

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-0047

RONALD GINGELL	:	On Appeal from the Hamilton County
	:	Court of Appeals,
Appellant,	:	First Appellate District
	:	
vs.	:	Court of Appeals Case No. C 08-01167
	:	
STATE OF OHIO	:	Trial Court No. B 08-05070
	:	
Appellee.	:	

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT RONALD GINGELL

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SUPREME COURT OF OHIO

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**THIS CASE INVOLVES A SUBSTANTIAL QUESTION AND IS A CASE OF PUBLIC  
OR GREAT GENERAL INTEREST**

This case presents this Court with a substantial constitutional issue: If a sex offender is convicted of a failure to register, should he be sentenced under the statute in effect when the duty arose or the statute in effect at the time he fails to register? Put differently, can an amended sentencing statute be applied retroactively to increase the sentence for a failure to register when the duty to register predated the statute? Although this Court has repeatedly held that registration duties can be retroactively increased because the duties are civil and remedial, this court has not yet addressed whether the amended penalty statute can be applied retroactively to increase the punishment for a failure to register. See e.g. *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, ¶ 29 (holding that the 2005 amendments increasing registration duties were not punitive and could therefore be applied retroactively). In the absence of language indicating intent, the sentencing statute should not be applied retroactively to individuals whose duty to register predates the statute.

R.C. 2950.99 is a criminal sentencing statute that sets forth the penalty for a failure to register. Since 1997, the statute has been amended three times. Each time, the penalty for a failure to register has become more severe. Initially, the offense was a first degree misdemeanor. After the most recent amendment effective on January 1, 2008, the failure to register is tied directly to the underlying offense. If the underlying sex offense is a felony of the first, second, third, or fourth degree felony, the failure to register is the same degree as the underlying offense. If the underlying sex offense is a misdemeanor or a fifth degree felony, the failure to register is a fourth degree felony.

Amended R.C. 2950.99 is being applied retroactively to individuals with a preexisting duty to register. As a matter of statutory construction, the legislature did not clearly express its

intent to apply the stiffer penalties retroactively. Moreover, a retroactive application of the sentencing statute violates R.C. 1.58, Ohio's retroactivity clause, and the ex post facto clause.

This significant issue must be addressed by this Court. Ohio has thousands of registered sex offenders, whose duties arose at varying times on and after July 1997. Applying the amended sentencing statute retroactively substantially increases the penalty for a subsequent failure to register. Although under *Ferguson*, enhanced registration duties can be retroactively applied because they are remedial, the criminal sentencing statute is punitive and cannot be applied retroactively to offenders whose duty to register predated the amendment.

#### STATEMENT OF THE CASE AND FACTS

In 1981, Ronald Gingell was convicted of three counts of rape and incarcerated. In 2003, the State conducted a hearing to determine whether Mr. Gingell was a predator. After considering the evidence, the Court concluded that Mr. Gingell was a sexually oriented offender and ordered him to register for 10 years. Most significantly, for purposes of this appeal, the judgment entry also included notification of the registration duties as required by R.C. 2950.03. Specifically, the entry notified Mr. Gingell that any failure to comply with the registration duties is a felony of the fifth degree.

In July 2008, Mr. Gingell was indicted for: 1) failing to notify the sheriff of a changed address and 2) failing to verify his address with the sheriff. Both offenses were charged as first degree felonies because amended R.C. 2950.99 was retroactively applied. Mr. Gingell pled guilty to the failure to verify, and the state dismissed the other charge. The court sentenced Mr. Gingell to an eight year prison term and five years of post-release control.

Mr. Gingell appealed his conviction alleging that his attorney was ineffective for failing to inform him that the offense should have been charged as a fifth degree felony and instead

advised him to enter a guilty plea to a first degree felony. Specifically, Mr. Gingell asserted that the amended penalty statute was not expressly made retroactive to individuals whose duty to register predated the statute. He further claimed that any retroactive application of R.C. 2950.99 would violate R.C. 1.58, Ohio's retroactivity clause, and the ex post facto clause. The First District Court of Appeals rejected the retroactivity argument and affirmed the trial court's judgment.

### LAW AND ARGUMENT

*Proposition of Law 1: The application of the amended sentencing statute to individuals whose offense and duty to register predates the amendment is a retroactive application under Ohio's retroactivity analysis.*

The First District Court of Appeals erroneously concluded that applying amended R.C. 2950.99 to Mr. Gingell was a prospective application because his failure to register occurred after the statute's enactment. See Entry Transmitting Errata, *State v. Gingell*, 1st Dist. No. C 08-01167, at ¶ 2. But this interpretation flies in the face of well established Ohio retroactivity jurisprudence. This Court has repeatedly held that "the retroactivity clause nullifies those new laws that 'reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time [the statute becomes effective].'" *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, 352-353, 721 N.E.2d 28, quoting *Miller v. Hixson* (1901), 64 Ohio St. 39, 51, 59 N.E. 749. The threshold question is whether the amended sentencing statute reaches back and creates a new liability not existing at the time Mr. Gingell was required to register.

