

ORIGINAL

IN THE OHIO SUPREME COURT

JOHN BROWNLEE

Appellant

v.

STATE OF OHIO

Appellee

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Case No. 09-2130
Appellate Case No. 2008-CA-0105

ON APPEAL FROM THE SECOND DISTRICT
COURT OF APPEALS

MEMORANDUM IN SUPPORT OF JURISDICTION

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ASSIGNMENTS OF ERROR

1. The Court of Appeals erred by holding that the new sex offender registration law, R.C. 2950.15, could be applied retroactively to defendants whose criminal convictions predated the law.
2. The Court of Appeals erred by holding that the old sexual offender registration law did not permit declassification of offenders of Mr. Brownlee's type.

STATEMENT OF ISSUES PRESENTED

Assignment of Error No. 1: May the new sex offender registration law, R.C. 2950.15 be applied to a defendant who was convicted in 2003 and who is in full compliance with the registration laws that existed at the time of his conviction?

Assignment of Error No. 2: Did the old sexual offender classification law permit sexually oriented offenders to be declassified?

STATEMENT OF FACTS

There are over 18,000 registered sex offenders in the State of Ohio¹. Almost all of these registrants were convicted under the registration laws that pre-date the current R.C. 2950.15. Many of these registrants were convicted as part of negotiated plea arrangements. Presumably, when considering whether to accept a plea arrangement they considered the registration law in effect at the time prior to making a decision. In many cases, including this one, the registrants have been subjected to increasingly restrictive registration laws. Many might have refused a plea arrangement, and exercised their constitutional right to a jury trial, had they known that they would later be subject to restrictions on their liberty not envisioned at the time.

On September 4, 2003, John Brownlee pleaded guilty to nine counts of related sex crimes, including attempted unlawful sexual conduct with a minor, pandering sexually oriented material involving a minor and illegal use of a minor in nudity oriented material or performance, all felonies of various degrees. Subsequent to the sentence, Mr. Brownlee was classified as a sexually oriented offender, under then R.C. 2950.04. The classification process and the

¹ From Klass Kids Foundation;

requirements of registration, as they existed at the time, were explained to him and he consented to the guilty plea with full knowledge of those requirements.

Mr. Brownlee has complied with all requirements of the sexual offender's laws since his conviction in 2003. He currently resides in Pennsylvania, although he does own a home in Ohio and wishes to return. When the sexual offender classification laws changed in 2008, the attorney general failed to reclassify Mr. Brownlee under the terms of the new R.C. 2950.031. He remains classified and subject to the prior classifications of R.C. 2950.04 as it existed prior to January 2008.

The issues presented by this case are of great importance to the citizens of the State of Ohio. Residents of Ohio need to know, at the time they agree to plead guilty to any crime, that their punishment is not going to be enhanced or altered at some subsequent time. Specifically, they need to know whether there exists some future chance that they will be subjected to some "reclassification" process that effects their essential liberty interests, such as where they may reside and whether they are subject to reporting requirements.

STATEMENT OF THE CASE

On September 4, 2003, John F. Brownlee, Jr., was sentenced by the Greene County Common Pleas Court on nine counts of related sex crimes. Subsequent to the sentencing, the trial court ordered Mr. Brownlee to be placed on the sexually oriented offender list, requiring him to register in compliance with R.C. 2950.04, as it read at that time.

In January, 2008, new versions of the sex offender registration laws went into effect in Ohio. The version of the law now in effect would permit Mr. Brownlee to be reclassified as a 4 Tier One offender, eligible for removal from the registry after a period of ten years. To date, Mr. Brownlee has not been reclassified as a Tier One offender.

On October 15, 2008, Mr. Brownlee made application to the trial court for an order declassifying him and removing him from the offender registry. The trial court denied Mr. Brownlee's motion on November 20, 2008.

