.

Based upon this subsequent conviction, the parole board found Townsend to be a parole violator, thereby re-incarcerating and extending the sentence from the 1973 rape conviction.

On December 18, 2007, less than one year after being released from his sentence, the trial court conducted a sexual predator classification hearing under former Chapter 2950. And on the eve of changes to Chapter 2950, the trial court found Townsend likely to commit another sexually oriented offense in the future, thereby classifying him as a sexual predator.

Townsend appealed this classification. The Eighth District Court of Appeals sustained two assignments of error. The court found that Townsend should not be subjected to registration under former R.C. 2950.04, and further, the trial court did not

have jurisdiction to adjudicate him as a sexual predator. *State v. Townsend*, Cuyahoga App. No. 90890, 2009-Ohio-467.

For the reasons set forth below, the trial court did not err in classifying Townsend under Ohio's former Megan's Law. And summary reversal on this sole proposition is warranted.

LAW AND ARGUMENT

PROPOSITION OF LAW I: IN ADDITION TO HEARING CASES INVOLVING SUBSTANTIAL CONSTITUTIONAL QUESTIONS OR QUESTIONS OF PUBLIC OR GREAT GENERAL INTEREST, THE SUPREME COURT OF OHIO MAY ALSO EXERCISE ITS APPELLATE JURISDICTION TO SUMMARILY REVERSE WITHOUT OPINION A CLEARLY ERRONEOUS APPELLATE COURT JUDGMENT IN A FELONY CASE.

The Eighth District, in vacating Townsend's adjudication as a sexual predator, along with finding that he is not subject to period registration, confused the basic canons of former Chapter 2950. This Court has specifically held that sex offenders, similarly situated to Townsend, may be classified without also being subjected to periodic registration. So based upon this Court's previous rulings, the vacation of Townsend's classification must be summarily reversed.

Traditionally, this Honorable Court has exercised its appellate jurisdiction pursuant to Ohio Constitution Art. IV, § 2(B)(2)(e), in which it hears cases involving a substantial constitutional question or question of public or great general interest. This falls in line with the type of Supreme Court review envisioned by Chief Justice Marshall in *Patten v. Aluminum Castings Co.* (1922), 105 Ohio St. 1, 24, 136 N.E. 426, Marshall, C.J., dissenting, wherein he stated:

In 1912, by constitutional amendment, this court was limited in its jurisdiction, and was given such measure of control over the volume of its

business and of the kind and character of the causes to be heard and determined, as to make it possible to reduce the number of cases to be heard, so that the court might keep the docket from congestion, and at the same time retain full jurisdiction to authoritatively declare the law upon all important principles of law and issues arising under the Constitutions of the United States and the state of Ohio, and to declare the proper construction and interpretation of the statutes of the state of Ohio, and to declare the law upon all important questions of general law, where there is a want of uniformity in the decisions of the Courts of Appeals of the state of Ohio, and, finally, to declare the law upon all questions of public and great general interest. It was the spirit of that amendment to give to litigants one trial and one review, and **since its adoption the primary function of this court is not to secure justice to the immediate parties; its ultimate end is to maintain uniformity of the decisions in the intermediate courts, to determine constitutional questions, and to make the law clearer for the general public.**

(Emphasis added). However certain cases, while constituting clear error, simply do offer the type of review described by Chief Justice Marshall.

Instead, intermediate appellate courts often apply well-settled law in a clearly erroneous manner. While such cases may not be the vehicles to announce new principles of law, justice is well served by this Honorable Court correcting an appellate court's wrong decision. The Ohio Constitution confers this Honorable Court with the jurisdiction to reverse without opinion such an erroneous appellate court judgment.

Art. IV, § 2 provides in relevant part:

- (2) The supreme court shall have appellate jurisdiction as follows:
 - (a) In appeals from the courts of appeals as a matter of right in the following:
 - (i) Cases originating in the courts of appeals;
 - (ii) Cases involving questions arising under the constitution of the United States or of this state.
 - (b) In appeals from the courts of appeals in cases of felony on leave first obtained,**
 - (c) In direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in cases in which the death penalty has been imposed;
 - (d) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(e) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(f) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B)(4) of this article.

(Emphasis added). Thus, in a felony case, Art. IV, § 2(B)(2)(e) grants this Honorable Court the appellate jurisdiction by leave in a felony case to review a decision of the court of appeals. Review of the Eighth District's vacation of Townsend's classification as a sexual predator is warranted, as further set forth herein.

