

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,

Appellee,

-vs-

PAUL E. PALMER,

Appellant.

Case No.:

10-1660

On Appeal From the  
Franklin County Court of Appeals,  
Tenth Appellate District

Case Nos. 09AP-956  
09AP-957

---

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT  
PAUL E. PALMER

---

Yeura R. Venters 0014879  
Franklin County Public Defender

-and-

David L. Strait 0024103  
(Counsel of Record)

Shayla L. Werner 0083998  
Assistant Franklin County Public  
Defender  
373 South High Street, 12<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: 614/719-8872  
Facsimile: 614/461-6470

*Attorney for Appellant  
Paul E. Palmer*

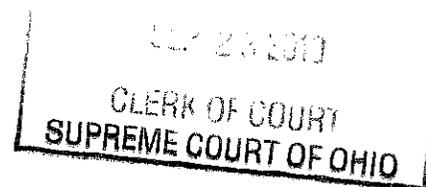
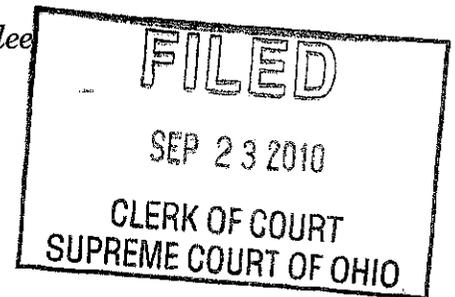
Ronald J. O'Brien 0017245  
Franklin County Prosecuting Attorney

-and-

Steven L. Taylor 0043876  
(Counsel of Record)

Assistant Franklin County  
Prosecuting Attorney  
373 South High Street, 13<sup>th</sup> Floor  
Columbus, Ohio 43215  
Phone: 614/462-3555  
Fax: 614/462-6103

*Attorney for Appellee  
State of Ohio*



## TABLE OF CONTENTS

|   | Page No. |
|---|----------|
| Explanation of Why This Case Presents a Substantial Constitutional Question and Matters of Public or Great General Interest.....  | 1        |
| Statement of the Case and Facts.....  | 1        |
| Argument.....   | 3        |
| <b>First Proposition of Law</b>   |          |
| R.C. 2950.031 and 2950.032 are unconstitutional and unenforceable. Give the unconstitutionality of these sections, they provide no basis for reclassification of any sexual offender into the tier classification system created by the Adam Walsh Act and no registration duties arise from these sections. [ <i>State v. Bodyke</i> , Slip Opinion No. 2010-Ohio-2424, applied.]..... | 4        |
| <b>Second Proposition of Law</b>  |          |
| When the record unequivocally demonstrates that Chapter 2950 does not impose registration requirements on a defendant, Crim.R. 12 permits the trial court to dismiss an indictment that asserts a violation of those requirements. ....   | 7        |
| <b>Third Proposition of Law</b>   |          |
| Upon determining that an offender is not a sexual offender subject to the requirements of Revised Code Chapter 2950, a trial court possesses jurisdiction to order law enforcement agencies to delete the offender's name from sexual offender databases. ....  | 8        |
| Conclusion .....  | 9        |
| Certificate of Service .....  | 9        |
| Appendix.....   | 10       |
| <b>Appendix Page Number</b>   |          |
| Judgment Entry Denying Reconsideration, 8/10/10.....  | A-1      |
| Decision Denying Reconsideration, 8/10/10 .....   | A-2      |
| Judgment, Franklin County Court of Appeals, 6/3//10 .....   | A-5      |
| Opinion, Franklin County Court of Appeals, 6/1/10.....  | A-6      |

## **Explanation of Why This Case Presents a Substantial Constitutional Question and Matters of Public or Great General Interest**

The Court of Appeals rewrote 2007 Am.Sub.S.B. No. 10 (“the Adam Walsh Act” or “the AWA”), expanding its scope far beyond the intent of the General Assembly, finding that the date of an offender’s conviction for a sexual offense is immaterial to his registration duties under AWA:

. . . we can conclude only that defendant's duties under the AWA are not premised on the time frame referenced in the law cited in [*State v. Champion*, 106 Ohio St.3d 120, 2005-Ohio-4098] but on the language of the AWA which requires compliance, regardless of when defendant pleaded guilty to the offense.

*.State v. Palmer*, Franklin App. Nos. 09AP-956, 957, 2010-Ohio-2421 at ¶23.

This holding ignores the language of R.C. 2950.033, which discusses procedures for applying the provisions of Senate Bill 10 retrospectively. It further disregards R.C. 2905.07 which discusses when AWA registration duties attach. Moreover, the court’s holding in denying Appellant’s motion for reconsideration ignored the scope of this Court’s opinion in *State v. Bodyke*, Slip Opinion No. 2010-Ohio-2424.

