

IN THE SUPREME COURT OF OHIO

ORIGINAL

State of Ohio,
Appellee,

vs.

Byron Clayborn
Appellant.

On Appeal from the
Franklin County Court
of Appeals, Tenth Appellate
District.

09-0971

Court of Appeals
Case No. 08AP-593

MEMORANDUM IN SUPPORT OF JURISDICTION OF BYRON CLAYBORN

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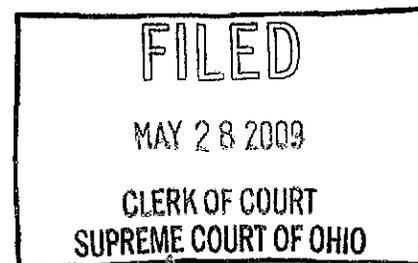


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**EXPLANATION WHY FURTHER REVIEW IS WARRANTED IN A CASE
INVOLVING A SUBSTANTIAL CONSTITUTIONAL QUESTION,
AND IN A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

Appellant seeks a determination by this court whether as of the date of judgment in his case Ohio's sex offender classification, registration, and notification laws were civil or criminal in nature. For purposes of determining his obligations under the Rules of Appellate Procedure, if they were criminal he was required to pursue a delayed appeal because he failed to file a notice of appeal within the thirty-day period set forth in Appellate Rule 4(A). If they were civil, appellant maintains he was entitled to the benefit of the tolling period, limited to civil cases, also set forth in Appellate Rule 4(A), because he was not served with a copy of the judgment entry in the manner prescribed by Civil Rule 58(B).

The Tenth District split on this issue, the majority finding for purposes of the tolling provision that this is "a quintessential criminal case - a case initiated with an indictment alleging that Clayborn committed criminal offenses and concluded with a conviction for one of those offenses and a two-year sentence." The dissent, citing this court's past characterization of predecessor provisions as civil in nature, would have allowed the appeal to be decided on its merits.

This court has accepted for review three cases involving constitutional challenges to Ohio's sex offender classification and registration laws as amended by Senate Bill 10. The cases are Chojnacki v. Cordray, Nos. 2008-0991 and 2008-0992, In re D.S., No. 2008-1624, and State v. Bodyke, No. 2008-2502.

Appellant was sentenced after the effective date of the Senate Bill 10 amendments for an offense committed prior to that date. In the trial court and on appeal he mounted constitutional challenges comparable to those in the referenced cases, particularly those at issue in Bodyke. Resolution of some of these claims ultimately will turn on whether the challenged provisions are civil or criminal in nature. Beginning with State v. Cook (1998), 83 Ohio St. 3d 404, this court has been of the view that prior versions of these statutes are civil and remedial in nature rather than criminal and punitive. Appellant's hopes for success on some of his challenges hinges on the Court

changing its view, concluding the course of amendments since the decision in Cook have changed the nature of the provisions, particularly in relation to his ex post facto and retroactivity claims.

As matters stand appellant is in limbo. The Court of Appeals determination that this is a criminal matter is at odds with this court's past decisions, and may or may not be at odds with the Court's forthcoming determination of Bodyke, Chojnacki and D.S. If appellant pursues a delayed appeal, he may be rebuffed if a different panel of the Court of Appeals agrees with the dissent and characterizes proceedings as civil in nature.

Appellant's difficulties on appeal arose from trial counsel's failure to forward his file to appellate counsel in time to file a notice of appeal within thirty days of judgment, not his own indecision. Whether through Appellate 4(A)'s tolling provision or through a delayed appeal, appellant should be allowed to have his constitutional challenges determined. Adopting the proposed proposition of law would give appellant his day in court.

STATEMENT OF THE CASE AND FACTS

Appellant was indicted in Franklin County on thirteen counts of pandering sexually oriented matter involving a minor (R.C. 2907.322) as a second degree felony and thirteen counts of the same offense as fourth degree felonies. Charges arose after appellant made photocopies of pornographic images of children at work and more were found during the execution of a search warrant at his home. The record is not clear, but photocopying may have been the basis for the more serious counts and possession the basis for the lesser.

