

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,

Appellee,

Case No. 09-971

vs.

Byron Clayborn,

Appellant.

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

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REPLY BRIEF OF APPELLANT BYRON CLAYBORN

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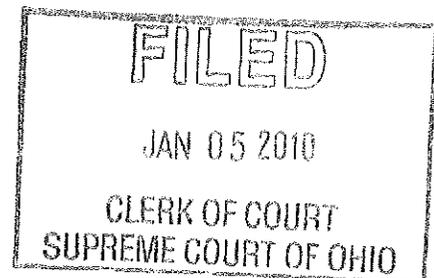
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## REPLY OF APPELLANT

The state's brief maintains. "Although defendant wished to raise constitutional challenges to Senate Bill 10, he could not pursue those challenges in a direct appeal from his criminal conviction." The brief cites the syllabus to Contract Carrier Assn. v. Public Utilities Commission of Ohio (1942), 140 Ohio St. 3d 160, for the proposition that appeals are not for the purpose of settling abstract questions when the appellant is not directly affected. Plainly the appellant in this case was adversely affected by the judgment of the trial court. Had the court sustained his constitutional challenges, and, as suggested by the judge at page 11 of the transcript, classified him as a sexually oriented offender under the law in force at the time the offense was committed, his obligation to register would have been limited to ten years. Instead he faces twenty-five years of registration and exposure to prosecution for failure to meet the more demanding requirements of the S.B. 10 version of Chapter 2950.

### **I. The split between the majority and dissent in the Court of Appeals.**

Appellee took the same position in the Court of Appeals. Though the Tenth District's opinion was not framed in the same terms as the state's brief, the argument appears to have been persuasive, and to have been the point of departure between the majority and dissenting opinions.

The stated basis for the majority's decision to dismiss the appeal was that the appeal was taken in "a quintessential criminal case," and, unlike State v. Furlong, Franklin App. No. 00AP-637, "In the case at bar, no civil proceeding occurred." State v. Clayborn, Franklin App. No. 08AP-593,

¶7. Paragraph eight of the majority opinion states:

Relying upon State v. Hayden, 96 Ohio St. 3d 211, 2002-Ohio-4169, the dissent asserts that a defendant's sex offender classification, even if imposed as a matter of law through operation of a statute, is civil in nature. While we do not disagree, we do not believe that the underlying case is a "civil case" merely because the trial court informed Clayborn that R.C. Chapter 2950 categorized him as a tier II sex offender.

In response, the dissent states at paragraph sixteen:

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 to be an anomaly to reverse the characterization in the single instance where a benefit accrues from this characterization.

Appellant submits that the dissent offers the correct assessment of the proceedings in the trial court.

For most adults, classification into Tiers I, II and III is not discretionary. However, as further discussed below, Chapter 2950 imposes a number of duties upon judges at the time of sentencing, including determining which tier an offender falls into when the charging statute may result in placement in multiple tiers. But the denial of relief from tier classification based on ex post facto, retroactivity, and other constitutional claims is a judicial determination, subject to appellate review. Since State v. Cook, 83 Ohio St. 3d 404, 1998-Ohio-291, Chapter 2950 has been held civil in nature. Thus this aspect of proceedings in the trial court, according to precedent, was civil in nature, and therefore subject to the tolling provision of Appellate Rule 4(A) since the trial court failed to instruct the clerk to make service in accordance with Civil Rule 58(B).

## **II. The duties of the judge under Senate Bill 10.**

Though placement in a specific tier is based on the offense and prescribed by statute, judges are assigned duties in the process.

Some statutes include alternative theories of culpability which, upon conviction, may result in offenders falling into different tiers. For example, gross sexual imposition (R.C. 2907.05) may be a Tier I, Tier II or Tier III offense. Certainly improper or mistaken classification must be subject to appellate review. Otherwise an individual may be prosecuted for violation of obligations he is not subject to, based on an improper classification set forth in a judgment entry.

With respect to some more serious offenses, R.C. 2929.19(B)(4) further commands the court, "include in the offender's sentence a statement that the offender is a tier III sex offender/child-

victim offender..." R.C. 2929.23 gives judges similar duties when passing sentence on sexually oriented misdemeanors. Division (A) of that statute corresponds to R.C. 2929.19(B)(4). Division (B) states:

If an offender is being sentenced for a sexually oriented offense or a child-victim oriented offense committed on or after January 1, 1997, the judge shall include in the sentence a summary of the offender's duties imposed under sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code and the duration of the duties.

The judge shall inform the offender, at the time of sentencing, of those duties and their duration. If required under division (A)(2) of section 2950.03 of the Revised Code, the judge shall perform the duties specified in that section or, if required under division (A)(6) of section 2950.03 of the Revised Code, the judge shall perform the duties specified in that division.

Though appellant was sentenced for a felony, the judgment entry included such a summary of his duties under Chapter 2950.