Compounding this flawed and faulty reasoning, the court improperly limited the authority of a trial court to determine legal issues in a ruling on a pre-trial motion. The appellate court deemed that the trial court could not resolve the purely legal question of the non-existence of any duty to register or verify address in the context of a motion to dismiss.

Finally, the court improperly restricted the ability of a trial court to limit information disseminated through law enforcement databases, such as the Ohio Attorney General’s E-Sorn database of sexual offenders.

The appellate court’s ruling runs afoul of the controlling precedent of this Court. It confuses and enormously complicates the issues arising in the litigation of AWA issues.

This Court should accept jurisdiction to do more than correct the demonstrable errors of the appellate court: it must provide much needed guidance and clarification for the benefit of courts, counsel, and the public at large.

### **STATEMENT OF THE CASE AND FACTS**

On September 25, 1995, the grand jury indicted Appellant for one count each of attempted rape, aggravated burglary, aggravated robbery, robbery, and kidnapping, each with a specification alleging defendant was convicted of robbery on May 27, 1988. On December 11, 1995, defendant entered a guilty plea to the stipulated lesser included offense of the first count of the indictment, sexual battery in violation of R.C. 2907.04, a felony of the third degree, without specification; on the state's request, the court entered a nolle prosequi on the remaining counts. The trial court sentenced defendant to one and one-half years of incarceration, granting 112 days of credit. A judgment entry memorializing the trial court's proceedings was filed January 8, 1996; a corrected entry was filed on April 23, 1996. Because the disposition of this case also included recognition of 112 days of jail credit, the expected expiration of that sentence changed to approximately March 15, 1997.

At the time of Appellant's sentencing, Ohio's sexual offender registration system was the law created by the General Assembly when it enacted Ohio's version of Megan's Law in 1996. Am.Sub.H.B. No. 180, 146 Ohio Laws, Part II, 2560, 2601. Megan's Law provided for offender registration, classification, and community notification. But under that law, "a person whose prison term for a sexually oriented offense was completed before July 1, 1997, is not required to register under R.C. 2950.04(A)(1)(a) or periodically verify a current address under R.C. 2950.06(A)[.]" *State v. Champion*, 106 Ohio St.3d 120, 2005-Ohio-4098 at ¶13.

Appellant completed his sentence before July 1, 1997. He therefore had no duty to register or verify his address under the earlier legislation, Megan's law.

Ohio's sexual offender registration system underwent sweeping changes. On January 1, 2008, Senate Bill 10, the Ohio formulation of the Adam Walsh Act, became effective. The Act made wholesale revisions in Revised Code Chapter 2950.

After that date, Appellant became aware that the Ohio Attorney General had classified him as a Tier III Sex Offender. On March 6, 2008, Appellant filed a Petition to contest this classification.

While, the petition was pending, the state filed new charges. On May 28, 2009, the Franklin County Grand Jury returned an indictment charging Appellant with failing to provide notice of change of address and failing to periodically verify his address.

Because the two matters presented interrelated issues, they were consolidated before the Honorable John Bessey, Judge of the Franklin County Common Pleas Court. On June 23, 2009, Appellant moved for immediate disposition of the pending petition.

The matters came on for hearing on September 16, 2009. Appellant, through counsel, contended that he had no duty to register under the prior law as enacted by H.B. 180. Counsel pointed out that this Court has been explicit on this point, that "a person whose prison term for a sexually oriented offense was completed before July 1, 1997, is not required to register under R.C. 2950.04(A)(1)(a) or periodically verify a current address under R.C. 2950.06(A)". *State v. Champion*, at ¶13. Since Appellant's sentence was completed prior to July 1, 1997, and because the court never determined him to be subject to registration requirements pursuant to the prior version of Chapter 2950, the trial court apparently agreed that he could not be subject to registration requirements under S.B. 10.

Since the court determined that Appellant had no duty to register pursuant to the analysis of the petition issues, it further concluded that he had no duty to

register under the analysis applicable to the new indictment, and dismissed that prosecution.

The State appealed to the Franklin County Court of Appeals. By Opinion rendered June 1, 2010, the appellate court reversed the judgment of the trial court.

On June 3, 2010, Appellant moved the appellate court to reconsider its decision in light of this Court's decision in *State v. Bodyke*, Slip Opinion No. 2010-Ohio-2424. By Decision and Entry filed August 10, 2010, the Court of Appeals denied reconsideration.

Appellant now seeks review by this Court.

## **ARGUMENT**

### **First Proposition of Law**

R.C. 2950.031 and 2950.032 are unconstitutional and unenforceable. Given the unconstitutionality of these sections, they provide no basis for reclassification of any sexual offender into the tier classification system created by the Adam Walsh Act and no registration duties arise from these sections. [*State v. Bodyke*, Slip Opinion No. 2010-Ohio-2424, applied.]