Mr. Brownlee appealed to the Second District Court of Appeals on December 18, 2008. On October 9, 2009, that Court agreed with Mr. Brownlee that he was not subject to the terms of the new registration law until such time as he had been reclassified. The Court of Appeals disagreed with Mr. Brownlee's argument that the new law could never be applied retroactively or that the old law permitted him to be declassified prior to the expiration of his registration requirements.

Mr. Brownlee now seeks review by this Court so that the issue of retroactive application and declassification may be settled once and for all.

ARGUMENT

Assignment of Error No. 1: May the new sex offender registration law, R.C. 2950.15 be applied to a defendant who was convicted in 2003 and who is in full compliance with the registration laws that existed at the time of his conviction?

As Justice Lanzinger observed in her dissent in *State v. Wilson*, 113 Oho St. 3d 382 (2007):

While protection of the public is the avowed goal of R.C. Chapter 2950, we cannot deny that severe obligations are imposed upon those classified as sex offenders. All sexual predators and most habitual sex offenders are expected, for the remainder of their lives, to register their residences and their employment with local sheriffs. Moreover, this information will be accessible to all. The stigma attached to sex offenders is significant, and the potential exists for ostracism and harassment, as the Cook court recognized. *Id.*, 83 Ohio St.3d at 418, 700 N.E.2d 570. Therefore, I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions.

Justice Lanzinger maintained this position in her dissent in *State v. Ferguson*, 120 Ohio St. 3d 7 (2008). Appellant contends that Justice Lanzinger is correct. The Supreme Court of Kentucky recently held that Kentucky's new registration statute, K.R.S. 17.545, as amended in 2006, had crossed over into being punitive and could not be retroactively applied. *Commonwealth of Kentucky v. Michael Baker*, 2007-SC-000347-CL (September 2009).

A close look at the changes in the statute since Mr. Brownlee was first required to register establishes the punitive nature of the new statutory scheme. According to the State, if Mr. Brownlee is reclassified he would be moved from the sexually oriented offender list (which permits declassification) to the Tier II list, which does not permit declassification. The time period for which Mr. Brownlee is subjected to the registration requirement is also increased. This changes the extent of the penalty imposed upon Mr. Brownlee from one which could be viewed as an inconvenience that would extend for a short period of time to one that would extend for the remainder of his life.

The reasoning of Justice Lanzinger in *Wilson* and *Ferguson* is sound. Given the increasingly punitive nature of the law, courts should decline to apply it retroactively. Mr. Brownlee should not be required to comply with the terms of the new law, either in making a motion to reclassify or in being forced into the new classification scheme.

Assignment of Error No. 2: Did the old sexual offender classification law permit sexually oriented offenders to be declassified?

The Court of Appeals held that the provisions of the old law must continue to apply to Mr. Brownlee until such time as he is reclassified (which he would argue cannot be constitutionally done). Logically, Mr. Brownlee may be removed from the registry so long as removal does not violate the terms of the law that was in effect at the time of his classification. That law permitted him to seek declassification by making an application to the trial court. In

2003, R.C. 2950.15 divided sexual offenders into three classifications. These were sexually oriented offender, habitual sexual offender and sexual predator. The section relating to sexual predators explicitly provided that the offender must remain subject to the registration requirements for life. The section creating the classification of sexually oriented offender, that applied to Mr. Brownlee, is silent as to any procedure for removal.

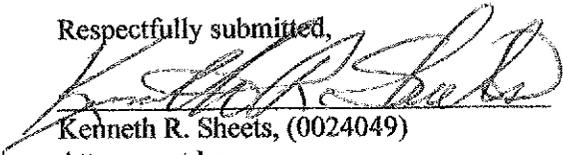
The fact that the legislature explicitly provided that no sexual predator could be removed from the list, but failed to provide that any sexually oriented offender could not be removed from the list implies that they intended that sexually oriented offenders could be removed. This is further supported by the fact that the reclassification under the new law would permit removal from the list.

