

ORIGINAL

IN THE SUPREME COURT OF OHIO

KEVIN CAES,

Defendant-Appellant,

v.

STATE OF OHIO,

Plaintiff-Appellee

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Case No. 2010-0289

On Appeal from the Warren
County Court of Appeals,
Twelfth Appellate District

Court of Appeals Case No.
CA2009-07-095

THE STATE OF OHIO'S RESPONSE TO THE DEFENDANT-APPELLANT'S MOTION AND
MEMORANDUM IN SUPPORT OF JURISDICTION

RACHEL A. HUTZEL (0055757)
Prosecuting Attorney
Michael Greer (0084352) (Counsel of Record)
Assistant Prosecuting Attorney
Warren County Prosecutor's Office
500 Justice Drive
Lebanon, Ohio 45036
(513) 695-1325
Facsimile: (513) 695-2962
rachel.hutzel@co.warren.oh.us
michael.greer@co.warren.oh.us

BARRY W. WILFORD (0014891)
Kura & Wilford Co., L.P.A.
492 City Park Avenue
Columbus, Ohio 43215
(614) 628-0100

COUNSEL FOR APPELLEE,
STATE OF OHIO

COUNSEL FOR APPELLANT,
KEVIN CAES

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**THE STATE OF OHIO'S RESPONSE TO THE DEFENDANT-APPELLANT'S MOTION AND
MEMORANDUM IN SUPPORT OF JURISDICTION**

In this present case, the Appellant raises many of the same propositions of law that were raised in *State v. Williams*, 2009-0088, and *State v. Bodyke*, 2008-2502, regarding the constitutionality of Ohio's Adam Walsh Act. This Court accepted jurisdiction over *State v. Williams* and placed that case in abeyance until this Court has decided *State v. Bodyke*. As this case presents many of the same issues as in *Williams* and *Bodyke*, the State does not object to this Court accepting jurisdiction over Appellant's second, third, and fourth propositions of law. While the State does not object to jurisdiction over these propositions of law, it does not concede any of the substantive issues set forth in those propositions. However, the State does oppose this Court accepting jurisdiction over Appellant's first proposition of law since the Appellant raises this issue for the first time in his memorandum in support of jurisdiction and because the Appellant lacks standing regarding this issue.

STATEMENT OF THE CASE AND FACTS

In 1999, the Appellant, Kevin Caes, was convicted of one count of kidnapping; twenty-two counts of rape; one count of failure to comply with an order or signal of police; three counts of felonious assault; and one count of unlawful possession of a dangerous ordnance. Petition to Contest Reclassification, T.d. 01, attachment 1, p. 1. After the Appellant's conviction, the Montgomery County Court of Common Pleas classified him as a sexual predator under the former R.C.¹ Chapter 2950. *Id.* at p. 2. After the General Assembly passed Ohio's Adam Walsh Act, the Attorney General reclassified the Appellant, as required by R.C. § 2950.032, as a Tier III sex offender. Magistrate's Decision, T.d. 10, p. 1.

¹ Ohio Revised Code.

After receiving notice of the reclassification, the Appellant filed, pursuant to R.C. § 2950.032(E), a petition to contest his reclassification with the Warren County Court of Common Pleas. Petition to Contest Reclassification, T.d. 01. In his petition, the Appellant argued that Ohio's Adam Walsh Act violated the Doctrine of the Separation of Powers. *Id.* at 2. In addition, the Appellant claimed that the Act violated the prohibition against retroactive laws found in the Ohio Constitution and violated the Ex Post Facto Clause set forth in the United States Constitution. *Id.* Finally, the Appellant asserted that the Act violated double jeopardy. *Id.*

The Warren County Court of Common Pleas denied Appellant's petition, and the Appellant filed an appeal with the Warren County Court of Appeals, Twelfth Appellate District. In a single assignment of error, Appellant argued that Ohio's Adam Walsh Act violated the Ex Post Facto Clause; violated double jeopardy; violated the prohibition against retroactive laws, and violated the Doctrine of the Separation of Powers. Corrected Brief of Petitioner-Appellant, Kevin Caes, T.d. 14, p. 2. In addition, Appellant claimed that Ohio's Adam Walsh Act violated due process; however, Appellant failed to explain how the Act violated due process. *Id.* He merely stated that it caused a "denial of due process[.]" *Id.* Ultimately, the Twelfth District overruled Appellant's sole assignment of error, affirming the lower court's decision. See *Caes v. State*, Warren App. No. CA2009-07-095, 2009-Ohio-6920.

