

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	
)	SUPREME COURT
)	CASE NUMBER: 2009-0893
Plaintiff-Appellant,)	
)	
v.)	ON APPEAL FROM THE COURT OF
)	APPEALS, NINTH APPELLATE
STEPHEN J. MCCONVILLE,)	DISTRICT
)	
)	Court of Appeals Case Number
Defendant-Appellee.)	08CA009444

MERIT BRIEF OF APPELLEE, STEPHEN J. MCCONVILLE

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STATEMENT OF FACTS

Appellee, Stephen J. McConville was indicted on or about December 27, 2007 by the Lorain County Grand Jury on a single count of Rape, a felony of the first degree and a single count of Gross Sexual Imposition, a felony of the fourth degree.

On July 18, 2008, Appellee knowingly and voluntarily withdrew his former not guilty plea and entered a plea of guilty to the indictment and was sentenced to an agreed sentence of four (4) years incarceration.¹ During this hearing, Appellee was further notified of his reporting requirements under the Adam Walsh Act by the Trial Court, Judge James M. Burge. At this time, the Trial Court refused to impose the community notification aspect of the Act.²

At the request of the State of Ohio, the Trial Court held a hearing, on July 23, 2008, in regard to the community notification feature of the Adam Walsh Act.³ The prosecutor explained that the purpose of this subsequent hearing was because:

It's the understanding of the State that the trial court must make certain findings on the record before – before the trial court can dismiss the – yeah, dismiss the requirement that there be community notification.⁴

Once again, the Trial Court did not feel compelled to institute this feature and declined to do so after reviewing and weighing each and every factor contained in O.R.C. 2950.11(F)(2).

For instance, the Trial Court found that Appellee and complaining witness were the same age (19 years old).⁵ The Trial Court also found that Appellee had a minimal prior criminal

¹ July 18, 2008 Tr. Pg. 7, line 15.

² July 18, 2008 Tr. Pg. 16, line 13

³ July 23, 2008 Tr. Pg. 3

⁴ Id.

⁵ July 23, 2008 Tr. Pg. 6.

record, not involving a sexually oriented offense.⁶ That Appellee's crime involved a single victim and not multiple victims.⁷ That there was no impairment of the victim through drugs or alcohol.⁸ That there may be some mental illness involved, however, it can be controlled through medication and does not constitute a threat to the public.⁹ That this crime involved "straight sex", further clarified by the Trial Court as "no bondage, no sadomasochism, that type of thing."¹⁰ That there was no cruelty or threat of cruelty made to the victim.¹¹ The Court further found that Appellee would not have been labeled a habitual sex offender or a habitual child victim offender under the prior version of the law.¹² Finally, the Court stated:

Based on those factors, what's especially important to me in considering this case is the fact that this took place, I believe, in your fiancée's home, there others were present. There was no physical injury. It did not involve a child. And from what's before this Court, I would not find that the community would be better protected if your neighbors were aware of this offense.¹³

The State of Ohio, through the Lorain County Prosecutor's Office, commenced an appeal to the Ninth District Court of Appeals. The Ninth District upheld Judge Burge's ruling, stating that the limiting language requested by Appellee is not found within the applicable statute. Appellee then initiated this further appeal to this Honorable Court.

⁶ July 23, 2008 Tr. Pg. 5.

⁷ July 23, 2008 Tr. Pg. 6.

⁸ Id.

⁹ July 23, 2008 Tr. Pg. 6-7.

¹⁰ July 23, 2008 Tr. Pg. 7.

¹¹ Id.

¹² Id.

¹³ July 23, 2008 Tr. Pg. 7-8.