On May 27, 2008 appellant entered a guilty plea to count one which made reference to a period between March 1, 2007 and April 27, 2007. The court imposed the jointly recommended sentence of two years incarceration. Pursuant to Revised Code Chapter 2950, as modified by Amended Substitute Senate Bill 10 of the 127th General Assembly, appellant was advised that he must register as a Tier II offender. This was done over defense objection, premised on the January 1, 2008 effective date of these measures falling after the date of the criminal conduct appellant

stood convicted of. The entry was journalized on May 30, 2008.

Appellant intended to appeal the retrospective application of amended Chapter 2950. However notice of appeal was not filed until July 15, 2008. Appellant was represented by the Franklin County Public Defender. Trial counsel did not forward the file to the office's appellate until more than thirty days had passed. The notice of appeal stated:

* * * Appellant is mindful that more than thirty days have passed since the date of judgment, but relies upon State v. Cook (1998), 83 Ohio St. 3d 404, and State v. Wilson, 113 Ohio St. 3d 382, 2007-Ohio-2202 for the proposition that sex offender classification proceedings are civil in nature. Appellant further relies upon this court's decision in State v. Furlong (February 6, 2001), Franklin Co. App. No. 00AP-637 finding that since sex offender classification is a civil proceeding, even when adjunct to a sentencing hearing, the time for filing the notice of appeal does not begin to run until the latter of (1) entry of the judgment or order appealed if the notice mandated by Civ.R. 58(B) is served within three days of the entry of judgment; or (2) service of the notice of judgment and its date of entry if service is not made upon the party within that three-day period. If the entry is not endorsed with directions to the clerk to serve all parties, time does not begin to run even though the defendant is in fact aware of the court's decision. The judgment entry in this case falls within this rule.

Thus appellant maintained the notice of appeal was timely, since appellant was challenging his classification but not his conviction.

Appellant submitted a brief advancing the following assignments of error:

FIRST ASSIGNMENT OF ERROR: Application of the provisions of Senate Bill 10 to those convicted of offenses committed before its January 1, 2008 effective date, but sentenced after that date, violates the ban on ex post facto lawmaking by the states set forth in Article I, Section 10 of the United States Constitution.

SECOND ASSIGNMENT OF ERROR: Application of the provisions of Senate Bill 10 to those convicted of offenses committed before its January 1, 2008 effective date, but sentenced after that date, violates the ban on retroactive laws set forth in Article II, Section 28, of the Ohio Constitution.

THIRD ASSIGNMENT OF ERROR: Senate Bill 10's tier system of classification violates the Separation of Powers Doctrine.

FOURTH ASSIGNMENT OF ERROR: The residency restrictions within Chapter 2950, as amended, violate the substantive due process provisions of the United States Constitution and Article I, Section 16 of the Ohio Constitution. Furthermore,

such restrictions violate the privacy guarantee of Article I, Section 1 of the Ohio Constitution.

FIFTH ASSIGNMENT OF ERROR: Retroactive application of S.B. 10 violates the procedural due process guarantees of the state and federal constitutions.

SIXTH ASSIGNMENT OF ERROR: Retroactive application of S.B. 10 violates the Double Jeopardy Clauses of the United States Constitution's Fifth Amendment and Article I, Section 10 of the Ohio Constitution.

SEVENTH ASSIGNMENT OF ERROR: Senate Bill 10 as applied to appellant constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

These were not addressed on the merits because the appellate court sua sponte dismissed the appeal.

State v. Clayborn, Franklin App. No. 08AP-593, 2009-Ohio-593.

