

IN THE SUPREME COURT OF OHIO
2009

ORIGINAL

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

MERIT BRIEF OF PLAINTIFF-APPELLEE STATE OF OHIO

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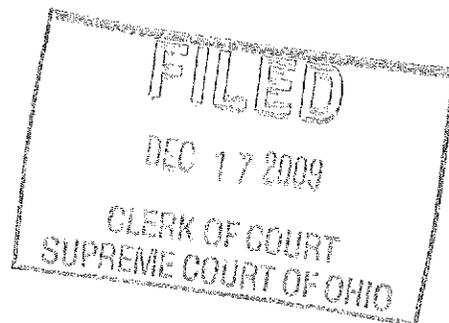


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STATEMENT OF FACTS

Defendant Clayborn pleaded guilty to one count of pandering sexually oriented material involving a minor, a second-degree felony. (Trial Ct. Rec. 42-43) The offense had involved defendant reproducing and giving the materials to a co-worker. (5-27-08 Tr. 8-9) The trial court imposed a jointly-recommended two-year sentence. (Trial Ct. Rec. 45, 47, 49-52; 5-27-08 Tr. 21) The trial court notified defendant in writing and orally of his duty to register as a Tier II offender. (5-27-08 Tr. 11-14; Trial Ct. Rec. 48) The judgment of conviction was filed on May 30, 2008. (Trial Ct. Rec. 45, 47, 49-52)

Regarding the registration-duty notification, the judgment stated, as follows:

In addition, at the time of the plea the Court notified the Defendant that by entering into this plea the Defendant will be a sexual offender and classified pursuant to S.B. 10 as a Tier II with registration duties to last twenty-five (25) years, in person verification required at the county sheriff's office every 180 days.

(Id.)

Defendant filed his appeal on July 15, 2008, more than 30 days after the judgment. (Trial Ct. Rec. 60) 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. (Id.)

The appeal proceeded through merit briefing, with defendant raising six assignments of error challenging the constitutionality of the registration requirements in various respects. (Appeal Ct. Rec. 19) Another assignment of error challenged the constitutionality of the 1,000-foot residency restriction on substantive-due-process and privacy grounds. (Id.)

The State's merit brief opposed the constitutional challenges, but it also pointed out that the challenges could not properly be heard in the pending appeal. (Appeal Ct. Rec. 21, at pp. 4-6) The State contended that defendant could not pursue a direct appeal from the trial court's judgment on sex-offender registration and residency matters because the trial court itself had not imposed the registration duties or the 1,000-foot residency restriction. (Id.) Defendant's grievance was with the statutory scheme, not with the trial court's judgment. (Id.)

A two-judge majority dismissed the appeal as untimely on April 14, 2009. *State v. Clayborn*, 10th Dist. No. 08AP-593, 2009-Ohio-1751 (Appeal Ct. Rec. 35). The majority concluded that the judgment being appealed was a criminal judgment, and the judgment would not be treated as a "civil" judgment "merely because the trial court informed Clayborn that R.C. Chapter 2950 categorized him as a tier II sex offender." Id. ¶ 8. "In the case at bar, no civil proceeding occurred." Id. ¶ 7.

On August 26, 2009, this Court accepted review over defendant's appeal in a 4-3 ruling. *08/26/2009 Case Announcements*, 2009-Ohio-4233, at p. 8.

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 notified the defendant of the Tier II status and even when the giving of such notification 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 and did not impose the registration duties or residency restriction. Defendant's grievance is with the statutory scheme, not with the judgment. As a result, there was no "civil" judgment that could be appealed, and defendant could not invoke the provisions applicable to "civil" cases in order to save the timeliness of his otherwise untimely appeal.

I. Amended Statutory Scheme

As defendant conceded in the Court of Appeals, he 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. See former R.C. 2950.01(D)(1)(b)(iii) (version immediately preceding 1-1-08). At a minimum, such offenders would have been subject to a ten-year registration requirement with annual verification. Such treatment was automatic, see *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, ¶ 16, because it flowed automatically from the fact that the defendant pleaded guilty to or was convicted of a "sexually oriented offense."

Such an offender also was 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, the offender was subject to a lifetime duty to register, with a duty to verify address every 90 days, along with community notification.

