

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 STEPHEN J. MCCONVILLE )  
 )  
 Appellee. )  
 )  
 )  
 )  
 )

SUPREME COURT CASE NO. 09-0893

ON APPEAL FROM THE COURT OF APPEALS, NINTH APPELLATE DISTRICT 08CA009444

LORAIN COUNTY COMMON PLEAS COURT CASE NO. 07CR075079

MEMORANDUM OF APPELLANT, THE STATE OF OHIO, IN SUPPORT OF JURISDICTION

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FILED  
MAY 15 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

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**EXPLANATION OF WHY THIS FELONY CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The State of Ohio urges this Honorable Court to grant jurisdiction in the within matter. This case is a felony case and of public and great general interest because this Court has accepted jurisdiction of multiple cases involving the determination as to the constitutionality of the Adam Walsh Act, Ohio Revised Code 2950.01, *et seq* hereinafter "AWA". See In Re Smith, Ohio Supreme Court case number 2008-1624; In Re Gant, Ohio Supreme Court case number 2008-2257; In Re G.E.S. , Ohio Supreme Court case number 2008-1926; and State v. Bodyke, Ohio Supreme Court case number 2008-2502. The matter Appellant urges this Honorable Court to consider is inextricably related to the above line of cases.

It is critical that a matter of statutory misapplication of a section in the Adam Walsh Act be corrected as a matter of public safety. This very misapplication strikes at the heart of the AWA and renders the protections it affords society virtually meaningless. In its decision of April 13, 2009, the Ninth District Court of Appeals incorrectly applied R.C. 2950.11, the statutory section detailing community notification requirements of registered sexual offenders as codified in the Adam Walsh Act, Ohio Revised Code 2950.01, *et seq*.

The impact of the decision of the appellate court allows trial courts within the jurisdiction of the appellate court to remove community notification requirements from Tier III sexual offenders who were sentenced on or after January 1, 2008 before the time period prescribed by law, in contravention of a clearly expressed legislative intent. Appellant asserts that in reviewing the Adam Walsh Act, Ohio Revised Code 2950.01, *et seq* in its entirety, it is apparent that the Ohio General Assembly removed much of the discretion courts enjoyed under Megan's Law in the classification of sexual offenders. Due to the application of the Ninth District Court of Appeals regarding R.C. 2950.11(F) and (H), the discretion deliberately removed by the Ohio General Assembly has now been restored, in contravention of the

legislature's intent. This discretion cuts directly against the issue of public safety as determined by the Ohio General Assembly.

Whether or not a trial court has the authority to suspend the community notification requirements of registered sexual offenders is a question of statutory interpretation. State v. McConville, 9<sup>th</sup> Dist. No. 08CA009444, 2009 Ohio 1713. Statutory interpretation involves a question of law; therefore this matter is subject to a *de novo* review by this Honorable Court. State v. Sufronko (1995), 105 Ohio App.3d 504, 506. A *de novo* review requires an independent review of the trial court's decision without any deference to the trial court's determination. Brown v. Scioto Cty. Bd. of Comm'rs (1993), 87 Ohio App. 3d 704, 711.

This Court has held that the ultimate goal of statutory interpretation is to ascertain the intent of the legislature in enacting the statute. Toledo v. Public Utilities Comm. (1939), 135 Ohio St. 57. In doing so, a court "must first look to the language of the statute itself \* \* \*." Provident Bank v. Wood (1973), 36 Ohio St. 2d 101, 105. In relation to the interpretation of the specific language, R.C. 1.42 states that the words and phrases of a statute must be read in context and construed in accordance with their common usage.

"The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it.' This court may engage in statutory interpretation when the statute under review is ambiguous." State v. Hairston, 101 Ohio St.3d 308, 2004 Ohio 969, at P11 quoting Slingluff v. Weaver (1902), 66 Ohio St. 621, paragraph one of the syllabus. Conversely, if a statute is not ambiguous, "then we need not interpret it; we must simply apply it." Hairston, at P13, citing Sears v. Weimer (1944), 143 Ohio St. 312, paragraph five of the syllabus ("An unambiguous statute is to be applied, not interpreted.").