### **The *Bodyke* Rule: AWA Does Not Apply to Appellant**

In *Bodyke*, the Court found that R.C. 2950.031 and 2950.032, the reclassification provisions in the AWA, are unconstitutional because they violate the separation-of-powers doctrine. As a remedy, the Court struck R.C. 2950.031 and 2950.032. These provisions are therefore of no force and effect.

This is critically important here, because the sole basis for reclassifying Appellant into a tier based registration system and for imposing AWA duties on Appellant is by application of R.C. 2950.031. The Court of Appeals never addressed this issue, instead standing on its holding that the AWA applies to any sex offender, no matter when the conviction occurred.

*Bodyke* is to the contrary. Compliance with AWA is required only after the Ohio Attorney General completes the tier classification for that offender provided by

R.C. 2950.031 and 2950.032. Since R.C. 2950.031 and 2950.032 are unconstitutional, the Attorney General may not conduct and complete this assessment and reclassification of Appellant—and he may not be prosecuted for failing to comply with AWA requirements.

**AWA May Not Be Applied Retrospectively to Offenders Who Were Not Subject to Megan’s Law**

The *Bodyke* holding and severance remedy remove any doubt on the issue: Appellant had no duty to register or verify his address and, accordingly, could not be subject to prosecution for failing to comply with those duties. But even without discussion or application of the *Bodyke*, analysis, Appellant had no such duties because he was not subject to the requirements imposed by H.B. 180 (“Megan’s Law”).

Under pre-AWA law, only offenders who were either sentenced after July 1, 1997, or released on or after that date from incarceration for the particular sex offense, were subject to the registration and verification requirements of the version of Chapter 2950 created by H.B. 180. See *State v. Bellman* (1999), 86 Ohio St.3d 208, 1999-Ohio-95; *State v. Taylor*, 100 Ohio St.3d 172, 2003-Ohio-5452. The Court was explicit on this point in *State v. Champion*, holding that “a person whose prison term for a sexually oriented offense was completed before July 1, 1997, is not required to register under R.C. 2950.04(A)(1)(a) or periodically verify a current address under R.C. 2950.06(A)”.

The court below held that Senate Bill 10 is so broad as to make any sex offender, no matter the date of conviction, subject to Chapter 2950’s requirements. But the language of R.C. 2950.033 reflects a more limited legislative intent. That statute sets forth procedures for applying the provisions of Senate Bill 10 retrospectively to offenders who had a duty to comply with the registration

requirements of prior law. It makes no mention of applying those requirements to offenders who had no previous duty to register.

Similarly, R.C. 2905.07 provides direction on how to determine *when* a duty attached to an individual. R. C. 2950.07(A)(8) states:

If the offender's duty to register was imposed pursuant to section 2950.04 of the Revised Code as they existed prior to January 1, 2008, the offender's duty to comply with sections 2950.04 of the Revised Code as they exist on and after January 1, 2008, is a continuation of the offender's duty to register imposed prior to January 1, 2008, under section 2950.04 of the Revised Code continues, after the date of commencement . . .

Only those offenders who *were* subject to the provisions of Chapter 2950 under Megan's Law are retroactively incorporated into AWA. Since Appellant was never actually subject to the former law, he cannot now be held subject to its successor statutes. *Id.*; see also *State v. Cook*, Miami App. No. 2008 CA 19, 2008-Ohio-6543 ("applies retroactively to those offenders whose existing registration requirements would expire after July 1, 2007").

By contrast, the appellate court's expansive interpretation renders complex provisions such as R.C. 2909.033 and 2905.07 little more than surplusage. It is a fundamental canon of statutory construction that a statute should not be construed so as to render any of its provisions mere surplusage. *See, e.g., Ratzlaf v. United States* (1994), 510 U.S. 135, 140-41 (noting that statutory language should not be construed so as to render certain words or phrases mere surplusage); *Bowsher v. Merck & Co* (1982), 460 U.S. 824, 833 (restating "the settled principle of statutory construction that we must give effect . . . to every word of the statute"); *Astoria Federal Savings & Loan Ass'n v. Solimino* (1991), 501 U.S. 104, 112; *Sprietsma v. Mercury Marine* (2003), 537 U.S. 51, 63; *Bailey v. United States* (1995), 516 U.S. 137, 146.

Therefore, even under pre-*Bodyke* law, Appellant had no duty to register or verify his address or otherwise comply with AWA.

## Second Proposition of Law

When the record unequivocally demonstrates that Chapter 2950 does not impose registration requirements on a defendant, Crim.R. 12 permits the trial court to dismiss an indictment that asserts a violation of those requirements.

The appellate court held that the trial court was without jurisdiction to dismiss the 2009 indictment filed against Appellant. The indictment, like Appellant's petition, raised the issue whether the Appellant had a duty to comply with Chapter 2950's registration requirements.