Shortly after the inception of Ohio's former Megan's law, the Court delineated three separate and distinct provisions, all codified under Chapter 2950. In *State v. Cook* (1998), 83 Ohio St.3d 404, this Court specifically found that "R.C. Chapter 2950 contains three primary provisions: classification, registration, and community notification." *Cook* at 407. These provisions, while intertwined, operate separately and distinctly from one another. This Court further instilled this principle in *State v. Bellman*, 86 Ohio St.3d 208, 1999-Ohio-95 and *State v. Taylor*, 100 Ohio St.3d 172, 2003-Ohio-5452, w herein this Court ruled that classification can stand without a sex offender also being subject to periodic registration.

First, in *Bellman*, this Court concluded that while the defendant, who was sentenced in February 1997, was not subject to the registration provisions codified under former R.C. 2950.04, the trial court, nevertheless, properly adjudicated him a sexual predator. "[A]lthough Bellman is properly adjudicated a sexual predator under the new law, he has no duty to register because he does not fit within the plain language of R.C. 2950.04 describing categories of compulsory registrants." *Bellman* at 212.

More closely akin to the case sub judice, in *Taylor*, the defendants therein were convicted of sex offenses prior to the enactment of Ohio's former Megan's Law. These defendants were classified as sexual predators while serving a prison term for offenses which were not sexually oriented offenses. This Court again found that these defendants did not fit within any of the categories under former R.C. 2950.04. But these defendants were properly adjudicated, despite no requirement to register. This Court specifically held that "adjudication as a sexual predator is distinct from the duty to register." *Taylor* at ¶ 10.

The Eighth District Court of Appeals, however, has melded these two concepts. It not only found that Townsend should not be subject to registration, but arbitrarily vacated his sexual predator adjudication as well. The Eighth District Court of Appeals concluded, after painstaking analysis, that Townsend does not fit within any of the categories delineated under R.C. 2950.04, thereby obviating any need to register. But instead of merely finding that he does not have a duty to periodically register, the court took it one step further. It vacated his classification as well. But by vacating his sexual predator adjudication, it essentially found that classification and registration are one in the same; it muddled the duty to register with the classification of a sex offender, in strict contravention of *Bellman* and *Taylor*.

But, much like *Taylor*, the trial court properly adjudicated Townsend. Under former R.C. 2950.09(C), a person is subject to adjudication "if a person was convicted of or pleaded guilty to a sexually oriented offense that is not a registration-exempt sexually oriented offense prior to January 1, 1997, if the person was not sentenced for the offense on or after January 1, 1997, and if, on or after January 1, 1997, the offender is serving a term of imprisonment in a state correctional institution." Townsend was convicted and

sentenced for a sexually oriented offense before January 1, 1997, so the only issue is whether appellant was serving a “term of imprisonment” on or after January 1, 1997. This question is answered in the affirmative. As previously stated, Townsend was incarcerated in 1987 for an aggravated burglary conviction, along with a parole violation stemming from the rape conviction. He was continually incarcerated from this point in time until his release in 2007.¹

And there is no need for Townsend to be serving the prison term for the underlying sex offense. Former R.C. 2950.09(C) is unambiguous. In no way does this statute impose a more restrictive condition that the term of imprisonment be for the sexually oriented offense, which would invoke Chapter 2950’s scheme. As noted by the court in *State v. Johnson* (Sept. 24, 1998), Franklin App. Nos. 97APA12-1585 and 97APA12-1589, at *3: “[T]he statutory framework does not support the more restrictive construction [appellant] articulates. The statute’s legislative findings and public policy declaration section speaks in terms of protecting the public from sexual predators who are ‘released from imprisonment, a prison term, or other confinement,’ without limiting the confinement to certain sex offenses.” The dissent in *Townsend* properly draws this distinction as well. The sex offender “need not be serving ‘the’ prison term imposed for the sexually oriented offense in order for the department to recommend to the court whether he should be found to be a sexual predator: he must only be serving ‘a’ prison term.” *Townsend* at ¶ 17.