Here, the appellate court misapplied R.C. 2950.11(F)(2) as written. The appellate court determined that R.C. 2950.11(F)(2) applies to criminal defendants convicted of sexual offenses that are sentenced and classified subsequent to January 1, 2008. The plain text of the statute dictates otherwise. The plain text of the statute indicates that this section is available only to individuals classified as sexual offenders prior to January 1, 2008 that were reclassified by the AWA.

Appellant's position that R.C. 2950.11(F)(2) applies only to individuals classified as sexual offenders prior to January 1, 2008 that were reclassified by the AWA is further supported by information available for public use on the website of the Ohio Public Defender. See [www.opd.ohio.gov](http://www.opd.ohio.gov), select Adam Walsh Act updates, select Motion for Relief from Community Notification that provides in pertinent part: "If you were previously labeled a sexually oriented offender or a habitual sex offender and were not subject to community notification, and you have now been reclassified a Tier III offender with a community notification requirement, you can file this motion to ask the court to relieve you of the new community notification requirement. (Click here for a Rich Text Format version)". If allowed to stand, the decision permits criminal defendants sentenced and classified on or after January 1, 2008 to avail themselves of this subsection to remove community notification requirements when legally not permitted to do so by R.C. 2950.11(H), in direct contravention of law, legislative intent, and public safety.

Accordingly, it is clearly of public and/or great general interest and involves a substantial constitutional question as well as a felony case when the decision of an appellate court misapplies statutory section that, on its face, clearly expresses an opposite intent. This misapplication significantly impacts public safety by permitting trial courts in a four (4) county area to remove the community notification requirements of Tier III sexual offenders prior to the time prescribed by law for offenders sentenced on or after January 1, 2008. Only through accepting the instant matter on a discretionary appeal can this Court

resolve this weighty issue. Therefore, the State of Ohio strongly urges this Honorable Court to accept jurisdiction in this matter.

### **STATEMENT OF THE CASE AND FACTS**

On December 27, 2007, the Lorain County Grand Jury indicted Appellee on one (1) count of Rape, a violation of R.C. 2907.02, a felony of the first degree and one (1) count of Gross Sexual Imposition, a violation of R.C. 2907.05, a felony of the fourth degree.

On July 18, 2008, Appellee entered a plea of guilty to the indictment before Judge James M. Burge of the Lorain County Court of Common Pleas. On July 18, 2008, Appellee was sentenced to a four (4) year term of incarceration on count one (1); no sentence was imposed on count two (2) as it was determined to be an allied offense of count one (1).

Appellee was also notified of his duties to register as a Tier III sex offender . The trial court, sua sponte, removed community notification from Appellee's duties to register as a Tier III sex offender.

On July 23, 2008, the trial court revisited this issue at Appellant's request. Appellant argued that pursuant to the AWA, the trial court lacked the authority to remove the community notification requirement from Appellee's duties to register as a sex offender as Appellee's sentencing occurred after the effective date of the Adam Walsh Act. The trial court disagreed. The trial court refused to order community notification as part of Appellee's duties to register as a Tier III sex offender despite Appellee being sentenced after the effective date of the Adam Walsh Act.

On August 1, 2008, Appellant filed notice of appeal with the Ninth District Court of Appeals. On April 13, 2009, the Ninth District Court of Appeals upheld the decision of the trial court. State v. McConville, 9<sup>th</sup> Dist. No. 08CA009444, 2009 Ohio 1713. In May 2009, the State of Ohio filed a discretionary appeal with this Honorable Court.

## LAW & ARGUMENT

### SOLE PROPOSITION OF LAW

#### **I. THE NINTH DISTRICT COURT OF APPEALS MISAPPLIED R.C. 2950.11(F) AND (H).**

As previously discussed above, whether or not a trial court has the authority to suspend the community notification requirements of registered sexual offenders is a question of statutory interpretation. State v. McConville, 9<sup>th</sup> Dist. No. 08CA009444, 2009 Ohio 1713. Statutory interpretation involves a question of law; therefore this matter is subject to a *de novo* review by this Honorable Court. State v. Sufronko (1995), 105 Ohio App.3d 504, 506. A *de novo* review requires an independent review of the trial court's decision without any deference to the trial court's determination. Brown v. Scioto Cty. Bd. of Comm'rs (1993), 87 Ohio App. 3d 704, 711.

