

ORIGINAL

NO. 2009-1086

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 91515, 91516, 91517, 91518, 91519 and 91521, 91522, 91523, 91524, 91525, 91526,
91527, 91528, 91529, 91530, 91531, 91532

ROBERT GILDERSLEEVE, ET AL

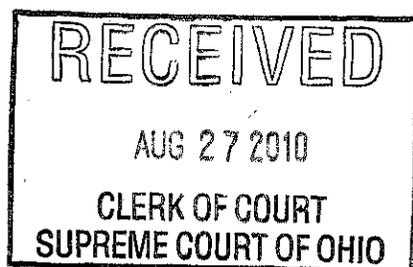
Appellants/Cross-Appellees

-vs-

STATE OF OHIO

Appellee/Cross-Appellant

MOTION FOR RECONSIDERATION



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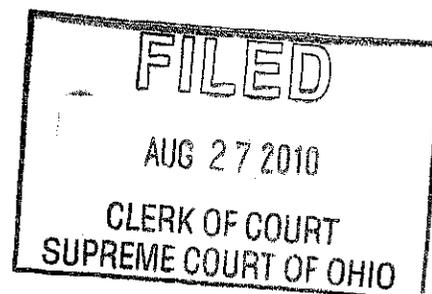


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STATE'S MOTION FOR RECONSIDERATION

On August 17, 2010 this Honorable Court, reversed the judgment of the court of appeals with regard to the portions of the judgments that rejected the constitutional challenges and remanded the case to the trial court for further proceedings.

Pursuant to S. Ct. Prac. R. XI, Section 2, the State of Ohio moves this Honorable Court to reconsider the August 17, 2010 disposition of this case, with regard to Robert Zamora and Ralph Wells, whose duty to register under Megan's Law arose by operation of law rather than by court order. Without a judicial classification, the State submits that any reclassification could not have violated the separation of powers doctrine.

In this case, Ralph Wells and Robert Zamora did not have a H.B. 180 hearing or judicial order of classification. Ohio courts were not required to enter judicial orders classifying an individual a "sexually oriented offender". In the Appellants/Cross-Appellee's merit brief addressing the State's cross-appeal, Appellants/Cross-Appellee's stated that Ralph Wells did not receive a H.B. 180 hearing. Without a H.B. 180 hearing, Wells would not have had a judicial order of classification. He would have defaulted to "sexually oriented offender" by operation of law. Robert Zamora, whose underlying conviction arose out of California would not have received a judicial order of classification either, unless he challenged an automatic sexual predator classification. See *Gildersleeve et al. v. State of Ohio*, 91515 – 91519 and 91521 – 91532, 2009-Ohio-2031, Appendix.

Without a judicial order of classification it cannot be said that "R.C. 2950.031 and R.C. 2950.032 impermissibly instructs the executive branch to review past decisions of the judicial branch," or that, the separation of powers doctrine is violated because "R.C. 2950.031 and R.C. 2950.032, [***] requires the attorney general to reclassify sex

offenders whose classifications have already been adjudicated by a court and made the subject of a final order.” *State v. Bodyke*, Slip Opinion No. 2010-Ohio-2424, paragraphs two and three of the syllabus.

In short, *State v. Bodyke* does not apply to sex offenders who did not have a prior judicial order of classification because those particular sex offenders have not been previously “adjudicated” by a court. They were classified by statute or operation of law.

The State would argue that Ralph Wells was appropriately reclassified under the Adam Walsh Act as a Tier III Sex Offender. The State maintains, that the plain language of R.C. 2950.11(F)(2) required that the trial court conduct a *de novo* hearing before relieving Wells of the mandatory community notification requirement. Accordingly with regards to Ralph Wells, this Honorable Court should reconsider the August 17, 2010 disposition of this case, and hold that the reclassification of sex offenders whose duty to register arose by operation of law does not violate the separation of powers doctrine. This Court should consider the remaining propositions of law raised in the appeal and in the cross-appeal. With regard to Robert Zamora, a Tier II sex offender, this Honorable Court should reconsider the August 17, 2010 disposition of this case and hold that the reclassification of out-of-state offenders whose duty to register arose by operation of law does not violate the separation of powers doctrine. This Court should consider the remaining propositions of law raised in the appeal.

LAW AND ARGUMENT

- I. Out of state offender would not have had a judicial order of classification under Ohio’s Megan’s law and therefore his reclassification does not violate the separation of powers doctrine

With regard to out of state offenders, “pursuant to the former R.C. 2950.04(A)(4), offenders moving into this state on or after July 1, 1997, who had been

convicted of a sexually oriented offense in another state, were required to register as a sex offender if the duty to register existed under the law of the jurisdiction in which the conviction occurred. Pursuant to the former R.C. 2950.04(A)(5), if the offender completed a term of imprisonment for a sexually oriented offense after July 1, 1997, the offender was required to register upon coming to Ohio regardless of any duty to register in the other jurisdiction.” See *Miller v. Cordray*, Franklin App. No. 08AP-1016, 2009-Ohio-3617.