Since Townsend was serving a prison term, including time for the rape conviction as a parole violator, on or after January 1, 1997, he was properly adjudicated a sexual

¹ While not at issue, the hearing took place within the proper timeframe outlined under former R.C. 2950.09(C)(2)(a).

predator. This coincides with this Court's precedent in *Bellman* and *Taylor*. And this interpretation also reiterates the fact that classification and registration are separate and distinct entities under Chapter 2950. A sex offender may be classified without being subject to the registration requirements.

Furthermore, the Eighth District, in summarily vacating Townsend's classification, unnecessarily interfered with a lawful decision of the trial court. As set forth above, the trial court had jurisdiction to conduct a sexual predator classification hearing. But the Eighth District needlessly vacated Townsend's classification and substituted its judgment for that of the trier of fact. By vacating the classification, it essentially ruled that because Townsend cannot be subject to registration under former R.C. 2950.04, his classification was useless. Such is not the case.

Instead, strong public policy supports a sex offender's continued classification, even without the attendant registration duties. Classification, registration and community notification laws were passed "to protect the safety and general welfare of the people of this state." Former R.C. 2950.02(B). The legislature specifically found that "[s]exual predators and habitual sex offenders pose a high risk of engaging in further offenses even after being released from imprisonment, a prison term, or other confinement and that protection of members of the public from sexual predators and habitual sex offenders is a paramount governmental interest." Former R.C. 2950.02(A)(2). The General Assembly further found that "[a] person who is found to be a sexual predator or a habitual sex offender has a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government." Former R.C. 2950.02(A)(5). Clearly, sex offender laws have found continuing public support over the evolution of Chapter 2950. And to needlessly vacate

a classification not only needlessly tampers with a trial court's determination, but also slaps the face of public policy.

In sum, when it vacated Townsend's sexual predator classification, the Eighth District Court of Appeals in this case reached an outcome contrary to controlling law in *Bellman and Taylor*. Townsend was properly adjudicated a sexual predator by the trial court. The State respectfully requests that this Honorable Court judge this case as no less deserving of reversal. This Honorable Court has taken such action in prior cases. See *OHA: The Assn. for Hosp. & Health Sys. v. Ohio Dept. of Human Serv.*, 96 Ohio St.3d 301, 773 N.E.2d 1047, 2002-Ohio-4209, at ¶ 1, ¶ 12 ("The majority reverses the appellate court's judgment without opinion on the authority of *Wallace*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018." Lundberg Stratton, J., dissenting.) The ends of public justice would be well served by summary reversal in this case.

Accordingly, the State requests that this Honorable Court grant leave to review this case and summarily reverse the decision of the Eighth District, vacating Townsend's classification as a sexual predator.

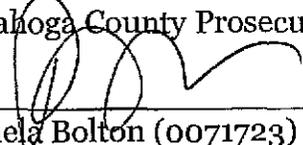
CONCLUSION

The teachings of this Honorable Court in prior cases have clearly established that a sex offender may be adjudicated a sexual predator without being subjected to the registration requirements. Therefore, the State requests that this Honorable Court grant leave to review this felony case and summarily reverse the Eighth District's judgment vacating Townsend's sexual predator adjudication.

Respectfully submitted,

Bill Mason
Cuyahoga County Prosecuting Attorney

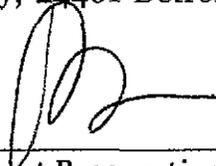
By:



Pamela Bolton (0071723)
Assistant Prosecuting Attorney
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
216.443.7865
pbolton@cuyahogacounty.us

SERVICE

A copy of the foregoing Memorandum In Support of Jurisdiction has been mailed this 31st day of March, 2009, to Michael P. Maloney, 24461 Detroit Road, Suite 340, Westlake, OH 44145.



Assistant Prosecuting Attorney

*Page***Court of Appeals of Ohio**

CA 90890 EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

DANIEL A. CLEARY
ASST. COUNTY PROSECUTOR
JUSTICE CENTER, 8TH FLOOR
1200 ONTARIO STREET
CLEVELAND, OH 44113

JOURNAL ENTRY AND OPINION
No. 90890

CA 90890

DEBRA A. OBED
ASST. COUNTY PROSECUTOR
THE JUSTICE CENTER, 9TH FLOOR
1200 ONTARIO STREET
CLEVELAND, OH 44113

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAWRENCE TOWNSEND

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-004543

BEFORE: McMonagle, J., Rocco, P.J., and Sweeney, J.