ARGUMENT

Appellant's First Proposition of Law:

R.C. 2950.11(F) may only be utilized to remove community notification requirements from a sexual offender's registration duties if the offender was sentenced before January 1, 2008

APPELLEE'S RESPONSE TO APPELLANT'S FIRST PROPOSITION OF LAW:

O.R.C. 2950.11(F) PROVIDES A TRIAL COURT WITH THE LIMITED DISCRETION TO INITIALLY DETERMINE WHETHER COMMUNITY NOTIFICATION IS WARRANTED IN REGARD TO A SPECIFIC INDIVIDUAL TIER III SEXUAL OFFENDERS

Appellee, Stephan J. McConville, respectfully requests this Honorable Court to uphold the plain meaning of Ohio Revised Code¹ 2950.11(F) and determine that trial courts possess limited discretion to initially determine whether an individual labeled as a Tier III sexual offender may be subject to community notification, rather than be automatically lumped together with all Tier III sexual offenders and be required to wait twenty (20) years to explore being relieved of this aspect of the Adam Walsh Act², as requested by Appellant.

Appellant would ask this Honorable Court to hold that this statute is only available for individuals sentenced before the January 1, 2008 amendments to the AWA became effective. However, this phantom language is no where to be found within O.R.C. 2950.11(F), and Appellant would want this Court to read this limiting language into the statute.

“Whether or not the trial court has the authority to suspend the community notification

¹ Hereinafter O.R.C.

requirement is a question of statutory interpretation.”³ It is well established that: “The primary purpose of the judiciary in the interpretation or construction of a statute is to give effect to the intention of the legislature, as gathered from the provisions enacted by application of well-settled rules of construction or interpretation.”⁴

“It is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent.”⁵ Furthermore, “In determining legislative intent, it is the duty of the court to give effect to the words used, not to delete words used or to insert words not used.”⁶ O.R.C. 2950.11 is not ambiguous and is capable of interpretation as written by the General Assembly. The language sought to be included by Appellee simply does not appear in the statute.

“If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly.”⁷ As eloquently stated by Justice William T. Spear of this Honorable Court over a century ago:

But the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.⁸

² Hereinafter AWA

³ State v. McConville, 2009-Ohio-1713

⁴ Henry v. Cent. Natl. Bank, 16 Ohio St.2d 16 (1968).

⁵ Provident Bank v. Wood, 36 Ohio St.2d 101 (1973).

⁶ Columbus-Suburban Coach Lines v. Public Utilities Commission, 20 Ohio St.2d 125 (1969).

⁷ *Id.*, quoting, Sears v. Weimer, 143 Ohio St. 312 (1944).

⁸ Slingluff v. Weaver (1902), 66 Ohio St. 621.

O.R.C. 2950.11 may not be the most artfully drafted statute found in the Ohio Revised Code, but it is not ambiguous concerning the requirement of community notification upon individual sexual offenders sentenced after the January 1, 2008 amendments to the AWA. For example, the Eighth District Court of Appeals found: “After reviewing R.C. 2950.11(F)(1) and (2), we conclude that it is clear that the legislature intended for Tier III sex offenders to be subject to community notification until a court determines otherwise.”⁹ It needs to be pointed out that Gildersleeve did find O.R.C. 2950.11(F)(2) ambiguous, but only as it applies to offenders who were classified prior to the AWA amendments, a situation not at issue in the instant matter. When reviewing the “clear meaning of the words used, applying the rules of grammar and common usage” the intent of the legislature is clear.¹⁰

There can be no realistic dispute that community notification and the relief therefrom is governed by O.R.C. 2950.11. In O.R.C. 2950.11(A), the Ohio General Assembly unequivocally states that if an offender falls into certain categories, “regardless of when the sexually oriented offense...was committed...”, certain notifications will be provided to a defined list of individuals and agencies.¹¹

Likewise, there can be no dispute that O.R.C. 2950.11(F)(1) spells out the exact classes of offenders that are subject to the community notification described in O.R.C. 2950.11(A) and clearly states that a Tier III sexual offender is within the category requiring community notification.¹² However, O.R.C. 2950.11(F)(2) clearly limits (F)(1) as follows:

(2) The notification provisions of this section do not apply to a person described in division (F)(1)(a), (b), or (c) of this section if a court finds at a hearing after

⁹ Gildersleeve v. State, 2009-Ohio 2031, paragraph 72.