This Court has held that the ultimate goal of statutory interpretation is to ascertain the intent of the legislature in enacting the statute. Toledo v. Public Utilities Comm. (1939), 135 Ohio St. 57. In doing so, a court "must first look to the language of the statute itself \* \* \*." Provident Bank v. Wood (1973), 36 Ohio St. 2d 101, 105. In relation to the interpretation of the specific language, R.C. 1.42 states that the words and phrases of a statute must be read in context and construed in accordance with their common usage.

"The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it.' This court may engage in statutory interpretation when the statute under review is ambiguous." State v. Hairston, 101 Ohio St.3d 308, 2004 Ohio 969, at P11 quoting Slingluff v. Weaver (1902), 66 Ohio St. 621, paragraph one of the syllabus. Conversely, if a statute is not ambiguous, "then we need not interpret it; we must simply apply it." Hairston, at P13, citing Sears v. Weimer (1944), 143 Ohio St. 312, paragraph five of the syllabus ("An unambiguous statute is to be applied, not interpreted.").

On January 1, 2008, Ohio adopted the AWA which established new classifications regarding individuals convicted of sexual offenses in Ohio. Tier I, Tier II, and Tier III sex offenders have replaced the prior Megan's Law designations of sexually oriented offender, habitual sexual offender, sexual predator, etc.

R.C. 2950.01(G) provides that a Tier III sex offender is an offender who has been convicted of a violation of R.C. 2907.02 or R.C. 2907.05, or any attempt, complicity, or conspiracy to commit either offense. Appellee is a Tier III offender because he was convicted of both the offense of Rape in addition to the offense of Gross Sexual Imposition.

R.C. 2950.11(A) sets forth the community notification requirement and states in pertinent part:

"Regardless of when the sexually oriented offense \* \* \* was committed, if a person is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a sexually oriented offense \* \* \* and if the offender \* \* \* is in any category specified in division (F)(1)(a), (b), or (c) of this section, the sheriff with whom the offender \* \* \* has most recently registered \* \* \* and the sheriff to whom the offender \* \* \* most recently sent a notice of intent to reside \* \* \* shall provide a written notice containing the information set forth in division (B) of this section to all of the persons described in division (A)(1) to (10) of this section."

R.C. 2950.11(F)(1) outlines to whom R.C. 2950.11(A) applies, stating:

"Except as provided in division (F)(2) of this section, the duties to provide the notices described in divisions (A) and (C) of this section apply regarding any offender \* \* \* who is in any of the following categories:

"(a) The offender is a tier III sex offender/child victim offender, \* \* \*."

It is clear from the above statutory provisions that community notification requirements are mandatory for all Tier III sex offenders. See R.C. 2950.11. However, provisions have been made for an offender to file a petition/motion for removal of the community notification requirement. R.C. 2950.11(F) and R.C. 2950.11(H).

R.C. 2950.11(F)(2) provides an exception to division (F)(1), stating in part:

*"The notification provisions of this section do not apply to a person described in (F)(1)(a), (b), or (c) of this section if a court finds at a hearing after considering the factors described in this division that the person would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment."* (Emphasis added.)

In relation to R.C. 2950.11(F), this subsection requires the trial court to conduct a hearing and to find after hearing that an offender would not have been subject to community notification requirements that were in effect as of January 2, 2007.

R.C. 2950.11(H) (1) and (2) provide as follows:

(1) Upon the motion of the offender or the prosecuting attorney of the county in which the offender was convicted of or pleaded guilty to the sexually oriented offense or child-victim oriented offense for which the offender is subject to community notification under this section, or upon the motion of the sentencing judge or that judge's successor in office, the judge may schedule a hearing to determine whether the interests of justice would be served by suspending the community notification requirement under this section in relation to the offender. The judge may dismiss the motion without a hearing but may not issue an order suspending the community notification requirement without a hearing. At the hearing, all parties are entitled to be heard, and the judge shall consider all of the factors set forth in division (K) of this section. If, at the conclusion of the hearing, the judge finds that the offender has proven by clear and convincing evidence that the offender is unlikely to commit in the future a sexually oriented offense or a child-victim oriented offense and if the judge finds that suspending the community notification requirement is in the interests of justice, the judge may suspend the application of this section in relation to the offender. The order shall contain both of these findings.