PROPOSITION OF LAW: Because prior decisions of this court have characterized sex offender classification, registration, and notification provisions set forth in Chapter 2950 of the Revised Code as civil in nature, pursuant to Appellate Rule 4(A) the defendant in a criminal case is excused from the requirement that notice of appeal be filed within thirty days when he has not been served with a copy of the trial court's judgment entry in the manner prescribed by Civil Rule 58(B). (State v. Cook (1998), 83 Ohio St. 3d 404; State v. Williams (2000), 88 Ohio St. 3d 513; State v. Hayden, 96 Ohio St. 3d 211, 2002-Ohio-4169; State v. Wilson, 113 Ohio St. 3d 382, 2007-Ohio-2202, and State v. Ferguson, 120 Ohio St. 3d 7, 2008-Ohio-4824, followed.)

Appellant asserted he was entitled to being classified under former Chapter 2950 provisions, as in effect at the time of his offense. This brought him squarely within the rule of State v. Furlong (Feb. 6, 2001), 10th Dist. No. 00AP-637, discussed below, where such sex-offender classification proceedings were deemed civil in nature, though adjunct to a criminal prosecution. Moreover, as noted by the dissent, "so, too, is the trial court's determination here under R.C. Chapter 2950, as amended by S.B. 10, that the amended provisions may be applied to Clayborn even though his crime pre-dated the statute's amendment." 2009-Ohio-593, ¶15. "As in Furlong, the trial court's decision occurred as a result of a proceeding involving statutes deemed civil in nature. As a result, Clayborn, like Furlong, is entitled to invoke the tolling provision of App. R.

4(A). Indeed, when those accountable under the sexual classification provisions of R.C. Chapter 2950 historically have been subject to the restrictions evolving from R.C. Chapter 2950's civil nature, it seems an anomaly to reverse the characterization in the single instance where a benefit accrues from the characterization." Id. ¶16.

Appellant is in the incongruous position of arguing his notice of appeal is timely by operation of Appellate Rule 4(A) because the classification aspect of trial court proceedings was civil in nature, though ultimately he maintains the controlling provisions within Chapter 2950 are criminal and punitive, thus making their application in his circumstances a violation of Article I, Section 10 of the United States Constitution and Article II, Section 28, of the Ohio Constitution. Nonetheless invocation of appellate jurisdiction and the ultimate resolution of constitutional claims on their merits are separate matters.

As with all versions of Chapter 2950, collateral consequences are the result of a criminal prosecution. Thus the "quintessential criminal case" language in the majority opinion in this case makes some sense. But beginning with State v. Cook (1998), 83 Ohio St. 3d 404, classification, registration and community notification provisions have been declared civil and remedial, thus heading off ex post facto and retroactive law challenges to their application to individuals convicted of offenses committed prior to the effective date of the provisions. This characterization has continued, though a split has developed.

In State v. Wilson, 113 Ohio St. 3d 382, 2007-Ohio-2202, the immediate issue was what standard of review should apply in appellate review of the sufficiency of the evidence in sex offender classification proceedings. The syllabus adheres to State v. Cook, holding: "Because sex-offender-classification hearings under Chapter 2950 are civil in nature, a trial court's determination in a sex-offender-classification hearing must be reviewed under a civil manifest-weight-of-the-evidence standard and may not be disturbed when the judge's findings are supported by some competent credible evidence." However, two justices and a Court of Appeals judge sitting by assignment dissented as to this categorization.

Senate Bill 5 of the 125th General Assembly had brought sweeping changes to Chapter 2950, effective July 21, 2003. Paragraphs 45-46 of the concurring and dissenting opinion addressed why these changes compelled the conclusion Chapter 2950 proceedings had become criminal and punitive in nature.