Under Megan’s Law, unlike in-state offenders, any requirement that an out-of-state offender register as a Sexual Predator under Ohio’s Megan’s Law arose by operation of law. Under the former, “R.C. 2950.09(A), such offenders are *automatically classified as sexual predators in Ohio*. R.C. 2950.09(F)(2) allows them to challenge such automatic classification by proving that the registration requirement of the foreign jurisdiction is not substantially similar to Ohio’s sexual-predator classification under R.C. Chapter 2950.” *State v. Kershner*, Ashland App. No. 06-COA-015, 2007-Ohio-5527. See also *Logue v. Leis*, Hamilton App. No. C-050894, 2006-Ohio-5597.

The former R.C. 2950.09(A)(1), stated, “ If a person is convicted, pleads guilty, or is adjudicated a delinquent child, in a court in another state, in a federal court, military court, or Indian tribal court, or in a court of any nation other than the United States for committing a sexually oriented offense that is not a registration-exempt sexually oriented offense, and if, as a result of that conviction, plea of guilty, or adjudication, the person is required under the law of the jurisdiction in which the person was convicted, pleaded guilty, or was adjudicated, to register as a sex offense until the person’s death, that conviction, plea of guilty, or adjudication automatically classifies the person as a

sexual predator ***.” See former R.C. 2950.09(A)(1), eff. 1/2/07, 2006 S.B. 260. Any judicial challenge of the automatic sexual predator designation was contingent on the sex offender challenging the classification in an Ohio court.

A similar provision automatically classified an offender a “habitual sex offender” but this arose if the sex offender was designated a “habitual sex offender” in the other state. See former R.C. 2950.09(E)(2), eff. 1-2-07, 2006 S.B. 260 stating that, “[i]f a court in another state [***] determines a person to be a habitual sex offender in that jurisdiction, the person is considered to be determined to be a habitual sex offender in this state. The duty to register as a “sexually oriented offender” would have arisen by operation of law pursuant to R.C. 2950.04 (see discussion below).

At a minimal, the duty to register as a “sexually oriented offender” arose by operation of law under R.C. 2950.04. Because an out-of-state offender’s duty to register arises by operation of law rather than by judicial order, the reclassification of out-of-state offenders does not violate the separation of powers doctrine. As a consequence, *State v. Bodyke*, supra. does not apply to out-of-state offenders such as Robert Zamora.

II. Offenders who did not have a H.B. 180 hearing would not have had a judicial order of classification under Megan’s Law and therefore his reclassification does not violate the separation of powers doctrine.

Under Megan’s Law, the duty to register as a “sexually oriented offender” arose *automatically* if the offender pled guilty to or was convicted of a sex offense and if the trial court did not make a determination that the offender was a sexual predator or habitual sex offender. Likewise, the duty to register as a “child-victim offender” arose *automatically* if the offender pled guilty to or was convicted of a child-victim offense and if the trial court did not make a determination that the offender was a child-victim predator or habitual child-victim offender.

Under Megan's Law, a trial court was not required to enter an order classifying an offender as a "sexually oriented offender" or "habitual offender".

The former H.B. 180 hearings pursuant to the former R.C. 2950.09 limited the trial court to determine whether the offender is a sexual predator. *State v. Goodballet* (Mar. 30, 1999), Columbiana App. No. 98 CO 15. The former R.C. 2950.09 only required the trial court to determine whether the offender was a sexual predator or a habitual sex offender. The State would argue if an offender fails to qualify as a sexual predator or habitual offender but has committed a sexually oriented offense, he still must register for a period of ten years. *Id.*

As the Seventh District explained, "while 'sexually oriented offender' is not a separate classification and does not require adjudication, it may nonetheless be utilized to refer to those individuals that are not classified as sexual predators or habitual sexual offenders but who must register due to a conviction of a sexually oriented offense." *Id.* Accordingly, the State argues that Petitioner's duty to register arises out of operation of law and the trial court was not required to adjudicate Petitioner a "sexually oriented offender." Petitioner's duty arises from petitioner's conviction. The Eighth District held that language classifying an offender a sexually oriented offender, "may be considered mere surplusage." *State v. Hanley* (Aug. 26, 1999), Cuyahoga App. No. 74323. Thus, under Megan's Law the classification of "sexually oriented offender" arises by operation of law for anyone convicted of a sex offense.

The version of R.C. 2950.04 under Megan's Law dictated who was subject to registration. In pertinent part R.C. 2950.04 provided:

(A) Each offender who is convicted of or pleads guilty to, or has been convicted of or pleaded guilty to, a sexually oriented offense and who is

described in division (A)(1), (2), or (3) of this section shall register at the following time and with the following official;

(1) Regardless of when the sexually oriented offense was committed, if the offender is sentenced for the sexually oriented offense to a prison term [***] and if, on or after the effective date of this section, the offender is released in any manner from the prison term [***].

(2) Regardless of when the sexually oriented offense was committed, if the offender is sentenced for a sexually oriented offense on or after the effective date of this section and if division (A)(1) of this section does not apply [***].