The judge promptly shall serve a copy of the order upon the sheriff with whom the offender most recently registered under section 2950.04, 2950.041 [2950.04.1], or 2950.05 of the Revised Code and upon the bureau of criminal identification and investigation.

An order suspending the community notification requirement does not suspend or otherwise alter an offender's duties to comply with sections 2950.04, 2950.041 [2950.04.1], 2950.05, and 2950.06 of the Revised Code and does not suspend the victim notification requirement under section 2950.10 of the Revised Code.

(2) A prosecuting attorney, a sentencing judge or that judge's successor in office, and an offender who is subject to the community notification requirement under this section may initially make a motion under division (H)(1) of this section upon the expiration of twenty years after the offender's duty to comply with division (A)(2), (3), or (4) of section 2950.04, division (A)(2), (3), or (4) of

section 2950.041 [2950.04.1] and sections 2950.05 and 2950.06 of the Revised Code begins in relation to the offense for which the offender is subject to community notification. After the initial making of a motion under division (H)(1) of this section, thereafter, the prosecutor, judge, and offender may make a subsequent motion under that division upon the expiration of five years after the judge has entered an order denying the initial motion or the most recent motion made under that division.

In relation to R.C. 2950.11(H), this subsection requires the trial court to conduct a hearing and to find after hearing that the interests of justice require the suspension of the community notification requirement. A court may suspend community notification requirements under subsection (H) after an offender has been registering as a sex offender subject to community notification for a period of twenty (20) years. In making either determination, the trial court is to consider the following factors:

- (a) The offender's or delinquent child's age;
- (b) The offender's or delinquent child's prior criminal or delinquency record regarding all offenses, including, but not limited to, all sexual offenses;
- (c) The age of the victim of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made;
- (d) Whether the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made involved multiple victims;
- (e) Whether the offender or delinquent child used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;
- (f) If the offender or delinquent child previously has been convicted of or pleaded guilty to, or been adjudicated a delinquent child for committing an act that if committed by an adult would be, a criminal offense, whether the offender or delinquent child completed any sentence or dispositional order imposed for the prior offense or act and, if the prior offense or act was a sex offense or a sexually oriented offense, whether the offender or delinquent child participated in available programs for sexual offenders;
- (g) Any mental illness or mental disability of the offender or delinquent child;
- (h) The nature of the offender's or delinquent child's sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;

(i) Whether the offender or delinquent child, during the commission of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made, displayed cruelty or made one or more threats of cruelty;

(j) Whether the offender or delinquent child would have been a habitual sex offender or a habitual child victim offender under definitions of those terms set forth in section 2950.01 of the Revised Code as that section existed prior to the effective date of this amendment;

(k) Any additional behavioral characteristics that contribute to the offender's or delinquent child's conduct.

See R.C. 2950.11(F)(2)(a)-(k).

However, Appellee had not been registering as a Tier III sex offender for a period of twenty (20) years and been subject to the community notification requirement. To the contrary, Appellee had only been recently sentenced and classified as a Tier III sex offender for his criminal actions and could not meet such a standard at that time.

In light of the two (2) mechanisms contained in R.C. 2950.11, after a careful reading of the statute, the appellate court misapplied R.C. 2950.11(F)(2) as written. The appellate court determined that R.C. 2950.11(F)(2) applies to criminal defendants convicted of sexual offenses that are sentenced and classified subsequent to January 1, 2008. The plain text of the statute dictates otherwise. The plain text of the statute indicates that this section is available only to individuals classified as sexual offenders prior to January 1, 2008 that were reclassified by the AWA. If not, there is no reason to include the "*person would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment.*" language as contained in subsection (F)(2). It is plain that the language was included to permit a trial court to remove community notification requirements from a previously classified sexual offender under Megan's Law.