RELEASED: February 5, 2009

JOURNALIZED FEB 17 2009

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CHRISTINE T. McMONAGLE, J.:

Defendant-appellant, Lawrence Townsend, appeals the December 18, 2007 trial court judgment adjudicating him a sexual predator. Townsend raises five assignments of error for our review. Upon review of the first and second assignments, we reverse and remand with instructions to vacate.

The record before us indicates that Townsend was convicted of rape in a multi-count indictment on August 17, 1972. He was sentenced on May 22, 1973 "for an indeterminate period." The parties stipulate in their briefs that Townsend was paroled on August 31, 1984. It is unclear from the record before us, but it appears that subsequent to this incarceration, he was returned to prison at least once for a non-sexual offense (not a parole violation). The record is silent as to the date of his return to prison for the non-sexual offense, and likewise silent as to his date of release. At the time of his H.B. 180 hearing on December 17, 2007, however, Townsend was no longer incarcerated on any charge.

The only evidence before the trial court on his convictions and sentences indicated that his sentence for the sexual offense was completed in 1984, and that thereafter he was never again convicted of a sexual offense. In his first and second assignments of error, Townsend contends, respectively, that R.C. 2950.04

(the sexual predator registration statute) did not apply to him, and the court did not have jurisdiction to adjudicate him a sexual predator. We agree.

In *State v. Champion*, 106 Ohio St.3d 120, 2005-Ohio-4098, 832 N.E.2d 718, the Ohio Supreme Court unanimously held that R.C. 2950.04 applies only to those who were convicted and sentenced to prison for a sexually oriented offense and who were released from prison on that sexually oriented offense on or after July 1, 1997.¹ The Ohio Supreme Court stated that:

“As in *Bellman* and *Taylor*,² we must follow the statutory language carefully. R.C. 2950.04(A)(1)(a) states: ‘Regardless of when the sexually oriented offense was committed, an offender who is sentenced for the sexually oriented offense to a prison term***and, on or after July 1, 1997, is released in any manner from the prison term’ must register. The language says released ‘from the prison term,’ not released from any prison term, as the state would have it.”

(Emphasis added [in court’s opinion].) Champion’s GSI [gross sexual imposition] sentence was two to five years, but his concurrent terms caused him to serve

¹Champion was sentenced to an indefinite term of two to five years as a result of a guilty plea to gross sexual imposition (a sexually oriented offense.) The sentence was to be served concurrently with two other sentences. He was released in 1989, only to be returned to prison twice for non-sexually oriented offenses. “There appears to be no evidence that he [Champion] was released from prison on a sexually oriented offense after July 1, 1997.” *Champion* at 122.

²*State v. Bellman*, 86 Ohio St.3d 208, 1999-Ohio-95, 714 N.E.2d 381; *State v. Taylor*, 100 Ohio St.3d 172, 2003-Ohio-5452, 797 N.E.2d 504.

almost 11 years before his first release in 1989. The GSI prison sentence had been completed, at the very latest, in 1983 (assuming the maximum sentence of five years.) Champion could not, therefore, have been released from prison on or after July 1, 1997, on his GSI conviction." *Id.* at ¶9.

Under the authority of *Champion*, the trial court was without jurisdiction to require Townsend to register as a sexual predator.

Subsequent to *Champion*, this court followed that same logic in *State v. Jones*, Cuyahoga App. No. 86251, 2006-Ohio-1338, as did the United States District Court for the Southern District of Ohio in *Coston v. Petro* (2005), 398 F.Supp.2d 878. All of these cases hold that to be required to register as a sex offender under R.C. 2950.04(A)(1), an offender must have served a term of imprisonment for the *sexually oriented offense* on or after July 1, 1997.

Champion was decided in August of 2005, *Coston* in November of 2005, and *Jones* in March of 2006. The dissent states that Townsend "relies upon statutes and case law which were no longer effective at the time the State requested the sexual predator hearing in December 2006 or at the time he was released from prison in January 2007," and cites *Champion* as one of the cases. The dissent believes that the short-lived April 2005 amendment to subsection

(A)(4) of R.C. 2950.04,³ which required registration if the offender was adjudicated a sexual predator, effectively overruled *Champion*. We are not persuaded. First, the April 2005 amendment was in effect at the time the Ohio Supreme Court decided *Champion*, and it did not impact the holding; rather, the Supreme Court decided *Champion* on R.C. 2950.04(A)(1). Second, if by the 2005 amendment to subsection (A)(4), the legislature had intended for *all* offenders to register, it would have stated that explicitly in R.C. 2950.04(A)(1); it did not. We therefore believe that *Champion*, *Jones*, and *Coston* are good law as to offenders, like Townsend, who were released from prison on a sentence for a sexually oriented offense before July 1, 1997, were sentenced prior to July 1, 1997, and were never adjudicated habitual sexual offenders.