ARGUMENT

APPELLEE'S RESPONSE TO APPELLANT'S FIRST PROPOSITION OF LAW

The Appellant failed to challenge the constitutionality of the residency restriction set forth in Ohio's Adam Walsh Act before the Warren County Court of Common Pleas and the Warren County Court of Appeals; thus, he is prohibited from raising that issue before the Supreme Court of Ohio. Furthermore, the Appellant lacks standing to raise this issue.

In Appellant's first proposition of law, he claims that the residency restriction found in Ohio's Adam Walsh Act, R.C. § 2950.034, violates his right to due process. According to

Appellant, “[h]e faces the *possibility* of being forced from his residence if a school, pre-school or day-care center opens nearby.” Memorandum in Support of Jurisdiction, T.d., p. 4 (emphasis added).

As stated previously, in Appellant’s petition to contest reclassification, he argued that Ohio’s Adam Walsh Act violated the Doctrine of the Separation of Powers; violated the prohibition against retroactive laws; violated the Ex Post Facto Clause of the United States Constitution; and violated double jeopardy. He failed to allege that the Act violated due process, and, more importantly, he failed to challenge the constitutionality of R.C. § 2950.034. Furthermore, while the Appellant argued before the Twelfth District that Ohio’s Adam Walsh Act violated due process, he failed to elaborate on the alleged due process violation and failed to argue that the residency restriction found in R.C. § 2950.034 violated due process.

Since Appellant failed to challenge the residency restriction before the trial court and before the Twelfth District, he is now precluded from raising that issue before this Court. See *Republic Steel Corp. v. Board of Revision of Cuyahoga County* (1963), 175 Ohio St. 179, 184, 192 N.E.2d 47 (Issues cannot be raised for the first time on appeal.). As such, the State urges this Court not to accept jurisdiction over Appellant’s first proposition of law.

In addition, this Court has previously held that “the constitutionality of a state statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied and who has not been injured by its alleged unconstitutional provision.” *Palazzi v. Estate of Gardner* (1987), 32 Ohio St. 3d 169, 512 N.E.2d 971. A review of the record reveals that Appellant failed to establish before the trial court that he resided within 1,000 feet of a school, preschool, or child day-care center. Nor does he now claim that he resided, resides, or will reside within 1,000 feet of a school, preschool, or child day-care center. Since the residency restriction only applies to registered sex offenders who reside

within a 1,000 feet of a school, preschool, or child day-care center, Appellant has failed to demonstrate that he is “within the class against whom the operation of [R.C. § 2950.034] is alleged to have been unconstitutionally applied.” Moreover, in his memorandum, Appellant claims that it is *possible* that he may eventually reside within 1,000 feet of a school, preschool, or child day-care center. However, it is not sufficient to claim a hypothetical or potential injury. *State v. Spikes* (1998), 129 Ohio App. 3d 142, 145, 717 N.E.2d 386. To have standing to raise a constitutional challenge, the Appellant must establish a “concrete injury in fact.” *Id.* However, Appellant has failed to establish that the Act’s residency restriction caused him any concrete injury in fact.

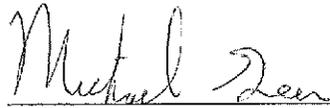
The State contends that Appellant has failed to demonstrate he is within the class to which the statute has been unconstitutionally applied and has failed to establish that he has suffered a concrete injury in fact. Consequently, he has failed to establish that he has standing to challenge the constitutionality of R.C. § 2950.034. As such, this Court should not accept jurisdiction over Appellant's first proposition of law.

CONCLUSION

Regarding Appellant's Proposition of Law No. II, Proposition of Law No. III, and Proposition of Law No. IV, the State does not object to this Court accepting jurisdiction. The State reiterates that it does not concede any of the substantive issues raised by Appellant in those propositions of law. Furthermore, the State would ask this Court to hold these issues in abeyance pending this Court's decision in *State v. Bodyke*.

However, for the reasons detailed above, the Appellant lacks standing to mount a constitutional challenge regarding the residency restriction found in R.C. § 2950.034; thus, this Court should not accept jurisdiction over Appellant's Proposition of Law No. I.

Respectfully submitted,



Michael Greer (0084352)
Assistant Prosecuting Attorney
Warren County Prosecutor's Office
500 Justice Drive
Lebanon, Ohio 45036
(513) 695-1325

CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing was mailed by ordinary U.S. mail to counsel for defendant-appellant, Mr. Barry W. Wilford, Kura & Wilford Co., L.P.A., 492 City Park Avenue, Columbus, OH 43215 on this 1st day of March, 2010.

Respectfully submitted,



Michael Greer (0084352)
Assistant Prosecuting Attorney
Warren County Prosecutor's Office
500 Justice Drive
Lebanon, Ohio 45036
(513) 695-1325