¹⁰ In re Guardianship of A.L.K and A.K., 2007-Ohio-509.

¹¹ O.R.C. 2950.11(A)

¹² O.R.C. 2950.11(F)(1)(a)

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. In making the determination of whether a person would have been subject to the notification provisions under prior law as described in this division, the court shall consider the following factors: ***¹³

According to the plain meaning of the words chosen and passed by the Ohio General Assembly, the community notification provisions may not apply to individuals described in O.R.C.

2950.11(F)(1)(a), (b), or (c).

As stated above, Appellee falls into the Tier III category found in O.R.C.

2950.11(F)(1)(a). As such, Appellee is subject to community notification. However, one must then look to the exception carved out by O.R.C. 2950.11(F)(2). Pursuant to this statute, the next step for the trial court to do is to hold a hearing, if a court so chooses, in order to determine whether or not an offender would have been subject to the notification provisions of the previous Megan's Law that existed immediately prior to the January 1, 2008 AWA amendments.

In order to guide trial court's in making the determination as to whether or not an offender would have been subject to community notification under the prior law, the Ohio General Assembly provided a list of eleven (11) factors to be considered by courts. This list is identical to the factors courts were to use to determine whether or not an offender was to be classified as a sexual predator under Megan's law¹⁴. The Ohio General Assembly essentially re-codified these factors for continued use through the AWA.

The Honorable Judge, James M. Burge, of the Lorain County Court of Common Pleas, the trial court in the instant action, at the hearing, each of the eleven (11) factors the Ohio General Assembly mandated that the Court consider prior to relieving the Appellee of his burden

¹³ O.R.C. 2950.11(F)(2), factors omitted.

of community notification under the AWA. Judge Burge did not implement this requirement and properly declined to do so after reviewing and weighing each and every factor contained in O.R.C. 2950.11(F)(2).

For instance, Judge Burge found that Appellee and the complaining witness were the same age (19 years old).¹⁵ The Trial Court also found that Appellee had a minimal prior criminal record, not involving a sexually oriented offense.¹⁶ That Appellee's crime involved a single victim and not multiple victims.¹⁷ That there was no impairment of the victim through drugs or alcohol.¹⁸ That there may be some mental illness involved, however, it can be controlled through medication and does not constitute a threat to the public.¹⁹ That this crime involved "straight sex", further clarified by the Trial Court as "no bondage, no sadomasochism, that type of thing."²⁰ That there was no cruelty or threat of cruelty made to the victim.²¹ The Court further found that Appellee would not have been labeled a habitual sex offender or a habitual child victim offender under the prior version of the law.²² The final factor to be examined is essentially any other behavioral characteristic. To this, Judge Burge explained:

Based on those factors, what's especially important to me in considering this case is the fact that this took place, I believe, in your fiancé's home, there others were present. There was no physical injury. It did not involve a child. And from what's before this Court, I would not find that the community would be better protected if your neighbors were aware of this offense.²³

¹⁴ O.R.C. 2950.09, effective until 1/1/08.

¹⁵ July 23, 2008 Tr. Pg. 6

¹⁶ July 23, 2008 Tr. Pg. 5.

¹⁷ July 23, 2008 Tr. Pg. 6.

¹⁸ Id.

¹⁹ July 23, 2008 Tr. Pg. 6-7.

²⁰ July 23, 2008 Tr. Pg. 7.

²¹ Id.

²² Id.

²³ July 23, 2008 Tr. Pg. 7-8.