Likewise, it is equally clear from the plain text of R.C. 2950.11(H)(2) that this section applies to individuals classified as a sexual offender subsequent to January 1, 2008 and serves as a mechanism for those individuals to petition to have a trial court remove such requirements subject to the criteria in the statute after the offender has registered for a period of twenty (20) years in relationship to their lifetime reporting requirements. Contrary to the appellate court's holding, R.C. 2950.11(F)(2) and (H)(2) are not alternate avenues in the same statute to remove community notification requirements. If this were true, (H)(2) would not contain twenty (20) years compliance with the notification requirements prior to removal of such requirements when (F)(2) does not. Moreover, it is unclear why any sexual offender would even bother with availing themselves of (H)(2) and meeting twenty (20) years of compliance with notification requirements prior to removal of such requirements when they could simply avail themselves of (F)(2) for an immediate removal of community notification requirements. Appellant submits (F)(2) and (H)(2) exist because (F)(2) is for individuals not previously subject to community notification requirements under Megan's Law and (H)(2) is designated for individuals classified as sexual offenders on or after January 1, 2008. The plain language of the statute can be read in no other fashion.

If allowed to stand, the decision permits criminal defendants sentenced and classified on or after January 1, 2008 to avail themselves of this subsection to remove community notification requirements when legally not permitted to do so by R.C. 2950.11(H). To permit this would be to completely defeat one (1) of the main purposes of the AWA, which is to warn the community about sexual offenders in their midst. The decision of the appellate court misapplies a statutory section that, on its face, clearly expresses an opposite intent. This misapplication significantly impacts public safety by permitting trial courts in a four (4) county area to remove community notification requirements of Tier III sexual offenders prior to the time prescribed by law for offenders sentenced on or after January 1, 2008. Only through accepting the instant

matter on a discretionary appeal can this Court resolve this weighty issue. Therefore, the State of Ohio strongly urges this Honorable Court to accept jurisdiction in this matter.

**CONCLUSION**

For the foregoing reasons, Appellant respectfully requests that this Honorable Court accept jurisdiction over the instant matter.

Respectfully Submitted,

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By: 

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**PROOF OF SERVICE**

A copy of the foregoing Brief of Appellant was sent by regular U.S. Mail to John M. Prusak, Esq., Counsel for Appellee, 715 Broadway Avenue, Lorain, Ohio 44052, this 10<sup>th</sup> day of May, 2009.



Billie Jo Belcher  
Assistant Prosecuting Attorney

STATE OF OHIO )  
)ss  
COUNTY OF LORAIN )

STATE OF OHIO  
Appellant

v.

STEPHEN J. MCCONVILLE  
Appellee

**COURT OF APPEALS**  
FILED  
LORAIN COUNTY  
IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT  
2009 APR 13 P 12:37  
CLERK OF COMMON PLEAS 08CA009444  
RON MABAKOWSKI  
**9th APPELLATE DISTRICT**

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF LORAIN, OHIO  
CASE No. 07CR075079

DECISION AND JOURNAL ENTRY

Dated: April 13, 2009

BELFANCE, Judge.

{¶1} The Appellant, State of Ohio, appeals from the judgment of the Lorain County Court of Common Pleas, that suspended the Appellee, Stephen James McConville's duty to comply with the community notification requirement of the Adam Walsh Act as part of his classification as a tier III sex offender. This Court affirms.

I.

{¶2} On July 18, 2008, Stephen James McConville pled guilty to one count of rape and one count of gross sexual imposition. On that same date, the trial court sentenced McConville to four years incarceration and notified him that he would be classified as a tier III sexual offender pursuant to the Adam Walsh Act, Ohio Revised Code 2950.01, *et seq.* The court informed McConville of his registering and reporting duties attendant to that classification. However, the trial court informed McConville that it would not require McConville to register for community notification

HEREBY CERTIFY THIS TO BE A TRUE COPY  
OF THE ORIGINAL ON FILE IN THIS OFFICE  
RON MABAKOWSKI, LORAIN COUNTY  
CLERK OF THE COURT OF COMMON PLEAS  
BY *[Signature]*

requirement and would address that issue at a later date after conducting a presentence investigation.