As a general proposition, determination of whether a duty exists is a question of law for the court to decide. *Mussivand v. David* (1989), 45 Ohio.St.3d 314, 31. *Clemets v. Heston* (1985), 20 Ohio.App.3d 132. Certainly, then, the trial court could properly find in the petition case that Appellant had no duty to register, based upon *State v. Champion*. Here, the State asks the trial court to proceed through an unnecessary trial in order to make the same determination in the failure to register prosecution. Even if a jury would have found Appellant guilty, the trial court would be obligated to dismiss because there was no duty to register.

The gist of the trial court's ruling is that the due to the absence of duty as a matter of law, the indictment does not charge an offense. Dismissal was proper pursuant to Crim.R. 12(C)(2).

Interestingly, this Court's opinion in *State v. Champion* reflects at least an implicit approval of this procedure. *Champion*, like the indictment at issue here, involved allegations of failure to register. The Court described the facts in ¶ 7 of the *Champion* opinion:

The state charged Champion with a registration violation under R.C. 2950.06 because he had been convicted of GSI, a sexually oriented offense under R.C. 2950.01(D)(1)(a), and had been released from prison after July 1, 1997. ***Champion filed a motion to dismiss the indictment, which was granted by the trial court after a hearing. The Court of Appeals for Cuyahoga County affirmed the dismissal of the indictment,*** determining that "[t]he plain language of R.C. 2950.04 requires that the offender be sentenced for or

under confinement for a 'sexually oriented offense' on or after July 1, 1997 in order for the registration requirement to be applicable." It also noted that there was insufficient evidence to indicate why Champion had been sent back to prison. *State v. Champion*, 8th Dist. No. 83157, 2004-Ohio-2009, 2004 WL 858763, at ¶ 15.

(Emphasis added.)

The trial court below properly exercised its jurisdiction in dismissing the indictment.

### **Third Proposition of Law**

Upon determining that an offender is not a sexual offender subject to the requirements of Revised Code Chapter 2950, a trial court possesses jurisdiction to order law enforcement agencies to delete the offender's name from sexual offender databases.

After the trial court determined that Appellant was not subject to the Chapter 2950's requirements, it ordered that his "name be removed from all sexually oriented lists maintained by the local, state or federal government." (Judgment Entry, September 16, 2009). This was a proper exercise of the court's jurisdiction.

The court correctly determined that Appellant was not subject to the requirements of Chapter 2950. The inclusion of Appellant's name on any list generated by law enforcement personnel consistent with the purposes of Chapter 2950 is likewise improper, impermissible, and unsupported by law.

It should be noted that the order is limited by its terms to "sexually oriented lists". Offender databases designed for other purposes (such as general investigative databases maintained by BCI or other law enforcement personnel) fall outside the scope of the order. Even in the absence of express statutory jurisdiction, Ohio courts historically have had jurisdiction to limit information contained in law enforcement records while nevertheless permitting law enforcement personnel to maintain records available for use in legitimate criminal investigations. See, *e.g.*, *City of*

*Pepper Pike v. Doe* (1981), 66 Ohio St.2d 374. The trial court's judgment was simply an exercise of this authority.

### CONCLUSION

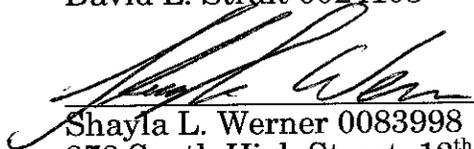
For the reasons set forth herein, Appellant Paul E. Palmer respectfully urges this Court to accept jurisdiction and decide this appeal on its merits.

Respectfully submitted,

Yeura R. Venters 0014879  
Franklin County Public Defender



David L. Strait 0024103

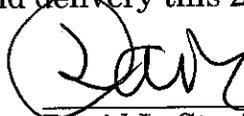


Shayla L. Werner 0083998  
373 South High Street, 12<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: 614/719-8872  
Facsimile: 614/461-6470

*Attorneys for Appellant  
Paul E. Palmer*

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum in Support of Jurisdiction of Appellant was served upon Steven L. Taylor, Assistant Franklin County Prosecuting Attorney, 373 S. High Street, Columbus, Ohio 43215 by hand delivery this 23rd day of September 2010.



David L. Strait 0024103

*Attorney for Appellant  
Paul E. Palmer*

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

-vs-

PAUL E. PALMER,

Appellant

Case No.:

On Appeal From the  
Franklin County Court of Appeals,  
Tenth Appellate District

Case Nos. 09AP-956  
09AP-957

**APPENDIX**

**Appendix Page  
Number**

|   |     |
|---|-----|
| Judgment Entry Denying Reconsideration, 8/10/10.....          | A-1 |
| Decision Denying Reconsideration, 8/10/10.....                | A-2 |
| Judgment Entry, Franklin County Court of Appeals, 6/3/10..... | A-5 |
| Opinion, Franklin County Court of Appeals, 6/11/10.....       | A-6 |

WX

FILED  
AUG 10 2010

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

AUG 10 PM 3:25  
CLERK OF COURTS

State of Ohio,

Plaintiff-Appellant,

v

Paul E. Palmer,

Defendant-Appellee.

