

ORIGINAL

IN THE SUPREME COURT OF OHIO
2009

STATE OF OHIO,

Case No. 09-971

Plaintiff-Appellee,

-vs-

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

BYRON CLAYBORN,

Court of Appeals
Case No. 08AP-593

Defendant-Appellant

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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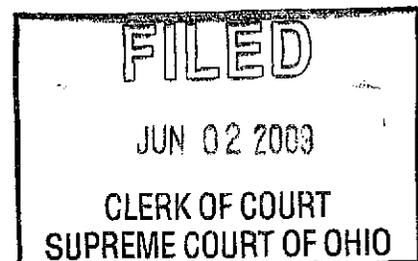


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Defendant does not provide a compelling reason to accept review of his case. The Tenth District majority correctly concluded that the case could not be treated as a “civil case,” since the trial court had merely informed the defendant of his status as a Tier II sex offender. The court itself did not impose such a requirement; the statutes did that. Since the trial court’s judgment was not a “civil” judgment in any sense, defendant could not take advantage of the service and docket-noting requirements that are applicable to the running of the time for appeal in civil cases.

Nor would this case be a proper vehicle in which to address the constitutional challenges to Senate Bill 10 that defendant wishes to ultimately pursue. The untimeliness of the appeal would preclude consideration of such issues, and, therefore, it is unnecessary to “hold” the present case pending the outcome of other cases that raise the constitutional issues.

This case does not present an issue of statewide significance, and it would be unwise for this Court to expend its scarce judicial resources to review this appeal. This Court should decline jurisdiction.

STATEMENT OF THE CASE AND FACTS

Defendant Clayborn pleaded guilty to one count of pandering sexually oriented material involving a minor, a second-degree felony. The trial court imposed a two-year sentence. Defendant was advised of his duty to register as a Tier II offender. The judgment of conviction was filed on May 30, 2008.

Defendant filed his appeal on July 15, 2008, more than thirty days after the judgment.

But he contended in the notice of appeal that the appeal was timely because the appeal was civil in nature and because the requirement for serving a civil judgment had not been followed so as to trigger the thirty-day appeal clock.

A two-judge majority dismissed the appeal as untimely on April 14, 2009. The majority concluded that the judgment being appealed was a criminal judgment, and it would not be treated as “civil” “merely because the trial court informed Clayborn that R.C. Chapter 2950 categorized him as a tier II sex offender.”

ARGUMENT

Response to Proposition of Law: Because an offender’s Tier II status is imposed by statutory law and not by the trial court, the trial court’s judgment in a criminal case is not “civil” in that respect, even when the trial court has advised the defendant of the Tier II status and even when the giving of such advice is noted in the judgment.

Defendant’s constitutional challenges to R.C. Chapter 2950 could not properly be brought in an appeal from the judgment of conviction in his criminal case, since the trial court did not impose his Tier II classification. Defendant’s grievance is with the statutory scheme, not with the judgment.

I. Amended Statutory Scheme

Defendant would have been at least a sexually oriented offender under “Megan’s Law,” i.e., R.C. Chapter 2950 as made effective on January 1 and July 1, 1997. As such, defendant would have been a subject to a 10-year duty of registration with annual verification. Defendant also would have been subject to a hearing by the sentencing court to determine whether he was a “sexual predator,” i.e., a sex offender who was likely to

commit a future sexually oriented offense. If found to be a sexual predator, defendant would have been subject to a lifetime duty to register, with a duty to verify address every ninety days. As a predator, defendant also would have been subject to community notification, whereby those living near him and certain others in the community would receive notification of his address and predator status. Also at the hearing, the sentencing court would have been tasked with the determination of whether defendant was a "habitual sex offender," i.e., a sex offender who was previously convicted of a sexually oriented offense.

As a result of the federal Adam Walsh Act, Ohio passed Senate Bill 10, effective July 1, 2007, and January 1, 2008, which reorganizes Ohio's sex-offender registration scheme. Instead of having three levels for "sexually oriented offenders," "habitual sex offenders," and "sexual predators," the new law employs three "Tiers," and it assigns offenders to such tiers based largely on the offense of conviction and/or the number of convictions. See R.C. 2950.01(E), (F), & (G).

Effective January 1, 2008, Tier I offenders must register for fifteen years and must periodically verify their residence address with the sheriff on an annual basis. R.C. 2950.05(B)(3); R.C. 2950.06(B)(1). Tier II offenders must register for twenty-five years and periodically verify every 180 days. R.C. 2950.05(B)(2); R.C. 2950.06(B)(2). Tier III offenders must register for the rest of their life and periodically verify every 90 days. R.C. 2950.05(B)(1); R.C. 2950.06(B)(3). Tier III offenders are also subject to community notification, under which the sheriff is required to notify the offender's neighbors and certain other persons in the community of, inter alia, the offender's residence, offense, and Tier III status. R.C. 2950.11.