When Mr. Gingell was initially ordered to register, any subsequent failure to comply with his duty was a fifth degree felony. Amended 2950.99 increases the penalty for a failure to register from a fifth degree felony to a first degree felony, a new liability not existing at the time Mr. Gingell's registration duty was imposed. On its face, a retroactive application of R.C.

2950.99 reaches back and creates a new liability on the preexisting duty to register. Thus the First District Court of Appeals erred in concluding that applying the amended sentencing statute to a preexisting duty to register is not a retroactive application.

*Proposition of Law 2: Amended R.C. 2950.99 does not apply to Mr. Gingell because the General Assembly did not intend for the penalty statute to apply retroactively.*

As this Court explained in *Hyle v. Porter*, 117 Ohio St.3d 165, 882 N.E.2d 899, 2008-Ohio-542, statutes apply prospectively unless the General Assembly “expressly made the statute retroactive.” Id. at ¶ 8. “In order to overcome the presumption that a statute applies prospectively, a statute must clearly proclaim its retroactive application. Text that supports a mere inference of retroactivity is not sufficient to satisfy this standard; we cannot *infer* retroactivity from suggestive language.” Id. at ¶ 10; (emphasis in original).

R.C. 2950.99<sup>1</sup> does not include an express provision making the statute applicable to persons with a preexisting duty to register. The legislature failed to include any language to apply the statute retroactively to individuals like Mr. Gingell, whose registration duties arose prior to the amendment. Because R.C. 2950.99 was not expressly made retrospective, it does not apply to an offender who committed his offense and had a duty to register before the effective date of the statute.

The best indication of the legislative intent is the use of the present tense in the phrase: “If the most serious sexually oriented offense \*\*\* is a felony of the first, second, third, or fourth degree.” The use of the present tense incorporates present and future felony convictions. R.C. 1.43. But it does not incorporate past convictions indicating that the statute applies only to

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<sup>1</sup> R.C. 2950.99 states that whoever violates the duty to register shall be punished as follows: “If the most serious sexually oriented offense \*\*\* that was the basis of the [duty to register] is a felony of the first, second, third, or fourth degree \*\*\* the offender is guilty of a felony of the same degree as the most serious sexually oriented offense \*\*\* that was the basis of the registration [duty].”

individuals who commit sex offenses and are required to register after the effective date.

Although the phrase “that was the basis of the [duty to register]” uses the past tense, that language “presents at best a suggestion of retroactivity, which is not sufficient to establish that a statute applies retroactively.” *Porter*, at ¶ 13.

Moreover, R.C.2901.04 requires that statutes defining offenses or penalties must be strictly construed against the state. As this Court recognized in *State v. Williams*, 114 Ohio St.3d 103, 868 N.E.2d 969, 2007-Ohio-3268, the failure to register is a criminal offense and “is subject to strict interpretation against the state, and must be liberally interpreted in favor of the accused.” *Id.* at ¶ 10. Thus, any doubt that the statute applies retroactively must be resolved against the state. *Id.* Because R.C. 2950.99 was not expressly made retroactive, it does not apply to individuals like Mr. Gingell whose duty to register predates the amendment. See *Porter*, at ¶ 24.

*Proposition of Law 3: If amended R.C.2950.99 is expressly retroactive, it violates R.C. 1.58, Ohio’s retroactivity clause, and the ex post facto clause.*

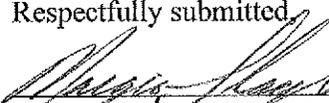
Under R.C. 1.58, a statutory amendment or repeal does not affect any “obligation or liability previously acquired” or “penalty, forfeiture, or punishment incurred in respect thereto.” It further states that in any proceeding with respect to that obligation, liability, or punishment, the punishment should be imposed as if the statute had not been amended or repealed. R.C. 1.58(A)(4). Under Ohio law, the amended statutes cannot be applied to increase Mr. Gingell’s penalty for a failure to register. See *State v. Brooks* (4th Dist.), 163 Ohio App.3d 241, 2005-Ohio-4728, 837 N.E.2d 796, at ¶ 16 (concluding that “under Ohio law, [the amended statute] cannot be applied retroactively to permit the modification of Brooks’s community-control sentence. Accordingly, we must apply the version of R.C. 2929.15 in effect at the time Brooks committed the underlying offense that caused him to receive his community-control sentence.”).

Mr. Gingell's *obligation* to register arose prior to amended R.C. 2950.99. (Emphasis added). R.C. 1.58 prohibits the amended statute from affecting this previous obligation and the penalty with respect to that obligation. Moreover R.C. 1.58 mandates that the sentencing court impose punishment as if the amendment did not exist. Thus the maximum penalty that Mr. Gingell can face for a failure to register is a fifth degree felony. Any other interpretation would result in an unconstitutionally retroactive criminal penalty statute. See Section 28, Article II of the Ohio Constitution: "The general assembly shall have no power to pass retroactive laws \* \* \*." See also the Ex Post Facto Clause, U.S. Const., Art. I, § 9.