{¶3} On July 23, 2008, the trial court reconvened for a hearing with respect to the community notification requirement. The trial court determined that it would not impose the community notification requirement at that time. The Appellant, State of Ohio argued at the hearing that the trial court lacked the authority to suspend the community notification requirement. The trial court was not persuaded and the instant appeal followed.

## II.

{¶4} In its sole assignment of error, the State argues that the trial court erred when it *sua sponte* removed the community notification requirement from McConville's tier III sex offender classification. The State contends that R.C. 2950.11(F)(2) should be read to allow the trial court to remove the community notification requirement only where the offender had been previously classified under the prior law.

{¶5} Whether or not the trial court has the authority to suspend the community notification requirement is a question of statutory interpretation. Statutory interpretation involves a question of law; therefore, we review this matter *de novo*. *State v. Myers*, 9th Dist. Nos. 3260-M, 3261-M, 2002-Ohio-3195, at ¶14; *Eager v. State*, 9th Dist. No. 08CA0037, 2008-Ohio-6742, at ¶8. "A *de novo* review requires an independent review of the trial court's decision without any deference to the trial court's determination." *Rusov v. Ansley*, 9th Dist. No. 23748, 2007-Ohio-7022, at ¶12, quoting *Kane v. O'Day*, 9th Dist. No. 23225, 2007-Ohio-702, at ¶6.

{¶6} Initially, we consider whether the specific language of the statute at issue is ambiguous. *Myers* at ¶14, quoting *Roxane Laboratories, Inc. v. Tracy* (1996), 75 Ohio St.3d 125, 127. A statute is ambiguous when the words used are susceptible to more than one

reasonable interpretation. *In re Guardianship of A.L.K and A.K.*, 9th Dist. Nos. 23338, 23339, 2007-Ohio-509, at ¶10, quoting *Donnelly v. Kashnier*, 9th Dist. No. 02CA0051-M, 2003-Ohio-639, at ¶26. If the language is unambiguous, we must apply the clear meaning of the words used, applying the rules of grammar and common usage. *Id.* at ¶9; R.C. 1.42. “A court may interpret a statute only where the statute is ambiguous.” *Myers* at ¶15, quoting *State ex rel. Celebrezze v. Allen Cty. Bd. of Commrs.* (1987), 32 Ohio St.3d 24, 27.

{¶7} The statute at issue in the case at bar became effective on January 1, 2008 as part of Ohio’s adoption of the federal Adam Walsh Act (“AWA”). Although AWA amended numerous sections of the Ohio Revised Code, this appeal only concerns the amendments to Chapter 2950, which replaced Ohio’s prior system of sex offender classification and registration requirements. Most notably, AWA provides a systems of tiers into which sex offenders are classified based strictly on the type and number of offenses committed. The trial court no longer has the discretion to classify each sex offender based on a finding of the individual’s likelihood of reoffending. Each tier mandates corresponding duties of registration.

{¶8} A tier I classification attaches to the least serious sex offenses with the lowest level registering requirements in terms of duration and frequency of in-person address verification. A tier III classification attaches to the most serious sex offenses and has the highest level of registering requirements, including the provision for community notification. Rape is a tier III offense. R.C. 2950.01(G)(1)(a). Tier III offenders are the only offenders subject to community notification. R.C. 2950.11(F)(1)(a).

{¶9} R.C. 2950.11(A) sets forth the community notification requirement and states in pertinent part:

“Regardless of when the sexually oriented offense \* \* \* was committed, if a person is convicted of, pleads guilty to, has been convicted of, or has pleaded

guilty to a sexually oriented offense \* \* \* and if the offender \* \* \* is in any category specified in division (F)(1)(a), (b), or (c) of this section, the sheriff with whom the offender \* \* \* has most recently registered \* \* \* and the sheriff to whom the offender \* \* \* most recently sent a notice of intent to reside \* \* \* shall provide a written notice containing the information set forth in division (B) of this section to all of the persons described in division (A)(1) to (10) of this section.”

