

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO, :
 :
 Plaintiff-Appellant, : Case No. 2009-0893
 :
 v. : On Appeal from the
 : Ninth Appellate District,
 STEPHEN J. McCONVILLE, : Lorain County
 : Case No. 08CA009444
 :
 Defendant-Appellee. :

**BRIEF OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLEE STEPHEN J. McCONVILLE**

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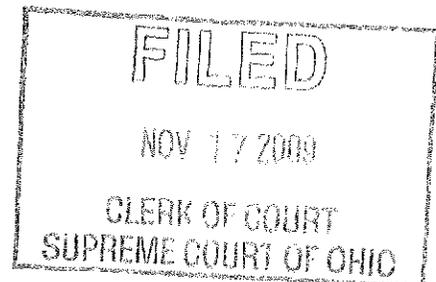


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STATEMENT OF THE CASE AND FACTS

Amicus adopts the statement of the case and facts set forth by Appellee Stephen J. McConville.

INTEREST OF AMICUS CURIAE

The Office of the Ohio Public Defender (“OPD”) is a state agency responsible for providing legal representation and other services to indigent criminal defendants convicted in state court. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect and ensure the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As *amicus curiae*, the OPD offers the Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in this case insofar as Senate Bill 10 has presented numerous questions and concerns regarding the sentencing of Ohio’s sex offenders. The OPD strongly asserts that all criminal defendants should have the benefit of consistent sentences that comply with all statutory requirements.

LAW AND ARGUMENT

A. Ohio Revised Code Section 2950.11(F) provides the trial court with discretion in applying community notification to Tier III sexual offenders at sentencing.

Generally, community notification applies to Tier III sex offenders. R.C. 2950.11(F)(1)(a). But under R.C. 2950.11(F)(2),

The notification provisions of this section do not apply to [Tier III offenders] if the 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). Essentially, R.C. 2950.11(F)(2) provides factors for the trial court to consider in determining if a Tier III offender would have been subject to community notification under prior law. If that offender would not have been subject to community notification under former R.C. 2950.11, then the offender is not subject to community notification under current law. *Id.* The Ninth District Court of Appeals correctly interpreted the statute to provide the trial court with discretion in applying community notification to sex offenders. *State v. McConville*, 182 Ohio App.3d 99, 2009-Ohio-1713.

Before Senate Bill 10 (“SB10”), former R.C. 2950.11(F)(1)(a)-(c) required community notification for sex offenders classified as “sexual predators” or “habitual sex offenders” and in some instances sexually oriented offenders. However, the notification provision did not apply to some sexual offenders who were subject to former R.C. 2950.09(C)(2) or R.C. 2950.09(E). See former R.C. 2950.11(F)(2)¹. Under former R.C. 2950.09(C)(2)(b), the trial court had discretion regarding whether or not to apply community notification and was required to hold a hearing to make that determination. Specifically, the trial court looked to the offender’s convictions and

¹ Former R.C. 2950 was in effect until January 1, 2008.

other relevant factors in deciding whether to apply community notification. Former R.C. 2950.09(C)(2)(c)(iii), former R.C. 2950.09(E)(2).

Ohio Revised Code Section 2950.11's current form is simply a continuation of that discretion. SB10 took away much of trial courts' discretion in sentencing sex offenders. By including the language in R.C. 2950.11(F)(2), the General Assembly indicated a desire to continue to rely on the discretion of trial courts in applying community notification – if not in other aspects of sex offender sentencing. Ohio Revised Code Section 2950.11(F)(2) allows trial courts to utilize their discretion by evaluating relevant factors in relation to individual inmates. It gives the trial court the power to decide whether community notification would actually serve the interests of justice on a case-by-case basis.

1. The plain language of R.C. 2950.11(F) grants the trial court discretion in applying community notification to Tier III offenders.

There is no language in R.C. 2950.11(F) that limits its application to pre-SB10 offenders. Although the State argues that R.C. 2950.11(F) applies only to those defendants who were sentenced prior to SB10, nothing in the language of the statute supports that interpretation. Rather, R.C. 2950.11(F)(2) states that the notification provision does not apply if: 1) the trial court holds a hearing, 2) at the hearing the trial court applies the factors listed in R.C. 2950.11(F)(2)(a)-(k), and 3) those factors indicate that the offender would not have been subject to notification under former R.C. 2950.11.

Ohio Revised Code Section 2950.11(F) is written in the present tense, which indicates a prospective application. “A statute is presumed to be prospective in its operation unless expressly made retrospective.” R.C. 1.48. Likewise, the factors enumerated in R.C. 2950.11(F)(2)(a)-(k) are written in the present tense. If the General Assembly had intended for the section to apply only retroactively, the drafters would have used the past tense to signal that

intention to readers. The General Assembly could also have included limiting language that expressly applied the statute to reclassified criminal defendants, but it did not do so.