(3) If the sexually oriented offense was committed prior to the effective date of this section, if neither division (A)(1) nor (A)(2) of this section applies, and if, immediately prior to the effective date of this section, the offender was a habitual sex offender [***].

R.C. 2950.04, eff. 7/1/97, H.B. 180; see also R.C. 2950.04, eff. 4-29-05, H.B. 473.

The version of R.C. 2950.04 under Megan's Law shows that the duty to register was not premised on a court-ordered classification but instead was premised on whether: 1) the offender committed a sex offense and was released from prison for the sex offense after the effective date of Megan's Law; 2) the offender committed a sex offense and was sentenced for the sex offense after the effective date of Megan's Law; or 3) the offender would have been a habitual sex offender under the pre-Megan's Law version of Ohio's sex offender registration laws. See also *State v. Freeman*, Cuyahoga App. No. 86740, 2006-Ohio-2583, ¶14 (holding the classification and duty to register arise by operation of law); see also *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169 (holding that the trial court was not required to perform any act beyond entering a judgment of conviction for gross sexual imposition, a sexually oriented offense, for defendant's duty to register to arise).

The State would also argue that the former R.C. 2950.07 demonstrates that a H.B. 180 hearing was not required to trigger the duty to register. Under the former R.C.

2950.07, the duration of registration was not dependent on adjudication as a sexually oriented offender. The former R.C. 2950.07(B)(1)-(3), provided:

(B) The duty of an offender who is convicted of or pleads guilty to, or has been convicted of or pleads guilty to, a sexually oriented offense to comply with sections 2950.04, 2950.05, and 2950.06 of the Revised Code, continues, after the date of commencement, for whichever of the following periods is applicable:

(1) Except as otherwise provided in this division, if the offender has been adjudicated as being a sexual predator relative to the sexually oriented offense, the offender's duty to comply with those sections continue until the offender's death.***

(2) If the judge who sentenced the offender for the sexually oriented offense determined pursuant to division (E) of section 2950.09 of the Revised Code that the offender is a habitual sex offender, the offender's duty to comply with those sections continues for twenty years.

(3) *If neither division (B)(1) nor (B)(2) of this section applies, the offender's duty to comply with those sections continues for ten years."*

See former R.C. 2950.07, eff. 7/1/97, H.B. 180, *emphasis added*. See also R.C. 2950.07, eff. 7/31/03, 2003 S.B. 5.

The words "sexually oriented offender" does not appear in R.C. 2950.07. The duty to register for ten years only arose if the offender was neither a sexual predator nor a habitual sex offender.

Moreover, under the version of R.C. 2950.03 in effect under Megan's Law, a trial court was not required to provide a sex offender notice of the duty to register if the sex offender was sentenced to prison. In cases where the sex offender was sentenced to prison, the prison official would have been required to provide the sex offender notice upon release from prison. The notice statute is consistent with the concept that the duty to register as a sexually oriented offender arises by operation of law. See former R.C. 2950.03(A), eff 7/1/97.

Therefore, it is evident that in some cases, sex offenders were required to register by statute or operation of law not by court order. In *State v. Bodyke*, Slip Opinion No. 2010-Ohio-3737, this Court held:

R.C. 2950.031 and 2950.032, which require the attorney general to reclassify sex offenders who have already been classified by court order under former law, impermissibly instruct the executive branch to review past decisions of the judicial branch and thereby violate the separation of powers doctrine.

R.C. 2950.031 and R.C. 2950.032, which require the attorney general to reclassify sex offenders whose classifications have already been adjudicated by a court and made the subject of a final order, violate the separation of powers doctrine by requiring the opening of final judgments.

Bodyke, paragraph two and three of the syllabus.

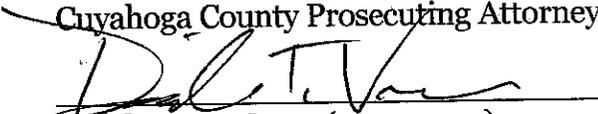
The State submits that the reclassification of offenders who were classified under Megan's Law by operation of law rather than by court order does not violate the separation of powers doctrine.

CONCLUSION

The State asks this Honorable Court to reconsider the August 17, 2010 disposition of this case and consider the remaining propositions of law raised in the appeal and the cross-appeal.

Respectfully submitted,
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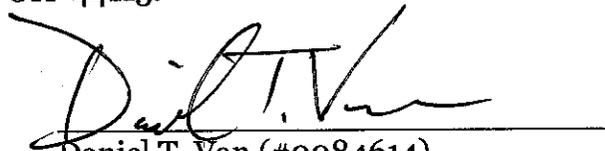
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CERTIFICATE OF SERVICE

A copy of the foregoing Application for Reconsideration was sent by regular U.S. mail this 26th day of August, 2010 to Cullen Sweeney, Esq., Assistant Public Defender, 310 Lakeside Avenue, Suite 200, Cleveland, OH 44113.

A handwritten signature in black ink, appearing to read "Daniel T. Van", written over a horizontal line.

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