R.C. 2950.03(A) requires various officials, including judges, to provide notice to those subject to a duty to register regarding the offender's, "duties imposed under sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code..." R.C. 2950.03(A)(2) provides:

Regardless of when the person committed the sexually oriented offense or child-victim oriented offense, if the person is an offender who is sentenced on or after January 1, 2008 for any offense, and if division (A)(1) of this section does not apply, the judge shall provide the notice to the offender at the time of sentencing.

Based on this language, the common practice is to advise all convicted sex offenders on their future duties, whether the court imposes community control or a prison sentence. Duties vary by tier, particularly with regard to duration and community notification. Proper advisement requires that the judge determine what tier an offender falls into, in order for the court to carry out its obligations pursuant R.C. 2950.03(B). In fact the trial judge did so in this case, providing advise as to the obligations of a Tier II offender during the plea colloquy in response to counsel's entry of constitutional challenges. (Tr. 11-15.) Appellant also filled out the required form, which R.C. 2950.03(B)(3)(a) requires the court forward to the state bureau of criminal identification and investigation and to the sheriffs of the county of conviction and counties where the offender will have a duty to register.

Appellee's brief, at page 18, suggests the judge in the case at bar was under no obligation to provide an advisement since appellant did not receive community control. However, the interplay between divisions (A)(1) and (2) is difficult to discern. Division (A)(1) requires advisement by jail and correctional facility personnel to those completing a sentence on or after the January 1, 2008 effective date of S.B. 10, thus reaching back to cover anyone completing a sentence for a sexually oriented offense, even if imposed in the distant past. But (A)(2) on its face does not limit advisement to community control cases, or preclude advice on tier placement and consequences in prison cases. Neither division is clear as to who bears the responsibility when judicial release is granted, and matters are further complicated by Division (C) which covers forwarding of information by various officials, including judges, involved in the gathering process.

Appellant further argues even a complete failure to provide an advisement would be of no consequence. This may or may not be true. The statutes within Chapter 2950 are lengthy, and efforts towards precision have not brought clarity. Recent cases involving postrelease control notification have taught comprehension of statutory language is an evolutionary process.

### **III. The necessity of pursuing an appeal.**

The state's brief contends, "Defendant's grievance is with the statutory scheme, not the judgment. (Brief, p. 3.) Appellant's problem is, in fact, with the statutory scheme, and in order to vindicate his substantial rights he is entitled to challenge that scheme in an appeal from his conviction.

"Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

[R.C. 2505.02(A)(1).] In the Court of Appeals appellant's assignments of error invoked Article I, Sections 1, 10 and 16; Article II, Section 28; and Article IV, Sections 1 and 3 of the Ohio Constitution. They invoked Article I, Section 10, and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Appellant's substantial rights being at stake, the court's determination that he be sentenced subject to the revised statutes, over his objection, and

placed in a specific tier, fell within the scope of the final appealable order in this case. Thus:

Every final order, judgment, or decree of a court \* \* may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme Court, whichever has jurisdiction.

[R.C. 2905.03)(A).]

Even if the disposition with regard to sex offender classification could somehow be separated from the judgment in this case, as appellee argues, it would remain appealable as the final order in a special proceeding in which the trial court rejected appellant's constitutional claim and classified him in Tier II.

"Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

[R.C. 2905.02(A)(2).]

(B) An order is a final appealable order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

\* \* \*

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

[R.C. 2905.02(B)(2).] Again, an appeal lies.

#### **IV. Discussion of cases relied upon by appellee..**

Appellee mistakenly relies on Ohio Contract Carriers Assn. v. Public Utilities Commission of Ohio (1942), 140 Ohio St. 3d 160. The syllabus in that case states:

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.

Contract Carriers is a standing case. It involved a World War II era Public Utilities Commission order concerning motor carriers in the Toledo area. What the association's objections to the order were is not stated in the opinion - the merits were not reached. The association claimed standing based on a provision in the General Code permitting the P.U.C. to cooperate with such associations,

but this was rejected as the association only represented a small percentage of carriers, and did not claim to represent the interest of any specific permit holder. Thus it was not "aggrieved." Appellant clearly is aggrieved: He has been made subject to laws not in force at the time his offense was committed.

Appellee also cites State v. Zerla, Franklin App. No. 04AP-1087, 2005-Ohio-5077. The assignment of error was, "The trial court erred in finding Appellant to be a sexually oriented offender subject to the registration requirements of Revised Code Chapter 2950." The claim advanced in the brief was that designation of all sex offenders as sexually oriented offenders without assessment of risk, and the resulting imposition of registration requirements, violated substantive due process. Essentially the Court was asked to determine whether such default classification under former Chapter 2950, not claimed to affect fundamental rights, had a rational basis. Cf. Massachusetts Board of Retirement v. Murgia (1976), 427 U.S. 307, 314.