More recently, in State v. Ferguson, 120 Ohio St. 3d 7, 2008-Ohio-4824, the defendant lodged ex post facto and retroactive law challenges to application of the Senate Bill 5 version of Chapter 2950 to his convictions dating back to 1990. In a 4-3 split, the majority rejected both claims, finding the provisions civil for purposes of ex post facto analysis and remedial for purposes of the retroactive law claim. *Id.* ¶43. But the shifting views of the justices are significant. Justice Lanzinger authored the minority opinion in both cases. Justice Lundberg Stratton wrote the opinion in Cook and the majority opinion in Wilson but joined the dissent in Ferguson. Justice Pfeiffer was part of the majority in Wilson, but joined the dissent in Ferguson. Justice O'Connor, who had joined the minority in Wilson authored the majority opinion in Ferguson, citing stare decisis as her rationale with respect to the version of Chapter 2950 under consideration. See footnote 4. Thus, between the two opinions, four justices have found the 2003 version of Chapter 2950 criminal and punitive in nature.

Appellant is hopeful that further amendments to Chapter 2950 made by Senate Bill 10 of the 127th General Assembly will now tip a majority of the court to the conclusion that the challenged provisions are criminal and punitive in nature. But as noted by Justice O'Connor in Ferguson, and as stated by numerous trial and appellate courts passing on challenges to the latest version of Chapter 2950, Cook is afforded great precedential value, notwithstanding the substantial changes brought by Senate Bill 5 and Senate Bill 10.

It is this precedent appellant relies upon for the claim he was excused from filing a notice of appeal within thirty days because he was not served with a civil judgment in the specified manner. As required by the current provisions, appellant was notified that he was classified as a Tier II offender, even though his offense predated the effective date of the present classification scheme.

He was denied more beneficial treatment under the laws in effect at the time his offense was committed. This was over defense objection premised on the issues appellant sought to raise in the Court of Appeals. Though the prosecutor has argued otherwise, direct appeal is the necessary avenue to vindicate these claims.

In State v. Furlong (Feb. 6, 2001), 10th Dist. No. 00AP-637 the defendant pleaded guilty to eight sexually oriented offenses, and at the sentencing hearing was classified as a sexual predator under the then controlling version of Chapter 2950. The judgment entry incorrectly stated that the parties stipulated that he be classified as sexual predator. As this would nullify any chance of success on appeal, the defense sought a correction, leading to a nunc pro tunc entry deleting the objectionable language. Notice of appeal was filed within thirty days of the corrected entry, but was untimely because a nunc pro tunc entry does not extend the time for filing the notice of appeal.

The appeal was saved by Appellate Rule 4(A):

While it is true that appellant filed his appeal more than thirty days after the May 2, 2000 entry and that the trial court's nunc pro tunc entry did not extend the thirty-day period, this court still has jurisdiction to review appellant's appeal. The reason for this is that a sexual predator hearing is a civil proceeding. State v. Gardiner (Nov. 16, 2000), Franklin App. No. 00AP-93, unreported. For civil cases, App. R. 4(A) requires the notice of appeal to be filed within thirty days of "service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure." Civ. R. 58(B) requires the court to endorse on its judgment "a direction to the clerk to serve upon all parties * * * notice of the judgment and its date of entry upon the journal." "The thirty-day time limit for filing the notice of appeal does not begin to run until the later of (1) entry of the judgment or order appealed if the notice mandated by Civ. R. 58(B) is served within three days of the entry of the judgment; or (2) service of the notice of judgment and its date of entry if service is not made on the party within the three-day period in Civ. R. 58(B)." Whitehall ex rel. Fennessy v. Bambi Motel, Inc. (1998), 131 Ohio App. 3d 734, 741.

A review of both judgment entries shows that the court never endorsed upon the entries the required "direction to the clerk to serve upon all parties * * * notice of the judgment and its date of entry upon the journal" pursuant to Civ. R. 58(B). Therefore, the time for filing a notice of appeal "never began to run because the trial court failed to comply with Civ. R. 58(B)." Id. at 741. Even though appellant was aware of the entry as evidenced by his objection filed May 5, 2000, "actual notice * * * is insufficient to begin the running of the time for appeal in the absence of

formal notice in compliance with Civ. R. 58(B)" Id. Accordingly, appellee's motion to dismiss appellant's appeal is overruled.

