

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : Case No. 2010-0047
: :
Plaintiff-Appellee, : On Appeal from the
: Hamilton County Court of Appeals,
vs. : First Appellate District
: :
RONALD GINGELL : :
: :
Defendant-Appellant. : :

REPLY BRIEF OF APPELLANT RONALD GINGELL

Margie Slagle (0082217)
Counsel of Record
David A. Singleton (0074556)
Ohio Justice & Policy Center
215 E. Ninth Street, Suite 601
Cincinnati, Ohio 45202
(513) 421-1108 exts. 20, 17
(513) 562-3200 (fax)
mslagle@ohiojpc.org
dsingleton@ohiojpc.org

Counsel for Appellant

Joseph T. Deters (0012084)
Paula Adams (0069036)
Counsel of Record
Hamilton County Prosecuting Attorney's
Office
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3228
(513) 946-3107 (fax)
Joseph.Deters@hcpros.org
Paula.Adams@hcpros.org

Counsel for Appellee

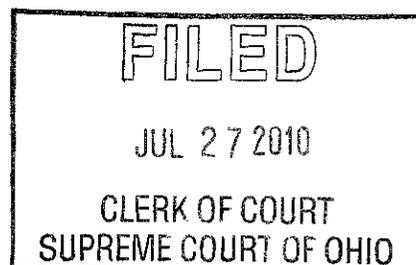


Table of Contents

Table of Authorities	ii
The State failed to address the implications of the Bodyke decision on Mr. Gingell's conviction	1
The State's claim that applying amended 2950.99 to Mr. Gingell is not a retroactive application is incorrect as a matter of law	2
The State's claim that Mr. Gingell waived this issue because he did not allege that his plea was involuntary is factually and legally incorrect	3
Certificate of Service	5

TABLE OF AUTHORITIES

Cases

<i>Hyle v. Porter</i> , 117 Ohio St.3d 165, 2008 -Ohio- 542, 882 N.E.2d 899.....	2, 3
<i>State v. Anderson</i> , 2nd Dist. No. 23389, 2010-Ohio-3337	1, 3
<i>State v. Bodyke</i> , -- Ohio St.3d ---, 2010-Ohio-2424	1, 2
<i>State v. Consilio</i> , 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167	3
<i>State v. Cook</i> , 83 Ohio St. 3d 404, 1998-Ohio-291, 700 N.E.2d 570.....	2
<i>State v. Roberts</i> , 2nd Dist. No. 23684, 2010-Ohio-3250.....	2
<i>State v. Rush</i> , 83 Ohio St.3d 53, 59, 1998-Ohio-423, 697 N.E.2d 634.....	4
<i>State v. Smith</i> , 8th Dist. No. 92550, 2010-Ohio-2880	1, 2, 4
<i>State v. Wilson</i> (1979), 58 Ohio St.2d 52, 53, 388 N.E.2d 745	3, 4
<i>Strickland v. Washington</i> (1984), 466 U.S. 668	4

Statutes

R.C. 2950.06.....	1
R.C. 2950.99.....	passim

I. The State failed to address the implications of the *Bodyke* decision on Mr. Gingell's conviction.

Although the State concedes that amended R. C. 2950.06 does not apply to Mr. Gingell per *Bodyke*, the State fails to address how this affects Mr. Gingell's conviction. *State v. Bodyke*, --- Ohio St.3d ---, 2010-Ohio-2424; (Merit Brief of Plaintiff-Appellee, State of Ohio, p. 2, fn.1). Specifically, the *Bodyke* decision impacts Mr. Gingell in two critical ways: 1) it prohibits the State from applying the new registration scheme to Mr. Gingell, and 2) it reinstates Mr. Gingell's judicial registration and classification order. *Bodyke* at ¶ 66.

The State admits that Mr. Gingell was not required to verify his address every 90 days but then fails to acknowledge that his conviction cannot be based upon a law that does not apply to him. *State v. Anderson*, 2nd Dist. No. 23389, 2010-Ohio-3337, at ¶ 8; *State v. Smith*, 8th Dist. No. 92550, 2010-Ohio-2880, at ¶ 29. Since *Bodyke*, the Second District Court of Appeals and the Eighth District Court of Appeals have concluded that convictions based upon the verification requirements imposed by SB 10 must be vacated. See *id.* In *Anderson*, the Second District held that "because Anderson's conviction was based upon the attorney general's unconstitutional reclassification of Anderson as a Tier III sexual offender, his conviction must be vacated." *Anderson* at ¶ 5. The Court further noted that "the State properly concedes that Anderson could not be convicted of failure to verify his address every 90 days because he was only required to verify his address once a year in accordance with the version of R.C. 2950.06 in effect at the time of his sexually oriented offender designation." *Id.* at ¶ 8.

Similarly in *Smith*, the Eighth District Court reversed Smith’s failure to register conviction because the “reclassification was unlawful, and cannot serve as the predicate for the crime for which he was indicted and convicted.” *Smith* at ¶ 29. Mr. Gingell’s conviction should be vacated because it is based on an unconstitutional reclassification and an amended statute that does not apply to him. *Id.* See also *State v. Roberts*, 2nd Dist. No. 23684, 2010-Ohio-3250, at ¶ 10 (vacating a failure to notify conviction because the “classification as a Sexually Oriented Offender has been reinstated, and the requirements imposed upon him by the Adam Walsh Act are a nullity.”).