No. 09AP-956  
(C P C No 95CR-5474)

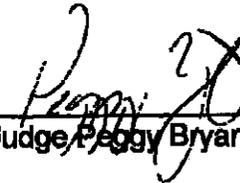
No. 09AP-957  
(C P C No 09CR-3152)

(REGULAR CALENDAR)

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on August 10, 2010, it is the order of this court that the motion for reconsideration, filed on June 3, 2010, is denied. Costs assessed to defendant.

BRYANT, SADLER & CONNOR, JJ.

By  \_\_\_\_\_  
Judge Peggy Bryant

A-1

FILED  
COURT OF APPEALS  
TENTH APPELLATE DISTRICT  
AUG 10 PM 1:33  
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

|                      |   |                       |
|----------------------|---|-----------------------|
| State of Ohio,       | : | <i>Bessley</i>        |
| Plaintiff-Appellant, | : | No. 09AP-956          |
| v.                   | : | (C.P.C. No 95CR-5474) |
| Paul E. Palmer,      | : | No. 09AP-957          |
| Defendant-Appellee.  | : | (C.P.C. No 09CR-3152) |
|                      |   | (REGULAR CALENDAR)    |

MEMORANDUM DECISION

Rendered on August 10, 2010

*Ron O'Brien, Prosecuting Attorney, and Steven L. Taylor, for appellant.*

*Yeura R. Venters, Public Defender, and David L. Strait, for appellee.*

ON MOTION FOR RECONSIDERATION

BRYANT, J.

{¶1} Defendant-appellee, Paul E. Palmer, filed a motion on June 3, 2010 requesting reconsideration pursuant to App.R. 26(A) of our decision in this case. Because defendant does not raise any issue not previously considered and does not set forth an obvious error in our prior decision, defendant's motion is denied.

A-2

{¶2} The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that the court either did not consider at all or did not fully consider when it should have been. *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 143. An application for reconsideration is not designed for use in instances where a party simply disagrees with the logic or conclusions of the court. *State v. Owens* (1996), 112 Ohio App.3d 334.

{¶3} In his motion for reconsideration, defendant asserts our decision is erroneous in light of the Supreme Court of Ohio's decision in *State v. Bodyke*, Slip Opinion No. 2010-Ohio-2424. In *Bodyke*, the Supreme Court of Ohio held R.C. 2950.031 and 2950.032 violate the separation-of-powers doctrine and ordered those provisions severed from S.B. 10. *Id.* at ¶¶66-67.

{¶4} Defendant's appeal did not raise constitutional issues. Rather, as we expressly noted, "[t]he parties' arguments do not involve a constitutional challenge to S.B. 10; they instead dispute whether the provisions of the AWA, by their very language, apply to defendant." *State v. Palmer*, 10th Dist No. 09AP-956, 2010-Ohio-2421, ¶18. Indeed, the statutory provisions at issue in defendant's case were the various subsections of R.C. 2950.04(A)(2); those provisions were not the subject of the *Bodyke* decision. Thus, *Bodyke* does not provide a basis to reconsider our decision in this case. On remand, defendant will be able to raise in the trial court not only *Bodyke*-related arguments but other constitutional issues as well.

{¶5} Defendant also asserts our decision is erroneous in that we did not consider the impact R.C. 2950.07(A)(8), which addresses not the applicability of the registration

A-3

X

requirements but rather when an offender's duty to register under R.C. 2950.04 commences. The appeal involved the applicability of R.C. 2950.04(A)(2) and the actual requirement of registration, not the timing involved in the registration requirements. See Decision at ¶¶21-24. As an examination of R.C. 2950.04(A)(2) addressed the trial court's decision and resolved the state's appeal, an in-depth discussion of R.C. 2950.07(A)(8) was not material to our decision. Defendant, however, may raise further challenges to S.B. 10, statutory or otherwise, in the trial court on remand.

{¶6} Because defendant's motion for reconsideration does not raise an issue not previously considered and does not set forth an obvious error in our prior decision, defendant's motion for reconsideration is denied.

*Motion for reconsideration denied.*

SADLER and CONNOR, JJ., concur.