This court adopted similar reasoning the following year in In re Anderson (2001), 92 Ohio St. 3d 63, a delinquency case. The syllabus holds: "A juvenile court proceeding is a civil proceeding." Consequently delayed appeals pursuant to App. R. 5(A) were not available. (The Court has since amended App. R. 5(A) to permit delayed appeals in delinquency and serious youthful offender proceedings.) However, the saving provision of App. R. 4(A) applied, extending the time for filing the notice of appeal when service of the judgment entry was not made upon the parties within three days as required by Civ. R. 58. Though Furlong is not cited, the closing paragraphs of the Anderson decision closely follow the paragraphs from the Furlong quoted above.

As in Furlong and Anderson, the judgment entry in this case did not include the required directions to the clerk. On this basis, appellant maintains his notice of appeal was timely insofar as he challenged the civil aspect of proceedings in the trial court.

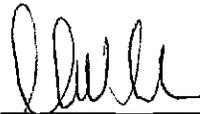
CONCLUSION

For the above stated reasons, further review of this cause is warranted.

Respectfully submitted,

Yeura R. Venters 0014879
Franklin County Public Defender

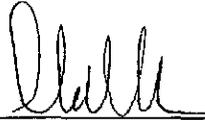
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PROOF OF SERVICE

I hereby certify that a copy of this Memorandum in Support of Jurisdiction was hand delivered to the office of the Franklin County Prosecuting Attorney, Counsel for Appellee, 373 South High Street, 13th Floor, Columbus, Ohio 43215, this 28th day of May, 2009.



Allen V. Adair, Counsel of Record
Counsel for Appellant,
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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 08AP-593
v.	:	(C.P.C. No. 07CR08-5606)
	:	
Byron Clayborn,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on April 14, 2009, it is the judgment and order of this court this appeal is dismissed as untimely. Costs assessed against appellant.

KLATT & SADLER, JJ.

By William A. Klatt
Judge William A. Klatt

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FILED

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FRANKLIN CO. OHIO

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 Plaintiff-Appellee, : CLERK OF COURTS
 v. : No. 08AP-593
 : (C.P.C. No. 07CR08-5606)
 Byron Clayborn, : (REGULAR CALENDAR)
 Defendant-Appellant. :

O P I N I O N

Rendered on April 14, 2009

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APPEAL from the Franklin County Court of Common Pleas.

KLATT, J.

{¶1} Defendant-appellant, Byron Clayborn, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of one count of pandering sexually oriented matter involving a minor. Because Clayborn failed to timely appeal from this judgment, we dismiss his appeal.

{¶2} On August 6, 2007, Clayborn was indicted with: (1) 13 counts of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(1) and/or (2), a second degree felony, and (2) 13 counts of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(5), a fourth degree felony. Ultimately, Clayborn pled guilty to one count of pandering sexually oriented matter involving a minor in

violation of R.C. 2907.322(A)(1) and/or (2), a second degree felony. During the combined plea and sentencing hearing, the trial court informed Clayborn that his guilty plea rendered him a tier II sex offender. Pursuant to R.C. 2950.03, the trial court then notified Clayborn of his duties to register and periodically verify his address.

{¶3} On May 30, 2008, the trial court issued a judgment entry convicting Clayborn of pandering sexually oriented matter involving a minor and imposing a two-year sentence. Clayborn now appeals from that judgment.

{¶4} According to App.R. 4(A):

A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.

Failure to comply with App.R. 4(A) is a jurisdictional defect and is fatal to any appeal. *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810, ¶17; *Bond v. Village of Canal Winchester*, 10th Dist. No. 07AP-556, 2008-Ohio-945, ¶11.

{¶5} In the case at bar, Clayborn filed his notice of appeal on July 15, 2008—46 days after the entry of the May 30, 2008 judgment. Thus, Clayborn's notice of appeal was untimely, and we must dismiss his appeal due to his noncompliance with App.R. 4(A).