The sentencing court also 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 initially enacted in 1997, R.C. Chapter 2950 provided that habitual sex offenders would face registration for 20 years with annual verification and could be subject to community notification if the sentencing court ordered it. In 2003, the General Assembly extended the 20-year registration requirement to lifetime registration for most habituals.

Senate Bill 10 was approved by the Governor on June 30, 2007, and became partly effective on July 1, 2007, with the remainder becoming effective on January 1, 2008. Under Senate Bill 10, defendant’s offense remains a “sexually oriented offense.” R.C. 2950.01(A)(1). Defendant is a Tier II offender because his pandering offense is automatically classified as a Tier II offense. R.C. 2950.01(F)(1)(a).

Under Senate Bill 10, Tier I offenders must register for 15 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 25 years and periodically verify every 180 days. R.C. 2950.05(B)(2); R.C. 2950.06(B)(2). A Tier III offender must register for the rest of his 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. R.C. 2950.11.

II. No Appeal at all on Registration Issues

Although defendant wished to raise constitutional challenges to Senate Bill 10, he could not pursue these challenges in a direct appeal from his criminal conviction. “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 raise constitutional challenges to the 25-year, bi-annual registration requirements and to the 1,000-foot residency restriction, his complaints about these features of R.C. Chapter 2950 were not imposed by the judgment he was seeking to appeal. Although the court notified defendant that he was a Tier II offender having registration obligations, such notification had no legal effect on defendant’s status under the new statutory scheme. The statutory scheme itself operated to impose registration duties on defendant, regardless of the court’s notification.

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 Tenth District 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 *Hayden*, at ¶ 16. 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.” *Zerla*, at ¶ 8. Such duties were imposed by statutory law, not by a court judgment that was subject to appeal.

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 such language 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, (Appeals Ct. Rec. 19), 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 Senate Bill 10, the appropriate remedy would have been to bring a declaratory judgment action.

III. Christian & Conkel

The Tenth District followed *Zerla* in *State v. Christian*, 10th Dist. No. 08AP-170, 2008-Ohio-6304. In *Christian*, the defendant was convicted of unlawful sexual conduct with a minor who was more than four years younger, a Tier II offense. Despite the trial court's "declar[ation]" that the defendant was a Tier II offender, and regardless of the trial court's statement that the defendant must register as such, the Tenth District concluded that the defendant could not complain about such matters in his direct appeal. As stated in *Christian*:

{¶5} Before we can address the merits of appellant's appeal, we must first address the state's argument that because appellant was not aggrieved by the final order from which he now appeals, appellant has no basis upon which to appeal and assert the assigned errors that relate to his classification as a Tier II sex offender.

{¶6} As this court stated in *State v. Zerla*, Franklin App. No. 04AP-1087, 2005-Ohio-5077, discretionary appeal not allowed:

An "[a]ppeal lies only on behalf of a party aggrieved by the final order appealed from." *Ohio Contract Carriers Assn., Inc. v. Public Utils. Comm.* (1942), 140 Ohio St. 160, syllabus. An appellant is "aggrieved" only if a trial court's judgment adversely affects or injures his interests or rights. *Franklin Cty. Regional Solid Waste Mgt. Auth. v. Schregardus* (1992), 84 Ohio App.3d 591, 599; *Tschantz v. Ferguson* (1989), 49 Ohio App.3d 9, 13. Thus, under common law, a party can only exercise the right to appeal if he can demonstrate that: (1) he has a present interest in the subject matter of the litigation, and (2) the judgment of the trial court prejudiced that present interest. *City of Willoughby Hills v. C.C. Bar's Sahara, Inc.* (1992), 64 Ohio St.3d 24, 26; *In re Guardianship of Love* (1969), 19 Ohio St.2d 111,

Id. at ¶6.