### CONCLUSION

This Court should accept jurisdiction over this case and summarily reverse the decision below. In the alternative, Ronald Gingell requests the opportunity for full briefing and oral argument on the significant issues presented.

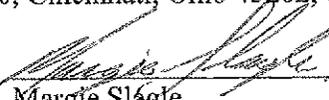
Respectfully submitted,

  
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*By Shyla Werner  
Per Authority*

### CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Appellant's Brief was served by U.S. Mail upon Paula Adams, Assistant Prosecuting Attorney, Hamilton County Prosecuting Attorney's Office, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, on this 8th day of January, 2010.

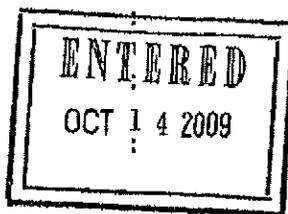
  
Margie Slagle  
*By Shyla Werner  
per authority*

## Appendix

Judgment Entry from the First District Court of Appeals

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-081167
		TRIAL NO. B-0805070
Plaintiff-Appellee,	:	
		<i>JUDGMENT ENTRY.</i>
vs.		
RONALD GINGELL,		
Defendant-Appellant.		



We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant, Ronald Gingell, appeals the judgment of the Hamilton County Court of Common Pleas convicting him of failing to verify his current address as a sexually oriented offender under R.C. 2950.06, a felony of the first degree. He was convicted after entering a guilty plea.

In his first assignment of error, Gingell now argues that the trial court erred in retroactively applying R.C. 2950.99, which made Gingell's violation of R.C. 2950.06 a first-degree felony.

A guilty plea acts as a waiver of all errors in the proceedings except those relating to the validity of the plea or the subject-matter jurisdiction of the trial court.<sup>2</sup> In this case, the claimed error does not fall within those exceptions, and we overrule the first assignment of error.

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.  
<sup>2</sup> See, e.g., *State v. West* (1999), 134 Ohio App.3d 45, 52, 730 N.E.2d 388.



OHIO FIRST DISTRICT COURT OF APPEALS

In the second assignment of error, Gingell argues that the trial court erred in imposing a prison sentence of eight years. Specifically, he argues that the trial court erred in basing the sentence on what he terms an "ex parte" investigation.

This assignment of error is also without merit. The transcript of the sentencing hearing indicates that the trial court based its sentence on material contained in the presentence investigation, on a psychological evaluation performed by the court clinic, and on other matters that were properly before the court. The sentence was within the statutory range for a first-degree felony,<sup>3</sup> and we accordingly overrule the second assignment of error.

In the third and final assignment of error, Gingell argues that he was denied the effective assistance of trial counsel. Specifically, he argues that counsel was deficient in advising him to plead guilty to a first-degree felony. He premises this argument on the allegedly improper retroactive application of the amended version of R.C. 2950.99. Because we have already rejected the argument concerning retroactivity, we overrule the third assignment of error.

The judgment of the trial court is affirmed.

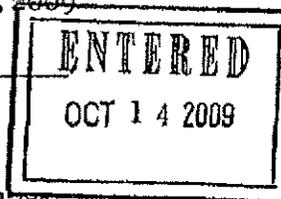
Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HILDEBRANDT, P.J., SUNDERMANN and CUNNINGHAM, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on October 14, 2009  
per order of the Court \_\_\_\_\_

*[Signature]*  
Presiding Judge



<sup>3</sup> See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

Entry Transmitting Errata from the First District Court of Appeals

ENTERED  
NOV 24 2009

IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO

STATE OF OHIO, : APPEAL NOS. C-081167  
Plaintiff-Appellee, : TRIAL NOS. B-0805070  
vs. : *ENTRY TRANSMITTING ERRATA.*  
RONALD GINGELL, :  
Defendant-Appellant. :

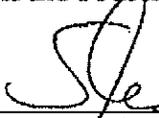
It appearing to the Court that on page one of the Judgment Entry filed with the Clerk of Courts on October 14, 2009, the Court through inadvertence made an error in the fourth paragraph on page 1 by using language from a draft version of the Judgment Entry. The correct language of this Judgment Entry was sent to counsel and posted on the Court's website.

Wherefore, it is the order of this Court that the fourth paragraph on page 1 be stricken in its entirety. The paragraph and footnote 2 should read as follows:

"This assignment is without merit. The amendment went into effect on January 1, 2008, while Gingell's failure to verify his address occurred on or about May 6, 2008. Thus, the amended statute was not applied retroactively, because the offense occurred after the effective date of the amendment.<sup>2</sup> We overrule the first assignment of error."

Footnote 2 - "See, e.g. *Bielat v. Bielat*, 87 Ohio St.3d 350, 353, 2000-Ohio-451, 721 N.E.2d 28 (test for retroactivity is whether the statute affects conduct occurring before statute went into effect)."

To The Clerk:  
Enter upon the Journal of the Court on November 24, 2009 per order of the Court.

By:  \_\_\_\_\_ (Copies sent to all counsel)  
Presiding Judge