{¶6} Clayborn, however, argues that this court should apply the portion of App.R. 4(A) governing the filing of notice of appeals in civil cases to his appeal. App.R. 4(A) tolls the time period for filing a notice of appeal in a civil case if the trial court's clerk fails to serve the parties within the three-day period specified in Civ.R. 58(B). *State ex rel. Sautter v. Grey*, 117 Ohio St.3d 465, 2008-Ohio-1444, ¶16. Clayborn asserts that the

clerk did not serve him as mandated in Civ.R. 58(B), and thus, this lack of service indefinitely tolled the time for filing his notice of appeal.

{¶7} The App.R. 4(A) tolling provision only saves Clayborn's appeal if Clayborn is appealing from a "civil case." Clayborn, however, appeals from a quintessential *criminal case*—a case initiated with an indictment alleging that Clayborn committed criminal offenses and concluded with a conviction for one of those offenses and a two-year sentence. Moreover, *State v. Furlong* (Feb. 6, 2001), 10th Dist. No. 00AP-637, does not provide Clayborn with a basis for claiming that he appeals from a civil case. In *Furlong*, we applied the App.R. 4(A) tolling provision to an appeal from a judgment finding that the defendant was a sexual predator. There, we allowed the defendant to benefit from a tolling provision that applies only to "civil case[s]" because the "sexual predator hearing is a civil proceeding." *Id.* In the case at bar, no civil proceeding occurred.

{¶8} Relying upon *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, the dissent asserts that a defendant's sex offender classification, even if imposed as a matter of law through the operation of statute, is civil in nature. While we do not disagree, we do not believe that the underlying case is a "civil case" merely because the trial court informed Clayborn that R.C. Chapter 2950 categorized him as a tier II sex offender.

{¶9} Because Clayborn appeals from a criminal—not civil—case, the App.R. 4(A) tolling provision does not extend the time for filing his appeal. Having found Clayborn's notice of appeal untimely, we dismiss this appeal.

Appeal dismissed.

SADLER, J, concurs.
BRYANT, J., dissents.

BRYANT, J., dissenting.

{¶10} Being unable to agree with the majority that the tolling provision contained in App.R. 4(A) does not apply and that, as a result, Clayborn's notice of appeal must be dismissed as untimely, I respectfully dissent.

{¶11} During the combined plea and sentencing hearing the trial court conducted, Clayborn objected to the trial court's applying R.C. Chapter 2950, as amended by Am.Sub.S.B. No. 10 ("S.B. 10"). Clayborn contended the prior version of R.C. Chapter 2950, in effect when he committed the offense that formed the basis of his guilty plea, must be applied to his conviction. After noting the objection for the record, the trial court determined Clayborn would be classified under the new law, S.B. 10, rather than the law existing at the time Clayborn committed the offense underlying his guilty plea. In his notice of appeal to this court, Clayborn appeals his sex-offender-classification under S.B. 10; he does not appeal his criminal conviction. Relying upon *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, and *State v. Furlong* (Feb. 6, 2001), 10th Dist. No. 00AP-637, Clayborn argues in his notice of appeal that the App.R. 4(A) tolling provision applies in this case because sex offender classification proceedings are civil in nature.

{¶12} Based upon its determination that Clayborn appeals from a criminal case, not a "civil case," the majority concludes "the App.R. 4(A) tolling provision does not extend the time for filing his appeal." (Opinion, ¶9.) I respectfully disagree with the majority's conclusion that the App.R. 4(A) tolling provision does not apply to extend the time for filing this appeal.