{¶7} In *Zerla*, the defendant appealed from the trial court's entry that did not classify the defendant as a sexual predator but, rather, classified him as a sexually oriented offender. This court noted that the defendant's status as a sexually oriented offender arose by operation of law and not as a result of the trial court's judgment. Though the trial court's judgment entry indicated Zerla was a sexually oriented offender, and that Zerla was required to register, the entry "merely reiterates the label and requirements already imposed by operation of law." Id. at ¶8, citing *State v. Hampp* (July 17, 2000), Ross App. No. 99CA2517. Because the only judicial determination was the finding of Zerla not to be a sexual predator, and this benefited, not aggrieved him, this court held Zerla had no standing to appeal from the trial court's decision and entry. "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, at syllabus paragraph two ("If a defendant has been convicted of a sexually oriented offense as defined in R.C. 2950.01(D), and is neither a habitual sex offender nor a sexual predator, the sexually oriented offender designation attaches as a matter of law."); see, also, *State v. Morgan*, Franklin App. No. 06AP-620, 2007-Ohio-1700 (because the defendant's status as a sexually oriented offender arose by operation of law, the trial court did not impose the designation, the relevant statute did, and the assignment of error relating to his classification was dismissed); *State v. Green* (Dec. 12, 2001), Hamilton App. No. C-010503 (because Green's status as a sexually oriented offender arose by operation of law, his classification as a sexually oriented offender was not properly appealable because it did not result from a judgment and the appeal was dismissed); *State v. Moyers* (2000), 137 Ohio App.3d 130 (the defendant was classified as a sexually oriented offender by operation of statute, not by court judgment; therefore, the court did not consider any of the assigned errors alleging various

constitutional violations); *Hampp*, supra (the appeal was dismissed because defendant's status as a sexually oriented offender arose by operation of law, not by court action).

{¶8} Although 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.

{¶9} Further, to the extent appellant contends the trial court used its discretion in deciding to sentence him under Senate Bill 10 as opposed to Senate Bill 5, we disagree. At sentencing, appellant's counsel stated, "I just want to object to him being classified as a Tier II Sexual Offender as we believe he would have been classified as a Sexually Oriented offender under the old system." (Jan. 31, 2008 Tr. at 5.) Maybe if appellant had appeared at his scheduled sentencing in February 2007, or anytime prior to January 1, 2008, his classification would have been different. However, as the state said at sentencing, the General Assembly passed Senate Bill 10 and it was in effect at the time of appellant's hearing on January 31, 2008. Pursuant to that statute, Senate Bill 10 was applicable because of appellant's sentencing date, and the trial court had no discretion not to apply the current version of the statute.

{¶10} Upon review, we find appellant, like *Zerla*, has no standing to assert his stated assignments of error in the current proceeding. There are, however, other adequate legal avenues by which appellant's constitutional concerns may be addressed, such as a declaratory judgment action. Nonetheless, because there is no standing to do so from the judgment at issue here, we dismiss the instant appeal.

In *State v. Conkel*, 10th Dist. No. 08AP-845, 2009-Ohio-2852, the Tenth District

followed *Christian* in the case of a rapist who was challenging the constitutionality of his Tier III classification in his direct appeal:

{¶8} In his third, fourth, and fifth assignments of error, appellant challenges the constitutionality of his tier III sex offender classification mandated by R.C. 2950 et seq., effective January 1, 2008. However, this court has held that a defendant does not have standing to challenge the sex offender designation in a direct appeal from the criminal conviction. *State v. Christian*, 10th Dist. No. 08AP-170, 2008-Ohio-6304, ¶10; see also *State v. Zerla*, 10th Dist. No. 04AP-1087, 2005-Ohio-5077, ¶8. In *Christian*, we reasoned that because a trial court makes no judicial determination of a sex offender's tier classification (which arises by operation of law based on the conviction) and, therefore, does nothing more than notify the defendant of requirements already imposed by law, a defendant is not aggrieved by the trial court's final order in this regard. *Id.* at ¶8. Accordingly, we overrule appellant's third, fourth, and fifth assignments of error.

IV. No Basis to Distinguish *Zerla*, *Christian*, or *Conkel*

Defendant might attempt to distinguish the *Zerla-Christian-Conkel* line of authority, but no such distinction should apply.

Because this Court addressed various constitutional challenges on direct appeal from the convictions in *State v. Cook* (1998), 83 Ohio St.3d 404, defendant might contend that appellate courts generally have the ability to review constitutional challenges to sex-offender registration requirements on direct appeal. But *Cook* was addressing an appeal in which the trial court had found the defendant to be a sexual predator, not just a sexually oriented offender. The trial court's own action in classifying the defendant therefore triggered heightened registration requirements pertinent to such predators. In addition, the statute authorized an appeal from the

predator determination. Former R.C. 2950.09(B)(3) (as effective 1-1-97 – prosecutor and offender “may appeal as a matter of right the judge’s determination under this division as to whether the offender is, or is not, a sexual predator.”).