The dissent further relies on R.C. 2950.09(C) (repealed January 1, 2008) as the applicable section of the Revised Code to be used in the resolution of this issue. That statute, however, governed the *labeling* of a defendant convicted of a sexually-oriented offense, not the *registration* of a sexual predator. This distinction was noted by the Ohio Supreme Court. In *Taylor*, the Court stated, “[a]ccordingly, we conclude that, even though Taylor and Wilson have been adjudicated to be sexual predators, R.C. 2950.04 does not require them to

³R.C. 2950.04 was again amended, effective January 1, 2008, and that amendment completely rewrote the statute.

register as such.” Id. at ¶9. Similarly, in *Bellman*, the Court noted “that although Bellman is properly adjudicated a sexual predator under the law, he has no duty to register because he does not fit with the plain language of R.C. 2950.04 describing categories of compulsory registrants.” Id. at 212. See, also, *State v. Kelly*, Mahoning App. No. 07 MA27, 2007-Ohio-6228. The dissent’s reliance on R.C. 2950.09 regarding the issue of registration is misplaced.

Accordingly, we hold consistent with *Champion* from the Ohio Supreme Court in 2005, *Coston* from the Southern District of Ohio in 2005, and *Jones* from this court in 2006, that in order to be required to register as a sex offender in Ohio, an offender must have served a term of imprisonment *for a sexually oriented offense* on or after July 1, 1997. Townsend having completed his sentence for a sexually oriented offense in 1984 is *not* subject to any registration requirements.

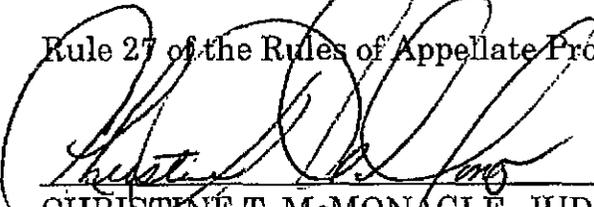
The first and second assignments of error are sustained, and the case is reversed and the sexual predator adjudication is vacated. The remaining assignments of error are moot and will not be considered. App.R. 12(A)(1)(c).

It is ordered that appellant recover from appellee 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.

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



CHRISTINE T. McMONAGLE, JUDGE

JAMES J. SWEENEY, J., CONCURS
KENNETH A. ROCCO, P.J., DISSENTS
WITH SEPARATE OPINION

KENNETH A. ROCCO, P.J., DISSENTING:

The majority incorrectly relies upon case law construing a version of R.C. 2950.04 that was no longer in effect at the time the trial court rendered its decision in December 2007. Concededly, *State v. Champion*, 106 Ohio St.3d 120, 2005-Ohio-4098, does not explicitly state which version of R.C. 2950.04 it is construing. However, the majority improperly assumes that the decision must have been based on the April 29, 2005 version of R.C. 2950.04 simply because that version was in effect on August 24, 2005, when the Ohio Supreme Court entered its decision. Based on this improper assumption, the majority apparently then concludes that R.C. 2950.04(A)(4) is irrelevant because the Supreme Court did not refer to it in *Champion*.

Appellate decisions must be based on the statutes applicable in the common pleas court when it rendered its decision. The version of R.C. 2950.04

at issue in *Champion* could not have been the version effective April 29, 2005, because all common pleas court proceedings had been completed before that date. Instead, the supreme court must have been construing the Senate Bill 5 version, effective July 31, 2003. This version did not include the language in subsection (A)(4) that I find critical to this case: an offender who "is adjudicated a sexual predator under division (C) of section 2950.09" but as to whom "neither division (A)(1), (2), nor (3) of this section applies," has a duty to register. The majority's incorrect assumption leads it to ignore this critical provision. Therefore, I dissent.