---

A-4

---

lvx

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

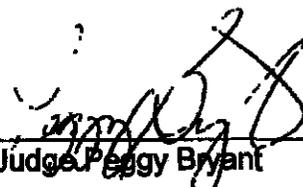
JUN-3 PM 3:25  
CLERK OF COURTS

|                      |   |                      |
|----------------------|---|----------------------|
| State of Ohio,       | : |                      |
|                      | : |                      |
| Plaintiff-Appellant, | : | No. 09AP-956         |
|                      | : | (C P C No 95CR-5474) |
| v                    | : | No. 09AP-957         |
|                      | : | (C P C No 09CR-3152) |
| Paul E Palmer,       | : |                      |
|                      | : | (REGULAR CALENDAR)   |
| Defendant-Appellee.  | : |                      |

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 1, 2010, and having sustained plaintiff's three assignments of error, it is the judgment and order of this court that the judgments of the Franklin County Court of Common Pleas are reversed, and these causes are remanded to that court for further proceedings in accordance with law consistent with said decision. Costs assessed to defendant.

BRYANT, SADLER & CONNOR, JJ

By  \_\_\_\_\_  
Judge Peggy Bryant

A-5

✓  
11

FILED  
COURT OF APPEALS  
FRANKLIN COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

2<sup>ND</sup> JUN -1 PM 12:01  
CLERK OF COURTS

*Henry*

|                      |   |                      |
|----------------------|---|----------------------|
| State of Ohio,       | : |                      |
|                      | : |                      |
| Plaintiff-Appellant, | : | No. 09AP-956         |
|                      | : | (C P C No 95CR-5474) |
| v.                   | : | No. 09AP-957         |
|                      | : | (C P C No 09CR-3152) |
| Paul E. Palmer,      | : |                      |
|                      | : | (REGULAR CALENDAR)   |
| Defendant-Appellee.  | : |                      |

DECISION

Rendered on June 1, 2010

*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

*Yeura R. Venters*, Public Defender, and *David L. Strait*, for appellee.

APPEALS from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, State of Ohio, appeals from judgments of the Franklin County Court of Common Pleas in case Nos. 09AP-956 and 09AP-957 that granted the motion to dismiss of defendant-appellee, Paul E. Palmer, and concluded defendant's 1995 conviction did not subject defendant to the provisions of R.C Chapter 2950, including any statutory duty to register or to verify his current address. Because the trial

court erred (1) in granting defendant's motion to dismiss, and (2) in concluding defendant is not subject to the provisions of R.C. Chapter 2950, we reverse.

### **I. Procedural History**

{¶2} On September 25, 1995, defendant was indicted for one count each of attempted rape, aggravated burglary, aggravated robbery, robbery, and kidnapping, each with a specification alleging defendant was convicted of robbery on May 27, 1988. On December 11, 1995, defendant entered a guilty plea to the stipulated lesser included offense of the first count of the indictment, sexual battery in violation of R.C. 2907.04, a felony of the third degree, without specification; on the state's request, the court entered a nolle prosequi on the remaining counts. The trial court sentenced defendant to one and one-half years of incarceration, granting 112 days of credit. A judgment entry memorializing the trial court's proceedings was filed January 8, 1996; a corrected entry was filed on April 23, 1996.

{¶3} On March 6, 2008, defendant filed a "Petition to Contest Reclassification and Application of R.C. 2950.01, et seq." in case No. 09AP-956. According to the petition, defendant became aware that, pursuant to Ohio's Adam Walsh Child Protection and Safety Act of 2006, as enacted in R.C. 2950.01 et seq. ("AWA"), the Ohio Attorney General reclassified defendant as a Tier III Sex Offender based on his 1995 conviction. The petition notes that, as a result of his reclassification, defendant was required to register with the local sheriff's office every 90 days for life and was subject to the community notification provisions of R.C. 2950.11. Defendant's petition contested his reclassification and challenged the constitutionality of the AWA.

{¶4} On the same day, defendant filed a motion to stay enforcement of the community notification provisions in R.C. 2950.11 pending a determination of his petition contesting his reclassification. Although the state opposed both defendant's motion for stay and his petition contesting his reclassification, the trial court in March 2008 granted defendant's motion to stay enforcement.

{¶5} On May 28, 2009, defendant was indicted in case No. 09AP-957 on one count each of failure to provide notice of change of address in violation of R.C. 2950.05 and failure to verify current address in violation of R.C. 2950.06, both felonies of the third degree. Defendant responded with a motion to dismiss, filed July 15, 2009. Due to defendant's indictment in case No. 09AP-957 for violations of R.C. 2950.05 and 2950.06, defendant filed on June 23, 2009 a motion for immediate disposition of his petition challenging his reclassification in case No. 09AP-956.

{¶6} The state on July 28, 2009 responded in case No. 09AP-957 to defendant's motion to dismiss. The state initially asserted defendant's motion in effect asked the court to grant summary judgment, a mechanism not permitted in criminal cases. It further contended the AWA, by its clear terms, applied to defendant and made him subject to the notification and registration sections of the AWA, an argument that spilled over into the issues contested in case No. 09AP-956.