As the many cases cited in *Christian* show, it was different when the defendant had prevailed on the predator issue and the trial court therefore had not issued a ruling that triggered heightened requirements under the statutory scheme.

In any event, *Cook* did not address the issue of appealability vis-à-vis mere sexually oriented offenders, and therefore it cannot be taken as dispositive on that question. There are no “implicit” precedents, and courts are not bound by “perceived implications” of an earlier decision that did not “definitively resolve” the issue. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶¶ 10, 12.¹

Defendant might also point to Judge Bryant’s dissent in *Christian*, in which she attempted to distinguish *Zerla*, as follows:

{¶14} The facts here are different. Although appellant’s classification as a Tier II offender arises by operation of law under the recently enacted legislation, his classification is not the issue on appeal. Instead, the issue is whether appellant’s being classified pursuant to the new legislation amounts to a retroactive application of the newly enacted law as prohibited under Section 28, Article II, Ohio Constitution or any of the other constitutional provisions appellant both asserted in his objection in the trial court and cites in his assigned errors on appeal.

¹ Without stopping to address the issue of appealability, some appellate courts have entertained constitutional challenges to Senate Bill 10 on direct appeal from the criminal judgment. Defendant might cite these cases as precedent for the view that such challenges are properly heard in such appeals. But such cases would not constitute precedent. There are no implicit precedents, see *Payne*, so decisions not addressing the appealability issue would not constitute precedent on that issue.

{¶15} Unlike the facts in *Zerla*, the trial court here decided something that did not happen by operation of law: the court determined if not expressly, at least tacitly, that appellant's classification would be determined under the new law rather than the law existing at the time appellant committed the crime underlying his conviction. Appellant has a right to appeal the trial court's adverse decision and to have this court review the constitutionality of the trial court's decision.

But *Zerla* is not distinguishable on these grounds. *Zerla* was contending that the trial court had wrongly referred to him as having committed a sexually oriented offense. The trial court had stated that "Defendant is classified as a Sexually Oriented Offender and shall be subject to the reporting requirements of that classification." *Zerla*, at ¶ 3. The assignment of error presented by *Zerla* was a constitutional challenge to the sexually-oriented-offender label and duties recognized by the trial court. *Zerla* could not appeal because the statutory scheme, not the trial court, imposed such label and such registration obligations. *Christian* was indistinguishable from *Zerla* in this respect, as both involved a trial court "at least tacitly" concluding that "the new law [applied] rather than the law existing at the time appellant committed the crime underlying his conviction." Even so, neither offender could appeal.

V. Dissent Below was Flawed

Judge Bryant's dissent in the present case suffers from a similar flaw as her dissent in *Christian*. The majority below had distinguished *State v. Furlong* (2001), 10th Dist. No. 00AP-637, in which the Tenth District had treated the defendant's appeal as "civil" for purposes of timeliness. In the present case, Judge Bryant thought that *Furlong* was on point:

{¶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.

Judge Bryant's reliance on *Furlong* was misplaced. Because *Furlong* was appealing from a predator determination, and because the predator determination was appealable by express statutory language, *Furlong* is inapposite to the present case. The trial court had actually done something in *Furlong* to affirmatively prejudice the defendant's registration status by labeling him a sexual predator.

Defendant Clayborn suffered no prejudice vis-à-vis registration duties. His offense of conviction is a "sexually oriented offense" automatically, and his status as a

Tier II offender follows by operation of law. The trial court did nothing to increase such status. Again, defendant's complaint is with the statutory scheme, not with anything the trial court did. As the majority correctly recognized, "[i]n the case at bar, no civil proceeding occurred."

Judge Bryant presupposed that the trial court's failure to find Senate Bill 10 unconstitutional created a civil proceeding that could be appealed. Defense counsel had objected on retroactivity and ex post facto grounds to the application of Senate Bill 10 to defendant. (5-27-08 Tr. 9-10) The trial court nevertheless proceeded to notify defendant of Tier II registration duties.