A necessary precondition to the applicability of R.C. 2950.04(A)(4) is that "neither division (A)(1), (2), nor (3) applies." I would find that they do not apply. Just as in *Champion*, the appellant here "is not included within any of the three subsections of R.C. 2950.04(A)(1). R.C. 2950.04(A)(1)(a) includes only those who were convicted and sentenced to prison for a sexually oriented offense and who were released from prison on that sexually oriented offense on or after July 1, 1997." *Champion*, at ¶11. Like the offender in *Champion*, appellant here was released from prison on the sexually oriented offense long before July 1, 1997. Appellant "also evades application R.C. 2950.04(A)(1)(b) because he was sentenced prior to July 1, 1997, and evades (A)(1)(c) because he was never

adjudicated a habitual sexual offender and was not required to register under R.C. Chapter 2950." Id. at ¶12.

Division (A)(2) also does not apply to appellant. It applies only to juvenile offender registrants, and appellant is not a juvenile offender. Division (A)(3) applies to offenders convicted or adjudicated in another state, a federal court, military court, Indian tribal court, or a court in another nation. This division also does not apply to appellant.

The first precondition of R.C. 2950.04(A)(4) has been met. Next, we must consider whether "the offender [was] adjudicated a sexual predator under division (C) of section 2950.09 of the Revised Code."⁴

R.C. 2950.09(C) applies "if a person was convicted of or pleaded guilty to a sexually oriented offense that is not a registration-exempt sexually oriented offense prior to January 1, 1997, if the person was not sentenced for the offense on or after January 1, 1997, and if, on or after January 1, 1997, the offender is serving a term of imprisonment in a state correctional institution." It is clear that appellant was convicted and sentenced for a sexually oriented offense before

⁴The majority correctly but irrelevantly notes that R.C. 2950.09(C) governs the labeling of a defendant convicted of a sexually-oriented offense, not the registration duties of a sexual predator. The sexual predator label is essential to create a registration duty under R.C. 2950.04(A)(4). Thus, we must assess whether appellant is a sexual predator under R.C. 2950.09(C) in order to determine whether he has registration duties under R.C. 2950.04(A)(4).

January 1, 1997, so the only issue is whether appellant "is serving a term of imprisonment." This language is markedly different from R.C. 2950.04(A)(1). The offender need not be serving "the" prison term imposed for the sexually oriented offense in order for the department to recommend to the court whether he should be found to be a sexual predator; he must only be serving "a" prison term.

If appellant was properly found to be a sexual predator under R.C. 2950.09(C), then he had a duty to register by the terms of R.C. 2950.04(A)(4), as amended effective April 29, 2005, notwithstanding that his sentence for the sexually oriented offense had already been served.

Under R.C. 2950.09(C)(2)(a), "[t]he court may hold the [sexual predator] hearing and make the determination prior to the offender's release from imprisonment or at any time within one year following the offender's release from that imprisonment." To hold that this refers to the imprisonment for the sexually oriented offense would create an anachronism, requiring a hearing to be held before the statute came into effect. We cannot assume the legislature intended an absurdity. The imprisonment to which this subdivision refers must be the same imprisonment referred to in subdivision (C)(1).

While the record does not contain any official record indicating when appellant was released from imprisonment, both the state (in its brief) and

appellant (in his disclosures during the sexual predator evaluation) indicate that he was paroled in January 2007. The court's hearing and determination occurred within one year thereafter, in December 2007. Therefore, the hearing was timely.

I would find there was ample evidence in the record to support the trial court's determination that appellant is a sexual predator. The court's exhibits included appellant's institutional records from the Ohio Department of Rehabilitation and Correction as well as the court psychiatric clinic's evaluation of his risk of reoffending. This evidence showed that appellant was sixty-one years old and had spent forty of the previous forty-two years in prison on the charges discussed above. His institutional record reflected an extensive history of sexual acting-out, including five placements in segregation between 2000 and 2005 for indecent exposure and masturbation in front of female corrections officers. The court psychiatric clinic determined that persons with appellant's score of 8 on the static-99 test have a recidivism rate of thirty-nine percent over five years, forty-five percent over ten years, and fifty-two percent over fifteen years. Furthermore, appellant satisfied the diagnostic criteria for antisocial personality disorder and exhibitionism. The record provided ample evidence to support the court's determination that the state had proved by clear and

convincing evidence that appellant was likely to engage in the future in a sexually oriented offense.

Accordingly, I would affirm the common pleas court's decision.