{¶7} On September 16, 2009, the trial court held a hearing on defendant's petition in case No. 09AP-956 in which it considered primarily the arguments the state raised in its memorandum opposing defendant's motion to dismiss in case No. 09AP-957. The trial court filed an entry the same day, granted the relief defendant requested in paragraph 20 of the petition and declared "that Defendant-Petitioner cannot properly be

classified under the Adam Walsh Act, and thus shall be free from all registration and notification requirements pursuant thereto." Accordingly, the court held "defendant is not under any statutory duty to verify his current address or to register as required by R.C. 2950.04 through 2950.06." Lastly, the trial court ordered defendant's name removed from all lists of sexually oriented offenders that the local, state, or federal governments maintain.

{¶8} By entry filed the same day in case No. 09AP-957, the trial court granted defendant's motion to dismiss, concluding defendant "is not under any statutory duty to verify his current address or to register as required by Revised Code Chapter 2950." The court ordered both that defendant's name be removed from all sexually oriented lists that the local, state, or federal governments maintain and that defendant be "released forthwith on this case."

## **II. Assignments of Error**

{¶9} The state appeals both judgments, assigning three errors:

### **FIRST ASSIGNMENT OF ERROR**

THE COMMON PLEAS COURT ERRED IN DISMISSING THE INDICTMENT BY GOING BEYOND THE FACE OF THE INDICTMENT AND CONCLUDING THAT DEFENDANT HAD NO DUTY TO REGISTER.

### **SECOND ASSIGNMENT OF ERROR**

THE COMMON PLEAS COURT ERRED IN DETERMINING THAT R.C. CHAPTER 2950, AS EFFECTIVE JANUARY 1, 2008, HAS NO APPLICATION TO DEFENDANT.

### **THIRD ASSIGNMENT OF ERROR**

THE COMMON PLEAS COURT ERRED IN ORDERING THAT DEFENDANT'S "NAME BE REMOVED FROM ALL

SEXUALLY ORIENTED LISTS MAINTAINED BY THE LOCAL, STATE OR FEDERAL GOVERNMENT," AS THE COURT LACKED JURISDICTION TO AFFORD SUCH BROAD INJUNCTIVE RELIEF.

### III. First Assignment of Error—Motion to Dismiss

{¶10} The state's first assignment of error asserts the trial court erred in granting defendant's motion to dismiss the indictment. The state contends Crim.R. 12(C) "only allows a pretrial motion to dismiss if it raises a defense or objection 'capable of determination without the trial of the general issue,' the 'general issue' meaning the defendant's guilt or innocence for the offense charged." (Appellant's brief, 7.) The state contends defendant's motion was impermissible under Crim.R. 12(C) because it prematurely raised the issue to be determined at trial: "whether the State could prove [defendant] had a duty to register, to provide change of address, and to verify current address" under R.C. 2950.05 and 2950.06 as a result of his prior conviction. (Appellant's brief, 7.)

{¶11} "A motion to dismiss tests the sufficiency of the indictment, without regard to the quantity or quality of evidence that may be produced at trial." *State v. Preztak*, 181 Ohio App.3d 106, 2009-Ohio-621, ¶12, citing *State v. Patterson* (1989), 63 Ohio App.3d 91. "The issue as to the legal sufficiency of the evidence is not properly raised by a pretrial motion[.]" *State v. McNamee* (1984), 17 Ohio App.3d 175, 176; *State v. Hood* (Sept. 27, 2001), 10th Dist. No. 01AP-90 (stating that "when a trial court decides on the validity of a charging instrument, it is precluded from considering whether the prosecution could prove the elements of the charged offenses").

{¶12} As a result, "[a] pretrial motion must not involve a determination of the sufficiency of the evidence to support the indictment. If the indictment is valid on its face, a motion to dismiss should not be granted." *Prezta*, citing *State v. Eppinger*, 162 Ohio App.3d 795, 2005-Ohio-4155, citing *State v. Varner* (1991), 81 Ohio App.3d 85, 86 (stating "[t]he Ohio Rules of Criminal Procedure \* \* \* do not allow for 'summary judgment' on an indictment prior to trial"); *Columbus v. Storey*, 10th Dist. No. 03AP-743, 2004-Ohio-3377, ¶7; *State v. Tipton* (1999), 135 Ohio App.3d 227, 228 (noting that "[w]hen a defendant in a criminal action files a motion to dismiss that goes beyond the face of the indictment, he is, essentially, moving for summary judgment")

{¶13} The Supreme Court of Ohio carved out an exception to the general rule, noting that a court may consider material outside the face of the indictment if the "motion did not embrace what would be the general issue at trial." *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, ¶18. Crim.R. 12(C), however, does not permit a court to determine a pretrial motion to dismiss if it requires the trial court also to determine the general issue for trial. *Id*

{¶14} Defendant's motion to dismiss contended "his continuing prosecution [under the noted statutes] is directly contrary to the Ohio Supreme Court's mandate in *State v. Champion*, 106 Ohio St.3d 120, 2005-Ohio-4098." Defendant pointed to the holding in *Champion*, which stated only offenders who were sentenced on or after July 1, 1997, released after that date, or declared a habitual sexual offender immediately prior to that date were subject to the registration and verification requirements of R.C. Chapter 2950. *Id.* at ¶3-6 Defendant compared the chronology of his own 1996 conviction to *Champion*, observing he completed his obligations under that conviction on March 15, 1997.