The problem here is that the court did not really rule on the retroactivity or ex post facto issues. The court "noted" the objection, (Id. 10), but it did not rule on the objection, saying that some other court might rule on constitutionality down the road. (Id. 11-12) The trial court noted that constitutional objections were being made in other state and federal courts, "and I don't know what is gonna come of them, but in the meantime, I have to go on what the law tells me today until some other court tells me differently." (Id. 12) This amounts to a non-ruling on the constitutional issues, with the trial court leaving constitutionality up to other courts. Given that the court had noted that Senate Bill 10 "automatically makes you a Tier II sexual offender when you commit certain offenses, and this is one of them," (Id. 11), it is apparent that the court was not ruling on the constitutionality of the Tier II classification, but, rather, was merely relaying information to defendant as to how the classification would work (unless another court found it unconstitutional).

Even if the trial court had actually ruled, the appealability problems still would exist. The trial court would have had no basis to issue a ruling on constitutionality, as such a ruling would have amounted to an advisory opinion. Because the statutes themselves impose the registration duties, and because a constitutional ruling would not have prevented the operation of the statutes, the ruling would have been purely advisory.

It must be emphasized that a criminal court is a court of *law*, not a court of equity. “A court of equity is in no sense a court of criminal jurisdiction.” *State ex rel. Chalfin v. Glick* (1961), 172 Ohio St. 249, 252. “Except where there is express statutory authority therefor, equity has no criminal jurisdiction * * *.” *Id.* at 252 (quoting *Corpus Juris Secundum*).

A criminal court does not have a roving commission to right all of the wrongs perceived by a defendant vis-à-vis how his conviction will purportedly be misused in an unconstitutional way. A criminal court does not have a general civil jurisdiction over the defendant, and such court has no jurisdiction to reach out and enjoin third parties administering the statutory scheme, especially when they have not been given notice and an opportunity to be heard. See, e.g., *State v. Thoman*, 10th Dist. No. 05AP-817, 2006-Ohio-1651, ¶ 11 (criminal court’s order issued against Children Services vacated; “nowhere in the applicable statutes is the court given authority to order parties other than the offender to do any acts as a condition of the offender’s community control sanction.”; emphasis sic); *State v. DeMastry*, 5th Dist. No. 05CA15, 2005-Ohio-5175, ¶26 & n. 4 (“The criminal charges were brought by the State of Ohio, not Fairfield

County. As such, the trial court has no jurisdiction arising from the criminal case to order Fairfield County to act.”; “even when an agency of the State is bound by a plea agreement, the criminal trial court that presided over the criminal matter has no authority over that agency unless that agency was a party to the criminal case.”); *State v. Cole*, 5th Dist. No. 2004-CA-108, 2005-Ohio-3048, ¶ 16 (complaint about Parole Board violating plea agreement not properly raised in motion to withdraw plea; “Although the parole board is an agent of the state, and bound by the plea agreement, the parole board is not a party in this criminal matter. The trial court had no authority over the parole board. A civil declaratory judgment action is the proper remedy in this instance.”).

Judge Bryant wrongly assumed that the criminal court could regulate, limit, or constrain how the statutory scheme would operate, when, in fact, the criminal court would have had no such authority.

In his reply brief below, (Appeal Ct. Rec. 25), defendant also wrongly assumed that the criminal court could decide the constitutional issues because a “substantial right” was involved. While constitutional rights are “substantial rights,” a defendant cannot use his criminal case as a vessel into which he can pour every constitutional objection he might have regarding how his conviction will be used by state or local officials in the future. The criminal court is not the defendant’s all-purpose civil court, and his objection to regulatory schemes using the conviction is simply not properly heard in the criminal court.

In the final analysis, the advisory opinion problem would remain. While the trial court acknowledged defendant's Tier II status and registration duties, the act of vacating the trial court's acknowledgment would have zero effect on such status and duties. The statutory scheme would remain.