{¶13} The Supreme Court of Ohio consistently has held that an offender's sexual offender classification under R.C. Chapter 2950 is civil in nature even though it arises

from an offender's criminal conviction. See *Cook*, supra (holding that the statutory scheme provided for in R.C. Chapter 2950, as enacted in 1996 H.B. No. 180, is civil in nature); *State v. Williams* (2000), 88 Ohio St.3d 513 (reaffirming that principle); *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169 (reaffirming *Cook* and *Williams*, and further holding a trial court may determine whether a defendant is a sexually oriented offender without conducting a hearing for that purpose); *Wilson*, supra, at syllabus (affirming that sex-offender classification proceedings under R.C. Chapter 2950 remain civil in nature); *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824 (concluding R.C. Chapter 2950, as amended by 2003 S.B. No. 5, is a civil, remedial statute). See also *Smith v. Doe* (2003), 538 U.S. 84, 123 S.Ct. 1140 (concluding statutory schemes similar to S.B. No. 5's amendment of R.C. Chapter 2950 are civil in nature).

{¶14} The Supreme Court of Ohio has not yet determined whether R.C. Chapter 2950 remains a civil, regulatory scheme after S.B. 10 amended it. Although S.B. 10 altered the landscape with regard to sex offender classification, registration and notification provisions in R.C. Chapter 2950, the precedent the Ohio Supreme Court set with respect to that chapter cannot be ignored. Until the Supreme Court decides otherwise, I must conclude, as have other appellate courts in this state, that an offender's sexual offender classification under R.C. Chapter 2950, as amended by S.B. 10, is civil in nature. See *Sewell v. State*, 1st Dist. No. C-080503, 2009-Ohio-872; *State v. King*, 2d Dist. No. 08-CA-02, 2008-Ohio-2594; *In re Gant*, 3d Dist. No. 1-08-11, 2008-Ohio-5198; *State v. Sewell*, 4th Dist. No. 08CA3042, 2009-Ohio-594; *Montgomery v. Leffler*, 6th Dist. No. H-08-011, 2008-Ohio-6397; *State v. Omiecinski*, 8th Dist. No. 90510, 2009-Ohio-1066; *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195.

{¶15} Moreover, I disagree with the majority's attempt to distinguish *Furlong*. Just as this court determined in *Furlong* that the trial court's sexual predator determination under the prior version of R.C. Chapter 2950 was a civil proceeding subject to App.R. 4(A)'s tolling provision, so, too, is the trial court's determination here under R.C. Chapter 2950, as amended by S.B. 10, that the amended provisions may be applied to Clayborn even though his crime pre-dated the statute's amendment.

{¶16} In reality, my view of this case diverges from the majority opinion because we begin from a different premise. The majority apparently relies heavily on its conclusion that the trial court took no action under R.C. Chapter 2950 because defendant's classification occurred as a matter of law. By contrast, in my opinion the trial court decided an appealable issue under R.C. Chapter 2950: whether the amended provisions may be applied retroactively. As in *Furlong*, the trial court's decision occurred as a result of a proceeding involving statutes deemed civil in nature. As a result, Clayborn, like *Furlong*, is entitled to invoke the tolling provision of App.R. 4(A). Indeed, when those accountable under the sexual classification provisions of R.C. Chapter 2950 historically have been subject to the restrictions evolving from R.C. Chapter 2950's civil nature, it seems an anomaly to reverse the characterization in the single instance where a benefit accrues from the characterization.

{¶17} Based on the foregoing, I conclude the trial court's decision on which version of R.C. Chapter 2950 to apply is an adverse decision that Clayborn may appeal, is civil in nature, and therefore is subject to App.R. 4(A)'s tolling provision, despite the fact the decision was rendered in conjunction with Clayborn's criminal conviction and sentencing. *Cook; Williams; Wilson; Hayden; Ferguson; Furlong*, supra. Because the trial court apparently failed to comply with Civ.R. 58(B) in the underlying case, I conclude this

court has jurisdiction in this matter under App.R. 4(A) because the time for filing a notice of appeal of the trial court's judgment was delayed. *Furlong*, supra; *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, syllabus. Because the majority concludes otherwise, I dissent.