Moreover, *Bodyke* reinstated Mr. Gingell’s court ordered classification and registration duties. *Bodyke* at ¶ 66. Mr. Gingell’s judicial order includes notice that the penalty for a failure to register is a fifth degree felony. Because *Bodyke* reinstated this order, any failure to register for Mr. Gingell is a fifth degree felony. *Id.* *Bodyke* makes it crystal clear that the legislature does not have the power to modify this final court order. *Id.* at ¶ 67. For both of these reasons, Mr. Gingell’s conviction must be vacated.

II. The State’s claim that applying amended 2950.99 to Mr. Gingell is not a retroactive application is incorrect as a matter of law.

To determine whether the sentencing statute applies retroactively, the Court must first “ask whether the General Assembly expressly made the statute retroactive.” *Hyle v. Porter*, 117 Ohio St.3d 165, 2008 -Ohio- 542, 882 N.E.2d 899, at ¶ 8 (citing to *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, at ¶ 10). Although the State appears to urge this Court to bypass that step (Merit Brief of Plaintiff-Appellee, State of Ohio, pp. 5-7), a review of the statute is mandatory to determine its retroactivity. *Id.* at ¶ 9. Because R.C. 2950.99 was not expressly made

retroactive, it does not apply to Mr. Gingell whose duty to register predated the amendment. See *id.* at ¶ 19.

Although the State concedes that Mr. Gingell has one continuous registration duty that arose before the amendment, the State insists applying the amended penalty statute to Mr. Gingell would not be a retroactive application. (Merit Brief of Plaintiff-Appellee, State of Ohio, pp. 5-7). The State is wrong. Applying amended R.C. 2950.99 would be retroactive in two respects: 1) it was enacted after he committed his sex offense, and 2) it was enacted after his registration duties arose. Amended 2950.99 would reach back and change the penalty for the failure to comply with this preexisting, continuous duty.

III. The State's claim that Mr. Gingell waived this issue because he did not allege that his plea was involuntary is factually and legally incorrect.

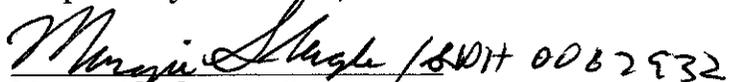
Mr. Gingell alleged that his plea was not voluntary or intelligent because his counsel advised him to plead guilty to a first degree felony rather than a fifth degree felony. (App. 25). Although a guilty plea eliminates any issue of factual guilt, it does not “preclude defendant from raising other issues attacking [the] constitutionality of [the] statute under which he was convicted.” *State v. Wilson* (1979), 58 Ohio St.2d 52, 53, 388 N.E.2d 745, at paragraph one of the syllabus (holding that “[w]hile a counseled plea of guilty is an admission of factual guilt which removes issues of factual guilt from the case, a defendant is not precluded from raising on appeal other issues which attack the constitutionality of the statute under which he has been convicted”). Any constitutional violations that relate to the validity of the statute and not an admission of factual guilt may be attacked on appeal. *Id.*

To the extent that trial counsel failed to preserve this issue, counsel's failure constituted deficient performance because there was no valid or strategic reason to fail to raise the argument that a retroactive application violates the retroactivity clause, the ex post facto clause, and R.C. 1.58. Further, Mr. Gingell was prejudiced because trial counsel's failure resulted in a possible maximum ten year sentence rather than a maximum sentence of one year. *Strickland v. Washington* (1984), 466 U.S. 668.

Even if this Court concludes that Mr. Gingell waived this issue, "in criminal cases this court may consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it." *State v. Rush*, 83 Ohio St.3d 53, 59, 1998-Ohio-423, 697 N.E.2d 634 (internal citation omitted). In *Rush*, the defendants alleged that R.C. 1.58, the ex post facto clause, and the retroactivity clause required the amended sentencing statutes to be applied to them. *Id.* at 56, 59. This Court concluded that "[b]ecause [Defendants] now present, albeit in tardy fashion, a constitutional argument in a criminal case that if correct would indicate that plain error occurred, we will address the issue." *Id.* at 59.

Mr. Gingell is presenting "a constitutional argument in a criminal case that if correct would indicate plain error occurred" and this Court should address this issue. *Id.* Moreover, as previously discussed, Mr. Gingell's conviction should be vacated because it is based upon an unconstitutional reclassification and a verification statute that does not apply to him. See *Anderson* at ¶ 8; *Smith* at ¶ 29.

Respectfully submitted,

 Margie Stagle 1/20/17 0082217

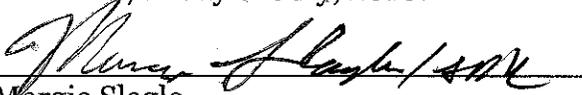
Margie Stagle, #0082217
David A. Singleton, #0074556
Ohio Justice and Policy Center
215 East 9th Street, Suite 601

Cincinnati, OH 45202
Phone: (513) 421-1108 exts. 20, 17

Fax: (513) 562-3200
Email: mslagle@ohiojpc.org
Email: dsingleton@ohiojpc.org

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 27th day of July, 2010.


Margie Slagle