As a result, Judge Bryant erred in thinking that a constitutional ruling by the trial court would have created a "civil" proceeding that could be appealed. An advisory opinion on constitutionality would not have created anything, but, rather, would have been a nullity. "It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect." *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14. Because courts at all levels must refrain from advisory opinions, a constitutional ruling by the trial court against defendant in this problematic context still would not have created an appealable issue.²

Finally, Judge Bryant erred in thinking that there was a double standard at work. She opined that "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." There is no such

² Judge Bryant's analysis would be problematic in the additional respect that defense counsel raised only two constitutional objections to Senate Bill 10's registration duties, i.e., retroactivity and ex post facto, and counsel did not object at all to the residency restriction. (5-27-08 Tr. 9-10) But defendant on appeal wished to raise numerous additional constitutional challenges and wished to challenge the residency restriction. If appealability really hinged on the trial court's purported ruling, appealability would have been limited to the issues raised in the trial court.

double standard involved. The State and the majority below were not disputing that sex-offender classification proceedings are civil in nature. The problem is not “civil” versus “criminal.” Rather, the problem is whether this defendant was aggrieved by a judgment that merely mimics the sex-offender classification and registration duties that the statutory law itself imposes.

VI. Notification Obligation Irrelevant to Appealability

Defendant might contend that a finding of unconstitutionality would have prevented the court from giving the notification of registration duties so that defendant could thereafter avoid his Tier II registration duties by reason of the trial court’s intentional inaction. But such an argument would be flawed for several reasons.

When a trial court imposes community control on a sex offender, the obligation of informing the offender of the registration duties falls on the trial court at the time of sentencing. R.C. 2950.03(A)(2). If the offender is sent to prison, the obligation falls on the ODRC before release from prison. R.C. 2950.03(A)(1).

Inasmuch as defendant received prison in the present case, the duty to notify fell on the ODRC. The trial court had no obligation to notify defendant of registration duties, and the court’s inaction would have accomplished nothing under the statutory scheme.

Even if the court had been operating under a statutory obligation to give notification, such statutory provisions still would not establish that defendant had standing to complain on direct appeal about the statutory scheme’s imposition of registration duties.

A notification requirement would not mean that *the court* is imposing such registration requirements. The statutory scheme imposes the requirements; the court is merely a conduit for the information that the General Assembly wishes to convey to the would-be registrant. As recognized in *Smith v. Doe* (2003), 538 U.S. 84, requiring the trial court to notify the offender of registration duties does not show a punitive legislative intent. “Invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive.” *Id.* at 95-96. Equally so, requiring the trial court to give such notifications does not mean that the court itself is imposing such requirements.

In addition, it would be wrong to assume that, absent notification from the court, the registration duties would have no application. The absence of such notification “does not affect the duty to register.” *State v. Freeman*, 8th Dist. No. 86740, 2006-Ohio-2583, ¶19, quoting *State v. Cooper*, 1st Dist. No. C-030921, 2004-Ohio-6428, ¶ 23. In *Cooper*, the First District stated:

While R.C. 2950.03(A)(2) provides that, at the time of sentencing, the trial court shall notify a sexually oriented offender that he has a duty to register and to verify his address annually with the sheriff in his county of residence, failure to provide the notice does not affect the duty to register. The duty to register does not, as Cooper argues, arise from the hearing or a court order.

Cooper, ¶ 23; *Freeman*, ¶ 14 (“although the trial court should have given Freeman notice at his sentencing of his duty to report, its failure to do so does not affect his duty to register.”). Nothing in R.C. Chapter 2950 hinges the duty to register on the giving of the notification under R.C. 2950.03. The duty to register applies regardless of some error in the notification and regardless of whether there was a failure to notify.

The lack of a “hinge” effect is shown by rulings recognizing that a failure-to-register offense is a strict-liability offense. *Cook*, 83 Ohio St.3d at 419-20 (“no scienter requirement indicated in R.C. 2950.04”; “The act of failing to register alone, without more, is sufficient to trigger criminal punishment provided in R.C. 2950.99.”); *State v. Blanton*, 10th Dist. No. 08AP-844, 2009-Ohio-5334.

Even if defendant could have prevailed on the trial court to withhold giving the notification, it would not have affected the obligations imposed by statute on defendant. Since those obligations are imposed by statute, a refusal by the court to give notification would have had no effect; the statutes would still require registration.