R.C. 2950.11(F)(1) outlines to whom R.C. 2950.11(A) applies, stating:

*“Except as provided in division (F)(2) of this section, the duties to provide the notices described in divisions (A) and (C) of this section apply regarding any offender \* \* \* who is in any of the following categories:*

*“(a) The offender is a tier III sex offender/child victim offender, \* \* \*.”*  
(Emphasis added.)

R.C. 2950.11(F)(2) provides an exception to division (F)(1), stating in part:

*“The notification provisions of this section do not apply to a person described in (F)(1)(a), (b), or (c) of this section if a court finds at a hearing after considering the factors described in this division that the person would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment.”* (Emphasis added.)

{¶10} R.C. 2950.11(F)(2) outlines the factors for the sentencing court to evaluate when deciding whether the offender would have been subject to the community notification provisions of the prior law. The factors the sentencing court shall consider include: the age of the offender; the offender’s prior criminal history as a juvenile or an adult; the age of the victim of the current sexual offense; the number of victims of the current sexual offense; whether the offender used drugs or alcohol to impair the victim; if the offender previously committed a sexual offense, whether the offender participated at that time in any programs for sexual offenders; any mental disease or disability the offender may have; in considering the sexual conduct of the offender toward the current victim, whether such conduct demonstrates a pattern of abuse; any cruelty or threats toward the current victim; whether the offender would have been classified as a habitual sex offender or habitual child victim offender as defined in the version of the statute that existed

immediately prior to January 1, 2008; and any of the offender's behavioral characteristics that contributed to the conduct. R.C. 2950.11(F)(2)(a) – (k).

{¶11} In summary, due to McConville's rape conviction, R.C. 2950.01 automatically classifies him as a tier III offender. Based on that classification, R.C. 2950.11(A) and 2950.11(F)(1)(a) provide that certain members of the community must receive notice that McConville resides, or intends to reside in their neighborhood. However, R.C. 2950.11(F)(2) provides that this requirement does not apply to McConville if the court finds after a hearing that he would not have been subject to the community notification requirement pursuant to the law in effect immediately prior to the current statute. R.C. 2950.11(F)(2)(a) – (k) delineate the factors the trial court must consider to determine if McConville would have been subjected to the community notification requirement under the prior law.

{¶12} This Court does not conclude that the above quoted statutory text is ambiguous or susceptible to more than one interpretation. Accordingly, we must apply the statute as written without further interpretation. *In re Guardianship of AL.K and A.K.* at ¶9. Although division (F)(1) defines which offenders may be subject to community notification, division (F)(2) states that the notification provisions of division (F)(1) do not apply if the judge conducts a hearing and makes the circumscribed findings. The statute does not establish when such a hearing may be held and does not prohibit the hearing to be conducted in conjunction with sentencing. It also does not forbid the court from commencing the hearing *sua sponte*.

{¶13} The State contends that the trial court did not have discretion to suspend the community notification requirement because the community notification requirement is automatic and mandatory once McConville is classified as a tier III offender and R.C. 2950.11(F)(2) does not apply to McConville. The State argues that R.C. 2950.11(F)(2) applies

only to sex offenders previously classified under the prior version of the law. In the State's view, R.C. 2950.11(H) is the only means by which McConville could be relieved of the community notification requirement.

{¶14} R.C. 2950.11(H) allows a motion to be made to remove the community notification requirement from an offender's sentence. This motion may be made by the offender, the prosecutor, the judge, or the judge's successor. R.C. 2950.11(H)(1). R.C. 2950.11(H)(2) provides that this motion may initially be made twenty years after the offender's duty to register and verify his or her address commences. After such motion, the judge may conduct a hearing, or may dismiss the motion without hearing. R.C. 2950.11(H)(1). In order to suspend the community notification requirement, the judge must find that the offender has proven by clear and convincing evidence that he or she is not likely to commit a future sexually oriented offense and that the suspension of the community notification requirement is in the interests of justice. *Id.* In making this determination, the judge must consider the ten factors enumerated in R.C. 2950.11(K). The ten factors in division (K) are identical to ten of the eleven factors in division (F)(2).

