

ORIGINAL

NO. 009-1086

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
CASE NOS. 91515, et al

ROBERT GILDERSLEEVE, ET AL
Defendants-Appellants/Cross-Appellees

vs.

STATE OF OHIO,
Plaintiff-Appellee/Cross-Appellant

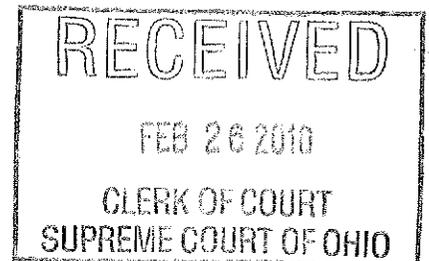
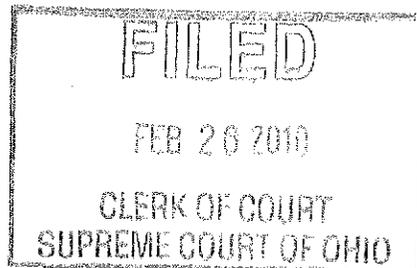
REPLY BRIEF OF CROSS-APPELLANT, STATE OF OHIO

WILLIAM D. MASON,
CUYAHOGA COUNTY PROSECUTOR

MATTHEW E. MEYER (0075253)
DANIEL T. VAN (0084614)
Assistant Prosecuting Attorney
Attorneys for Cross-Appellant
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Appellant

CULLEN SWEENEY
310 Lakeside Avenue, 2nd Floor
Cleveland, Ohio 44113



REPLY BRIEF

The State is not barred by res judicata from opposing a R.C. §2950.11(F)(2) hearing raised by cross-appellees or similar Tier III sex offenders.

Cross-appellees in their answer brief stress that res judicata applies to the very hearing they initiated. This argument ignores the intent of the General Assembly and precludes the State from defending against any R.C. §2950.11(F)(2) hearing initiated by a sex offender who was classified under the former sex offender registration law (“Megan’s Law”). Moreover, cross-appellees cannot demonstrate res judicata applies because the issue of community notification was not *actually* and *directly* at issue under the former hearings.

Cross-appellees argument focuses on the proposition that community notification must be determined by the prior judicial determination. There is nothing in R.C. §2950.11(F)(2) that suggests that the prior classification is determinative of community notification. A trial court in conducting the R.C. §2950.11(F)(2) hearing must find at a hearing after considering the enumerated factors that the offender “would not be subject” to the community notification that were in the version of R.C. §2950.11 in effect immediately prior to January 1, 2008. The words “would not be subject” does not plainly and clearly indicate that the issue of community notification must be determined by the prior judicial determination. Had the General Assembly intended to do so, they would have exempted cross-appellees from the onset, thus avoiding the need for cross-appellees to request exemption under R.C. §2950.11(F)(2).

I. Community notification was not *directly* at issue in the former proceeding.

Cross-appellees argue, “[a]lthough the Eighth District’s decision did not rest on the principles of *res judicata*, that legal doctrine serves as an independent basis for

upholding the Eighth District's decision *** [and the] State is barred by doctrines of res judicata and collateral estoppel from relitigating, with respect to cross-appellees, the community notification issue under the Adam Walsh Act when that precise issue was previously litigated, or could have been litigated, by the same parties under Ohio's Megan's Law."

Res judicata dictates that a "valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." See *Grava v. Parkman Twp.* (1995), 73 Ohio St. 3d 379, 382. The doctrine of collateral estoppel holds that "a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different." *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 692 N.E.2d 140, 1998-Ohio-435.

A prerequisite to the application of issue preclusion "is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action." *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 120 Ohio St.3d 386, 899 N.E.2d 975, 2008-Ohio-6254, ¶ 28 (quoting *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St.3d 193, 201, 443 N.E.2d 978).

Cross-appellees argue that the prior question of community notification was litigated. But community notification was never *actually* and *directly* at issue. Community notification was not litigated under the former R.C. §2950.09 hearing ("H.B. 180 hearing"). The State *actually* and *directly* litigated the issue of cross-

appellees classification under the former H.B. 180 hearing. The former H.B. 180 hearing was conducted to determine whether a sex offender should be classified a sexual predator and/or habitual sex offender. Under the former hearing, community notification was never *actually* and *directly* at issue because community notification was only a consequence of being classified a sexual predator, habitual sex offender or aggravated sexually oriented offender. Under the current R.C. §2950.11(F)(2) hearing, it is the community notification requirement, which is *actually* and *directly* at issue and not the classification as a sexual predator at issue.