One item missing from the above analysis is the phantom language requested by Appellant that this statute somehow should only pertain to individuals sentenced prior to the January 1, 2008 AWA amendments. This imputed language does not exist in this statute. As stated by the Ninth District Court of Appeals:

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 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.**²⁴

The language requested by the state is not in the statute and therefore the prior rulings of the Lorain County Court of Common Pleas and the Ninth District Court of Appeals should be upheld by this Honorable Court.

Appellant's Second Proposition of Law:

R.C. 2950.11(H) is the mechanism by which a sexual offender sentenced on or after January 1, 2008 may petition a court to remove community notification requirement from their dutoes (*sic*) to register as a tier II or tier III sex offender

APPELLEE'S RESPONSE TO APPELLANT'S SECOND PROPOSITION OF LAW:

O.R.C 2950.11(H) IS ONE MECHANISM BY WHICH A SEXUAL OFFENDER MAY PETITION A COURT TO REMOVE A COMMUNITY NOTIFICATION REQUIREMENT UPON A SEXUAL OFFENDER

Appellant would ask this Honorable Court to hold that O.R.C. 2950.11(H) is the sole avenue for a sexual offender, sentenced on or after January 1, 2008, to remove a community notification requirement. Appellee would agree that in some instances, O.R.C. 2950.11(H) does provide an avenue for a sexual offender to be relieved of his or her community notification requirement after a twenty (20) year time period has elapsed. However, this is simply not the issue we are confronted with in the instant appeal.

In the instant case, we are presented with an Appellee who was never required to face community notification as he was relieved from this burden by O.R.C. 2950.11(F). On its face, this statute cannot be applicable to Appellee as the twenty (20) year time requirement does not begin to run until the offender's duty to comply has commenced. In the case at bar, there was no duty to comply placed upon Appellee and therefore the twenty (20) year waiting period will never begin.

²⁴ State v. McConville, 2009-Ohio-1713, emphasis added.

Additionally, Appellant's argument suffers from the same flaw as outlined above. Appellant asks this Honorable Court to read into the statute language that is not present. Appellant would ask this Court to infer that this statute is limited to those offenders sentenced on or after the January 1, 2008 AWA amendments. The General Assembly did not include this language in the statute it contemplated and debated, however, Appellant asks this Honorable Court to substitute the General Assembly's judgment for that of this Court. This is simply not proper or allowable.

CONCLUSION

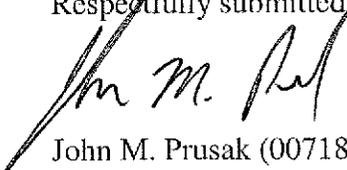
Appellant, the State of Ohio, is asking this Honorable Court to insert language into a statute that is simply not present. There is no language stating the O.R.C. 2950.11(F)(2) is only applicable to offenders sentenced prior to the January 1, 2008 AWA amendments. Actually, to the contrary, O.R.C. 2950.11(A) specifically states that the statute applies "Regardless of when the sexually oriented offense...was committed."²⁵ From the language it chose, it is clear that the Ohio General Assembly did not intend to limit the language found in O.R.C. 2950.11(F)(2) to offenders sentenced prior to 2008. Had it meant to limit the application of this statute in a manner consistent with Appellant's strained argument, it could have done so with little effort.

Appellant's argument concerning O.R.C. 2950.11(H) is similarly flawed. Once again, Appellant asks this court to read into the statute language that is not present. This is clearly not proper. As Justice Spear instructed: "The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact."²⁶

²⁵ O.R.C. 2950.11(A)

²⁶ Slingluff, *supra*

Respectfully submitted,



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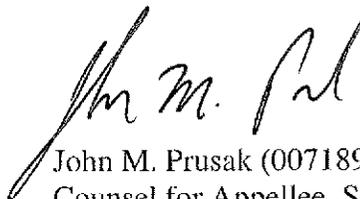
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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellee was served via regular U.S. Mail upon the Lorain County Prosecutor's Office, 225 Court Street, Third Floor, Elyria, Ohio 44035 on the 17 day of November, 2009.



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