2. The former version of R.C. 2950.11(F) gave trial courts discretion regarding community notification – further evidence that trial courts have discretion under the current law.

Under former R.C. 2950.09(C)(2)(b) and R.C. 2950.09(E)(2), the trial court had discretion in applying community notification and in deciding a sex offender's classification. To preserve that discretion and ensure consistent results, the General Assembly held that the trial court had to look at a series of factors in making those determinations. Former R.C. 2950.09(C) and (E). In reviewing those decisions, Ohio's courts of appeals have assumed that trial courts have discretion. See, e.g., *Maumee v. Pflgebraar*, 6th Dist. Nos. L-05-1289, L-05-1324, 2006-Ohio-864 (remanded for new classification hearing when trial court had insufficient support for finding); *State v. Sanders*, 12th Dist. No. CA99-07-069, 2000 Ohio App. LEXIS 2050 (affirming imposition of community notification when the trial court relied on sufficient evidence).

Moreover, this Court affirmed the reversal of a trial court that failed to discuss relevant evidence in determining a sex offender's classification under former R.C. 2950. *State v. Eppinger*, 91 Ohio St.3d 158, 166, 2001-Ohio-247. The *Eppinger* Court recognized that trial courts have discretion in applying sex offender classifications based on the evidence presented. *Id.* This Court held that trial courts must consider the factors in former R.C. 2950.09(B) and discuss the specific evidence on the record in wielding that discretion. *Id.*

The plain language of current R.C. 2950.11(F)(2) requires trial courts to look to prior law. That prior law – former R.C. 2950.11 – required trial courts to apply a set of factors to each defendant. Those factors allowed individual trial courts, who had the benefit of seeing the criminal defendant present in court and hearing his or her history, to make a case-by-case determination about community notification. That discretion allowed trial courts to decide for

each defendant whether community notification was necessary to further the interest of justice and ensure public safety, or whether it was merely a cumulative and ineffective punishment. This Court should not cast aside that critical discretion now, nor does R.C. 2950.11(F) allow this Court to do so.

B. Ohio Revised Code Section 2950.11(H) provides Tier III sex offenders with a mechanism for seeking post-sentencing relief from community notification.

Under R.C. 2950.11(H)(1), a sex offender or prosecuting attorney may move the trial court for relief from community notification. The trial judge may then schedule a hearing to determine if suspending the requirement would serve “the interests of justice.” At the hearing, the trial judge must apply the factors in R.C. 2950.11(K) in determining whether to suspend community notification.

Ohio Revised Code Section 2950.11(H) applies only to offenders who are already subject to community notification. That is evidenced by the plain language of the statute, which allows a motion to the trial court for a suspension of community notification for sexually oriented offenses “for which the offender is subject to community notification.” R.C. 2950.11(H) (emphasis added). The present tense “is” indicates that the rule applies to offenders who are currently subject to community notification.

Additionally, R.C. 2950.11(H) is only an accessible form of relief once a sex offender has been subject to community notification for decades. Ohio Revised Code Section 2950.11(H)(2) allows only those offenders who have complied with registration duties for twenty years to move to the trial court for relief. Ohio Revised Code Section 2950.11(H)(2) provides a mechanism for seeking a suspension of community notification when the offender has already been sentenced with a community notification requirement. For that reason, R.C. 2950.11(H) deals with a concern that is completely separate from R.C. 2950.11(F). Ohio

Revised Code Section 2950.11(H) addresses sex offenders who are already subject to community notification and seeking relief or who are subsequently subjected to community notification and seek relief in the future. Contrarily, R.C. 2950.11(F) applies only to defendants who are being sentenced as sex offenders or – potentially – who are retroactively classified into the tier system². This Court is currently reviewing the question of whether R.C. 2950.11(F)(2) applies retroactively. See *State v. Gildersleeve*, Case No. 2009-1086, pending (whether sex offenders who are reclassified under SB10 are subject to community notification under R.C. 2950.11(F)). Therefore, this Court must read these two sections as separate ideas with separate applications.

CONCLUSION

Based upon the foregoing, this Court should affirm the holding of the Ninth District Court of Appeals, which held that R.C. 2950.11(F) gives the trial court discretion in applying community notification to sex offenders at sentencing.

Respectfully submitted,

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² Contrary to the Appellant's position, that statutory interpretation is consistent with the pro bono materials offered on the Ohio Public Defender website. (http://www.opd.ohio.gov/AWA_Information/Adam_Walsh.htm.)

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this **BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANT STEPHEN J. MCCONVILLE** has been served upon Billie Jo Belcher, Assistant Lorain County Prosecutor, 225 Court Street, 3rd Floor, Elyria, Ohio 44035, and John Prusak, 715 Broadway Avenue, Lorain, Ohio 44052, on this 17th day of November, 2009.



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