Zerla was incorrectly decided. Assuming Mr. Zerla had properly developed his claims in the trial court, the merits should have been addressed. Given the general tenor of litigation in the "Megan's Law" era they no doubt would readily have been rejected. Instead the court relied on Contract Carriers and other cases, concluding the trial court had only acted as a "rubber stamp" with regard to default classification as a sexually oriented offender. If applied broadly, such a view seemingly nullifies a criminal defendant's ability to mount constitutional challenges to any statutory provision.

Even if this court finds Zerla persuasive it has no bearing on the ex post facto and retroactive law arguments advanced in the first and second assignments of error advanced in the Court of Appeals: Retroactive application is at issue, not the sensibility of the classification scheme itself. At most Zerla might reach the fourth assignment of error, concerning residency restrictions. Otherwise, the remaining assignments of error arise from retrospective application of amended statutes, and, contrary to appellee's assertion, from the judgment being appealed.

Appellee cites Tenth District decisions in State v. Christian, Franklin App. No. 08AP-170,

2008-Ohio-6304 and State v. Conkel, Franklin App. No.08AP-845, 2009-Ohio-2852. Neither case was cited by the majority or dissent in the present case, but provide background for understanding the division.

Christian was comparable to the present case, except the notice of appeal was filed within thirty days, making the civil/criminal distinction of no immediate consequence. The court dismissed the appeal, following the Zerla reasoning that tier classification was not judicially determined, thus appellant did not have standing to appeal. Judge Bryant dissented, as she did in the present case.

I agree with the decision in Zerla. The trial court in that case determined Zerla was not a sexual predator. Nonetheless, his conviction meant he was classified by operation of law as a sexually oriented offender. This court concluded Zerla had no standing to appeal because: (1) the trial court made no decision other than to conclude Zerla was not a sexual predator, a decision that did not aggrieve Zerla, and (2) his sexually oriented offender status arose without any action or decision of the trial court.

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 error on appeal.

Unlike the court 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.

Christian, 2008-Ohio-6304, ¶13-15. Present counsel was also counsel for Mr. Christian. Mr. Christian did not respond to correspondence concerning seeking further review by this court, so the case did not go forward. State v. Conkel, supra, at ¶8 simply cited Christian and Zerla and overruled three assignments of error challenging the defendant's sex offender classification. There was no dissent.

## **V. Standing has not been at issue in other Chapter 2950 cases.**

Standing was not an issue in the four lead cases before this court testing the constitutionality of the Senate Bill 10 version of Chapter 2950. Nor should it be for appellant. In State v. Bodyke, No. 2008-2502 three individuals previously convicted of sex offenses got classification notices from the Attorney General and filed petitions contesting classification and asking for relief from community notification. The constitutional challenges taken up by this court were raised in their petitions for relief, though no express provision was made for including such challenges. Appellant's constitutional challenges advanced in the trial court sought relief in the same manner as did these individuals. Nor was standing an issue in Chojnacki v. Ohio Attorney General, No. 2008-991, the right to counsel case, or in the two juvenile cases, In re Smith, No. 2008-1624 and In re Adrian R., No. 2009-189. The juvenile cases concern the degree of discretion granted judges in sex offender classification under S.B. 10. While judges in adult cases have less discretion, as noted, they also are given duties under the S.B. 10 version of Chapter 2950.

Nor was standing an issue in State v. Hayden, 96 Ohio St. 3d 211, 2002-Ohio-4169. That case involved a defendant sentenced in 1984. In 1999 an entry was put on classifying his as a sexually oriented offender, the default classification when one was neither a sexual predator nor an habitual sex offender under former law. The opinion does not state why this was done, but it would appear that under the 1997 "Megan's Law" version of Chapter 2950 the trial court either elected not to conduct a sex offender classification hearing, or found itself without authority to do so as Hayden had completed the maximum term under a five to fifteen year indefinite sentence. In an appeal from this entry Hayden contended he had a due process right to a hearing before being so classified. Unlike the defendant in Zerla, his claim sounded in procedural due process, not substantive due process. This court addressed the merits, concluding, "Appellee has not shown that he was deprived of a protected liberty or property interest as a result of the registration requirement imposed without a hearing." Id., ¶14.

At page 6, appellee's brief suggests a declaratory judgment might be the appropriate remedy.

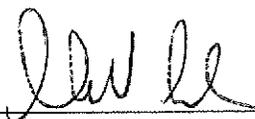
While declaratory judgement might be a means of obtaining relief, the right to appeal does not require demonstration of the absence of an alternative remedy. If declaratory relief were pursued, those defending the state's interest could be expected to argue a failure to pursue direct appeal amounts to waiver and res judicata.

### CONCLUSION

Appellant has been made subject to retroactive application of sex offender statutes as a consequence of his conviction. He is entitled to appeal this infringement of his substantial rights.

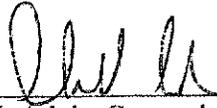
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**PROOF OF SERVICE**

I hereby certify that a copy of this reply brief was hand delivered to the office of the Franklin County Prosecuting Attorney, Counsel for Appellee, 373 South High Street, 13th Floor, Columbus, Ohio 43215, this 5th day of January, 2010.



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