Since the legislature did not specifically prohibit the removal of Mr. Brownlee from the list but failed to provide a process for review indicates that it was their intention to leave the issue of when a defendant should be removed from the list to the sound discretion of the convicting court. The trial court's refusal to entertain Mr. Brownlee's motion is error.

CONCLUSION

The sexual offender registration laws have crossed a line and have become punitive in nature. They cannot be applied retroactively. This Court should accept this case for review and so hold. The issue is of too great importance to the residents of Ohio to be ignored.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This certifies that a true copy of the foregoing was served upon the State of Ohio by leaving it in the drop basket for the Greene County Prosecutor at the Greene County Clerk's Office this 20th day of November, 2009.



Kenneth R. Sheets

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~~SECOND APPELLATE DISTRICT~~

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COURT OF APPEALS
SECOND APPELLATE DISTRICT

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

STATE OF OHIO :
Plaintiff-Appellee : Appellate Case No. 2008-CA-105
v. : Trial Court Case No. 2003-CR-260
JOHN FREDERICK BROWNLEE, JR. : (Criminal Appeal from
Defendant-Appellant : Common Pleas Court)
FINAL ENTRY

Pursuant to the opinion of this court rendered on the 9th day
of October, 2009, the judgment of the trial court is **Affirmed**.

Costs to be paid as stated in App.R. 24.


MARY E. DONOVAN, Presiding Judge


JAMES A. BROGAN, Judge


THOMAS J. GRADY, Judge

09-10-1407

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In his sole assignment of error, Brownlee contends the trial court erred in applying R.C. Chapter 2950, as amended by S.B. 10, and holding that he did not satisfy its requirements for being removed from the sex offender registry.

Brownlee raises two arguments in support. First, he claims the new sex offender legislation, which took effect in 2008, cannot be applied to him because he was sentenced in 2003. He insists that S.B. 10 is punitive and that its retroactive application would be unconstitutional. Second, he contends the trial court erred in finding that he failed to comply with R.C. 2950.15, which was enacted as part of S.B. 10 and allows Tier I sex offenders to seek termination of their registration requirements. Brownlee argues that the statute's requirements do not apply to him because he filed his motion under pre-S.B. 10 law.

The record reflects that Brownlee was sentenced to community control and classified as a sexually oriented offender following his 2003 conviction on charges of importuning, attempted unlawful sexual conduct with a minor, pandering sexually oriented material involving a minor, and illegal use of a minor in nudity oriented material. Brownlee completed community control in 2007. He now lives in Pennsylvania, where he is registering as a sex offender under that state's law.

In 2008, the Ohio legislature enacted S.B. 10, which created a new sex offender classification scheme. As part of the new system, sex offenders like Brownlee administratively were reclassified by the Ohio Attorney General's office as Tier I, II, or III offenders based strictly on the offenses they had committed. See, e.g., *State v. King*, Miami App. No. 08-CA-02, 2008-Ohio-2594, ¶2. Brownlee was not reclassified by the Ohio Attorney General as a Tier I, II, or III offender, apparently due to his move to Pennsylvania

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In October 2008, Brownlee filed a "motion to declassify." He argued that the requirements of R.C. 2950.15 did not apply to him because he had not been reclassified as a Tier I offender. Because he never had been reclassified under Ohio's tier system, Brownlee maintained that he was entitled to removal from Ohio's sex offender registry under the law that existed in 2003 when he was designated a sexually oriented offender. The trial court nevertheless applied R.C. 2950.15 to Brownlee's motion. It noted that the statute required a motion to include certain documentation. The trial court denied Brownlee's motion due to the absence of the required documentation. This timely appeal followed.

As set forth above, Brownlee first argues that the S.B. 10 amendments to R.C. Chapter 2950 are punitive and that their retroactive application would be unconstitutional. We have ruled, however, that the S.B. 10 amendments to R.C. Chapter 2950 are civil, not criminal, and remedial, not punitive. The new legislation is not an ex post facto law and does not violate the prohibition against retroactive laws. *State v. Barker*, Montgomery App. No. 22963, 2009-Ohio-2774.