II. Res judicata does not apply because cross-appellees were classified under a now defunct classification scheme.

In *State v. Curd*, Lake App. No. 2008-L-048, 2009-Ohio-3814, the Eleventh District held that res judicata did bar the reclassification of a sexually oriented offender.

Appellant was formerly classified under a now defunct statutory scheme. The current classification scheme is both procedurally and substantively different than the scheme under which he was previously classified. Thus, because the current scheme did not exist at the time [he] was labeled *** [his] new classification as a "Tier III" Offender was never directly at issue.

State v. Curd, Lake App. No. 2008-L-048, 2009-Ohio-3814, ¶11.

Similarly, cross-appellees were classified under a now defunct statutory scheme. Community notification became a consequence if the cross-appellees were classified a sexual predator, a habitual sex offender (in some cases), or an aggravated sexually oriented offender. The current classification scheme is both procedurally and substantively different than the former scheme. Likewise community notification under the current scheme was never *actually* and *directly* at issue. Nor was community notification *actually* and *directly* under the former scheme. By definition, res judicata cannot apply to the R.C. §2950.11(F)(2) hearing.

III. Res judicata cannot operate to preclude the State from opposing the R.C. §2950.11(F)(2) hearing.

As argued in the State's merit brief, the General Assembly exempted non-public registry qualified juveniles (who were initially classified under Megan's Law) from community notification if they were not subject to R.C. §2950.11 under former law. See §2950.11(F)(1)(b). Had the General Assembly intended to exempt adult Tier III sex offenders from community notification, they would have done so on the onset. As a result there is no *automatic* exemption for adult Tier III sex offenders and a hearing under R.C. §2950.11(F)(2) is required before exempting the adult Tier III sex offender from community notification.

To initiate the hearing under R.C. §2950.11(F)(2) it would be necessary for a party to raise the issue before the appropriate court. In the instant case, cross-appellees requested the court for relief from community notification, under R.C. §2950.11(F)(2). Cross-appellees raised the issue of community under R.C. §2950.11(F)(2) but seek to prevent the State from opposing the hearing under the doctrines of res judicata and collateral estoppel. An application of res judicata to R.C. §2950.11(F)(2) to preclude the State from opposing the R.C. §2950.11(F)(2) hearing would frustrate the intent of the General Assembly in enacting the offense-based classification scheme.

IV. Statutory provisions allow for subsequent hearings in some circumstances.

The State maintains that the issue of community notification under R.C. §2950.11(F)(2) was not *actually* and *directly* litigated under the former H.B. 180 hearing and therefore res judicata cannot apply. Even if community notification was somehow at issue under the prior proceedings, cross-appellees argument ignores the

proposition that statutory provisions may provide for a subsequent hearing, even on an issue that was already litigated.

R.C. §2950.11(H) provides relief from community notification for Tier III sex offenders after twenty years of compliance with the registration requirements. If the trial court denies the R.C. §2950.11(H)(1) motion, R.C. §2950.11(H)(2) allows the Tier III sex offender to make a subsequent motion after five years. R.C. §2950.11(H)(2) is an example of an exception to what would otherwise be barred by res judicata. (However, the State submits the factual scenario involving a subsequent hearing under R.C. §2950.11(H)(2) is distinguishable from the instant case because there was no prior R.C. §2950.11(F)(2) hearing.) Even if res judicata applied, the State submits that R.C. §2950.11(F)(2) provides for an exception.

CONCLUSION

Accordingly, the State submits that res judicata does not apply to a R.C. §2950.11(F)(2) hearing.

Respectfully submitted,

WILLIAM D. MASON
Cuyahoga County Prosecuting Attorney



Daniel T. Van (#0084614)
Matthew E. Meyer (#0075253)
Assistant Prosecuting Attorneys
Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7821
(216) 443-7602 fax
dvan@cuyahogacounty.us email
mmeyer@cuyahogacounty.us email

SERVICE

A copy of the foregoing Reply Brief has been mailed this 25th day of February 2010, to Cullen Sweeney, 310 Lakeside Avenue #200, Cleveland, Ohio 44113 .



Assistant Prosecuting Attorney