Defendant is a Tier II offender because pandering sexually oriented material involving a minor is a Tier II offense. R.C. 2950.01(F)(1)(a).

II. Constitutional Challenges to R.C. Chapter 2950 Cannot Be Heard in this Appeal.

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

While defendant wishes to complain about various features of R.C. Chapter 2950 as applicable to him, his grievance does not arise out of requirements imposed by the judgment he wished to appeal. Although the court notified defendant of his registration duties, it was only recognizing what the statutory scheme already imposed upon defendant. The statutory scheme did not even require that the court inform defendant of his registration duties, since defendant was being sent to prison and therefore the duty of notification fell on prison officials. R.C. 2950.03(A)(1).

The Tenth District considered analogous issues in *State v. Zerla*, 10th Dist. No. 04AP-1087, 2005-Ohio-5077, recognizing that “sexually oriented offenders” could not appeal regarding their status as sexually oriented offenders. Based on the *Ohio Contract Carriers* syllabus, the court recognized that the defendant’s “status arose by operation of law, and not as a result of the trial court’s * * * judgment.” *Id.* at ¶ 7. “Other than ‘the ministerial act of rubber-stamping the registration requirement on the offender,’ the trial court plays no

role in the imposition of the sexually oriented offender designation.” Id. at ¶ 7. quoting *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169. Thus, even when the trial court referenced the defendant’s classification in the judgment and the resultant duty to register, such references created no ground for appeal, as they “merely reiterate[] the label and requirements already imposed by operation of law.” Id. at ¶ 8. Other Ohio case law applied the same analysis. *State v. Moyers* (2000), 137 Ohio App.3d 130, 134; *State v. Hampp* (2000), 4th Dist. No. 99CA2517.

Since sexually oriented offenders could not complain on appeal regarding their registration duties as sexually oriented offenders, it follows that defendant similarly cannot complain about obligations and restrictions flowing from his status as someone convicted of a Tier II offense. Such duties and restrictions were imposed by statutory law, not by a court judgment that was subject to appeal.

Consistent with the foregoing, the Tenth District dismissed an earlier appeal by a Tier II offender in *State v. Christian*, 10th Dist. No. 08AP-170, 2008-Ohio-6304. In language that applies equally here, the court in *Christian* recognized that, “[a]lthough the sentencing entry indicates appellant is classified as a Tier II sex offender and that defendant has to register, the trial court, like that in *Zerla*, is doing nothing more than reiterating the requirements already imposed by operation of law. Because R.C. Chapter 2950’s revisions had already been implemented at the time of appellant’s sentencing, the trial court made no judicial determination with respect to appellant’s classification as a Tier II sex offender.” Id. at ¶ 8.

Also relevant here is the prohibition against rendering advisory opinions. To vacate or modify the language in the trial court’s judgment regarding defendant’s Tier classification and registration duties would be pointless, as the classification and duties do not arise from

the judgment but rather as a matter of law. Since “the issue being appealed to us does not emanate from an order which is final and appealable,” “any opinion we would render on an issue which is not the subject of a final judgment would be, at best, advisory in nature. It is, of course, well settled that this court will not indulge in advisory opinions.” *North Canton v. Hutchinson* (1996), 75 Ohio St.3d 112, 114.

Defendant implicitly conceded the problem below. In his discussion on page 8 of his appellate brief, defendant had conceded that “[c]lassification as a * * * Tier II * * * offender now comes as an automatic consequence of conviction by virtue of the definitions set forth in R.C. 2950.01 * * *.” In short, he asked for relief from the statutes, not relief from the judgment that he wished to appeal. If defendant wished to challenge the constitutionality of S.B. 10, the appropriate remedy would be to bring a declaratory judgment action.

III. Dismissal for Lack of Timely Notice of Appeal

In light of the foregoing, the Tenth District majority acted correctly in dismissing the appeal. There was no “civil” component to the trial court’s judgment that could be appealed. The trial court’s act of notifying defendant of Tier II status did not create an appealable issue, since the court was merely repeating what the statutory scheme itself imposed. Defendant’s grievance was with the statutes, not the judgment.

Defendant’s proposition of law does not warrant review.

The State must hasten to add that the new statutory scheme is a civil, regulatory scheme that survives the various constitutional challenges. The State notes that all of the appellate courts have rejected one or more of the constitutional challenges.

If this Court were to conclude that the trial court's judgment had a "civil" component that could be appealed, the remedy would be to remand to the Tenth District to address the constitutional challenges. None of the constitutional challenges have merit, and the Tenth District should be given an opportunity to address those challenges in the first instance.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered on this 2nd day of June, 2009, to office of Allen V. Adair, 373 South High Street, 12th Floor, Columbus, Ohio 43215, Counsel for Defendant-Appellant.



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