With regard to Brownlee's second argument, we agree that the trial court should not have denied his motion for failure to provide the documentation required by R.C. 2950.15. On its face, the statute does not apply to him. It allows Tier I sex offenders to move for termination of their registration duties after ten years and requires various pieces of supporting documentation. Brownlee has not been reclassified under Ohio's new tier system at all because he is living in Pennsylvania. Moreover, if he were reclassified, he would be a Tier II offender by virtue of his convictions for attempted unlawful sexual conduct with a minor, pandering sexually oriented material involving a minor, and illegal

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use of a minor in nudity-oriented material. See R.C. 2950.01(F)(1)(b) and (h); R.C. 2950.01(F)(1)(a); R.C. 2950.01(F)(1)(c). Because Brownlee is not, and will not be, a Tier I sex offender, the trial court should not have applied the documentation requirements of R.C. 2950.15 to his motion.¹

This does not mean, however, that reversal of the trial court's judgment is required. Although the trial court should not have denied Brownlee's motion for failure to comply with the documentation requirements of R.C. 2950.15, its error was harmless as a matter of law. The trial court should have denied the motion for a more fundamental reason: there is not, and has not been, a statutory mechanism for an offender such as Brownlee to be "declassified" as a registered sex offender. After S.B. 10, the available procedure is found in R.C. 2950.15, which applies to Tier I offenders. Prior to Brownlee's September 2003 convictions, a procedure existed for sexual predators to petition for removal of their sexual predator designation. By the time of Brownlee's convictions, the General Assembly had eliminated this provision through S.B. 5, effective July 31, 2003. See *State v. Leftridge*, 174 Ohio App.3d 314, 316, 2007-Ohio-6807. In particular, S.B. 5 amended R.C. 2950.09(D) by deleting language that authorized a petition to remove a sexual predator designation and adding language making clear that a sexual predator designation was permanent. *State v. Horch*, Union App. No. 14-07-47, 2008-Ohio-1484, ¶12.

Although Brownlee was not designated a sexual predator, he seizes on the foregoing change made by S.B. 5 to argue that he was entitled to petition for

¹On appeal, the State suggests that the trial court's error in this regard was "invited" by Brownlee. We disagree. In his motion, Brownlee stressed that he had not been reclassified under Ohio's tier system and asserted that "the provisions of the new R.C. 2950.15 do not apply to him." (Doc. #35 at 1).

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declassification under the law that existed at the time of his convictions. He reasons:

"The fact that the legislature explicitly provided that no sexual predator could be removed from the list, but failed to provide that any sexually oriented offender could not be removed from the list implies that they intended that sexually oriented offenders could be removed. This is further supported by the fact that the reclassification under the new law would permit removal from the list."

Even assuming, purely arguendo, that Brownlee can avail himself of the law that existed at the time of his convictions, his analysis is unpersuasive. Prior to S.B. 10 and the exception for Tier I offenders in R.C. 2950.15, the Revised Code did not provide a way for any adult sex offender to seek early removal "from the list." Rather, for a period of time, it provided a way for sexual predators to seek removal of their sexual predator designation. Even if successful, however, these former sexual predators remained subject to the registration requirements applicable to sexually oriented offenders, who were required to register for ten years. *State v. Cook*, 83 Ohio St.3d 404, 422 n.6, 1998-Ohio-291. We are unconvinced that S.B. 5's act of making a sexual predator designation permanent implicitly was intended to allow sexually oriented offenders to seek early removal from the sex offender registry.

In short, Brownlee is not entitled to declassification under R.C. 2950.15 because he is not a Tier I offender, and nothing in the law that existed prior to the S.B. 10 amendments to R.C. Chapter 2950 provided for adult sexually oriented offenders to be declassified before expiration of their ten-year registration term. Accordingly, the trial court did not err in overruling Brownlee's motion for declassification. His assignment of error is overruled, and the judgment of the Greene County Common Pleas Court is affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

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