{¶15} We do not deem the State's arguments to be well taken. Although the State contends that R.C. 2950.11(F)(2) is meant to apply to offenders already classified under the prior law, we fail to see how that meaning can be gleaned from a plain reading of the statute given that the text of the statute does not limit the application of division (F)(2) to prior offenders classified or convicted pursuant to the previous version of Chapter 2950. Rather, R.C. 2950.11(F)(2) provides that the notification requirements will not apply to a *person* who would not have been subject to the notification requirements under the prior law. If the legislature intended R.C.

2950.11(F)(2) to apply only to persons previously classified under the prior law, then the legislature could have included language imposing such a limitation.

{¶16} Although the State wishes this Court to interpret the statute by going beyond the plain language of the statute, it has not provided any legislative history supporting its suggested interpretation. Given the plain language of the statute, it would appear that the legislature intended to provide the trial court with discretion to determine whether the community notification requirements should apply to certain offenders who would not have been subject to community notification under the prior law.

{¶17} The State has also suggested that R.C. 2950.11(H) is the sole method by which the community notification requirement may be suspended. Again, we do not discern merit in this argument. Instead, we determine that division (H) provides *another* method to relieve an offender from the community notification requirement.<sup>1</sup> The language of division (F) and division (H) are distinct; each merely sets out its own procedure for relief from the community notification requirement. We see no reason to determine that the procedures outlined in divisions (F) and (H) are interrelated or to be read in conjunction with each other.

{¶18} Having determined that the trial court acted within statutory authority, we now consider whether the trial court's determination to remove community notification from McConville's sentence was supported by competent, credible evidence. See, e.g., *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, syllabus; *State v. Hultz*, 9th Dist. No. 07CA0043, 2008-Ohio-4153, at ¶9.

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<sup>1</sup> For example, an offender whose sentence included the community notification requirement and who could not meet the requirements of division (F)(2), could employ division (H) to seek relief from the community notification requirement consistent with the terms set forth in division (H).

{¶19} At the plea and sentencing hearing on July 18, 2008, the trial court properly found that McConville was a tier III offender due to his conviction for rape. The trial court then informed McConville of his registration duties consistent with that classification. However, the trial court held its ruling with regard to community notification in abeyance pending a presentence investigation report.

{¶20} On July 23, 2008, the trial court conducted a hearing with respect to the community notification provision. On the record and in its judgment entry, the trial court stated that it considered all the factors of R.C. 2950.11(F)(2) as applied to McConville and concluded that the community notification requirements attendant to a tier III classification did not apply to McConville.

{¶21} Application of R.C. 2950.11(F)(2)(a) – (k) to the instant matter reveals the following: McConville was 19 years old when he committed the offense and the victim, his fiancée at the time, was also 19. His only prior criminal offense was a misdemeanor, which was not sexually oriented. McConville's offense was not against multiple victims and he did not impair the victim with drugs or alcohol. The offense was not alleged to be part of a larger pattern of abuse and did not involve cruelty or threats. McConville reported that he has a mood disorder for which he takes multiple prescribed medications, but that his disorder is well controlled by the medications. Based on the above, McConville would not have been classified as a habitual sex offender or a sexual predator pursuant to the immediately preceding version of R.C. 2950.01, et seq. Therefore, McConville properly falls within the category of offenders to which R.C. 2950.11(F)(2) applies. See *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195, at ¶10 (stating that, under prior law, community notification applied to habitual sex offenders and sexual predators).

{¶22} Accordingly, the trial court did not err in suspending the community notification requirement with respect to McConville.

III.

{¶23} The State of Ohio's sole assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

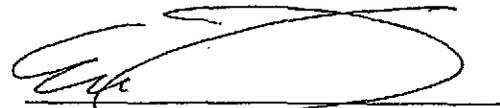
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The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



EVE V. BELFANCE  
FOR THE COURT

WHITMORE, J.  
DICKINSON, P. J.  
CONCUR

APPEARANCES:

DENNIS WILL, Prosecuting Attorney and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for Appellant.

JOHN M. PRUSAK, Attorney at Law, for Appellee.