It bears emphasis here that, for imprisoned Tier II offenders like this defendant, the court plays no statutory role in notification. The ODRC gives the notification before the offender’s release from prison. The differing identity of the notifier depending on whether imprisonment is imposed shows that the General Assembly views the registration requirements as something imposed by statute, not something imposed or ordered by the court. The ODRC gives notification to prisoners, and the court only steps in to notify when no prison is imposed. Since the ODRC itself is not imposing the registration requirements when it notifies the prisoner, neither is the court.

A narrow basis for appeal tied to the notification obligation might be envisioned in cases involving the crime of unlawful sexual conduct with a minor. Unlike most of the crimes treated as “sexually oriented offenses” under R.C. 2950.01(A), which in the vast majority of cases are determined solely by the section or subsection involved in the offense of conviction, the registrability of unlawful-sexual-conduct offenders can turn on

case-specific facts involving consent, the existence of prior convictions, and/or the age difference. As part of its duty to notify of registration obligations, the trial court in some cases may need to referee disputes about such issues in order to accurately notify the offender of his registration obligations. But no such problem is involved here.

VII. Residency Restriction not Appealable

Defendant also wished to challenge the 1,000-foot residency restriction in R.C. 2950.034 in his appeal. But, in addition to the grounds stated above, there were additional reasons for not entertaining a challenge to the 1,000-foot residency restriction.

First, there is no indication that the residency issue would have been ripe for review. The ripeness doctrine generally prevents “courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Abbott Labs v. Gardner* (1967), 387 U.S. 136, 148. “The basic principle of ripeness may be derived from the conclusion that ‘judicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote.’” *State ex rel. Elyria Foundry Co. v. Industrial Comm.* (1998), 82 Ohio St.3d 89, 89 (quoting law review).

Defendant’s challenge to R.C. 2950.034 was purely hypothetical. The appellate record did not show that he resided within 1,000 feet of a prohibited location, that he had immediate plans to move near a prohibited location, or that he was forced to move from a residence near a prohibited location. Defendant’s arguments were apparently based on the assumption that he may – someday – be subject R.C. 2950.034.

“[A] defendant lacks standing to challenge the constitutionality of R.C. 2950.031 [now R.C. 2950.034] where the record fails to show whether the defendant has suffered an actual deprivation of his property rights by operation of R.C. 2950.031 [now R.C. 2950.034].” *State v. Pierce*, 8th Dist. No. 88470, 2007-Ohio-3665, ¶ 33, affirmed, 120 Ohio St.3d 321, 2008-Ohio-6248; see, also, *State v. Peak*, 8th Dist. No. 90255, 2008-Ohio-3448, ¶ 8. Because there is no indication of an “actual deprivation of property rights,” defendant would have lacked standing to appeal on the residency restriction. *State v. Gilfillan*, 10th Dist. No. 08AP-317, 2009-Ohio-1104.

An argument that he may be forced to move if a school, preschool, or day-care center opens near his home also would fail for lack of ripeness. *Hyle v. Porter*, 170 Ohio App.3d 710, 2006-Ohio-5454 (*Hyle I*), ¶ 21, overruled on other grounds, *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542 (*Hyle II*). This argument “would be more appropriately raised at an injunction hearing after the speculative facts of which he now complains have come to fruition.” *Hyle I*, at ¶21.

Even if the constitutional challenge were ripe, defendant still could not raise the challenge in this appeal. The statute imposes the restriction, not the trial court. In addition, even if defendant relies on the court’s duty under R.C. 2950.03(A)(2) in some cases to notify a defendant of registration requirements, it is notable that there is no requirement therein that the offender be notified of the 1,000-foot restriction. The residency restriction applies regardless of registration obligations, and even applies to offenders whose registration obligation has expired. Again, defendant’s complaint is with the statute, not with the court’s judgment.

VIII. 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 should be overruled.

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 the vast majority 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 was appealable, 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. If this Court wishes to opine on the constitutional issues without a remand, the State would request notice and an opportunity to be heard on the merits of the constitutional issues (or on the merits of any other new issues the Court might raise sua sponte). *Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 301 & n. 3; *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170.

CONCLUSION

For the foregoing reasons, plaintiff-appellee State of Ohio requests that this Court affirm the judgment of the Tenth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered on this 17th day of Dec., 2009, to the office of Allen V. Adair, 373 South High Street, 12th Floor, Columbus, Ohio 43215, counsel for defendant-appellant.



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