A-11

{¶15} Defendant's motion to dismiss does not challenge the face of the indictment or contend that it fails to assert violations of R.C. 2950.05 and 2950.06. Instead, defendant asserts the state is unable to prove the allegations of the indictment due to the dates of defendant's past conviction. Because defendant's arguments not only draw upon evidence outside the face of the indictment but address the very issue to be determined at trial, the trial court erred in granting defendant's motion to dismiss the indictment.

{¶16} Indeed, the state's first assignment of error presents an issue remarkably similar to *State v. Caldwell*, 8th Dist. No. 92219, 2009-Ohio-4881, where the indictment charged Caldwell with failing to notify the sheriff of a change of address, a duty arising out of his conviction on February 16, 2003 for gross sexual imposition. Caldwell moved to dismiss the indictment, contending the sentencing court specifically determined he had no legal duty to register and therefore could not have been reclassified as a Tier I sex offender under the Adam Walsh Act. In determining the trial court erred when it granted Caldwell's motion, the appellate court observed that the "motion necessarily questions the state's ability to prove the indictment, which implicitly alleged that appellee did have a duty to register." *Id.* at ¶4. Noting Caldwell did not contend the indictment facially failed to charge an offense, "but rather that the state cannot prove that he committed the offense charged," the Eighth District determined the common pleas court erred in dismissing the indictment "at this early stage of the proceedings." *Id.*

{¶17} Because defendant's motion to dismiss did not challenge the face of the indictment, but rather contended the state would not be able to prove defendant violated R.C. 2950.05 or 2950.06 due to the date of defendant's release from imprisonment, defendant's motion exceeded the permissible bounds of a pretrial motion under Crim.R.

A-12

12(C). The trial court erred in granting defendant's motion to dismiss. The state's first assignment of error is sustained.

#### **IV. Second and Third Assignments of Error – Duty under S.B. 10**

{¶18} The state's second assignment of error contends the trial court erred in concluding the provisions of the AWA do not apply to defendant. The state's third assignment of error, a corollary to the second, contends the trial court erred in ordering defendant's name removed from the lists of sexually oriented offenders the local, state, and federal governments maintain. The parties' arguments do not involve a constitutional challenge to S.B. 10; they instead dispute whether the provisions of the AWA, by their very language, apply to defendant.

{¶19} "The polestar of construction and interpretation of statutory language is legislative intention." *State ex rel. Francis v. Sours* (1944), 143 Ohio St. 120, 124. "In determining the legislative intent of a statute 'it is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used.' " (Emphasis sic.) *Wheeling Steel Corp. v. Porterfield* (1970), 24 Ohio St.2d 24, 28, quoting *Columbus-Suburban Coach Lines v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127.

{¶20} "[C]ourts do not have authority to ignore the plain and unambiguous language under the guise of judicial interpretation, but rather in such situations the courts must give effect to the words used." *In re Burchfield* (1988), 51 Ohio App.3d 148, 152, citing *Dougherty v. Torrence* (1982), 2 Ohio St.3d 69, 70; *Ohio Dental Hygienists Assn. v. Ohio State Dental Bd.* (1986), 21 Ohio St.3d 21, 23, *State v. Krutz* (1986), 28 Ohio St.3d 36, 38, certiorari denied (1987), 481 U.S. 1028, 107 S.Ct. 1953. "Where the

language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph five of the syllabus.

{¶21} To support its assignment of error, the state points to the language of R.C. 2950.04(A)(2) of the AWA, which states that "[r]egardless of when the sexually oriented offense was committed, each offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a sexually oriented offense shall comply" with the registration requirements described in R.C. 2950.04(A)(2)(a), (b), (c), (d), and (e). Focusing on the initial clause of R.C. 2950.04(A)(2), the state contends that the date of defendant's conviction or release from imprisonment is immaterial to his statutory duties.

{¶22} The trial court relied on the Supreme Court's decision in *Champion* to grant defendant's motion. Applying the law then in effect, *Champion* determined that "a person whose prison term for a sexually oriented offense was completed before July 1, 1997, is not required to register under R.C. 2950.04(A)(1)(a) or periodically verify a current address under R.C. 2950.06(A).]" *Id.* at ¶13. The state, however, notes *Champion* was premised on statutory language that the AWA substantially changed.

{¶23} Former R.C. 2950.04(A)(1)(a), (b), and (c) based the statutory duties of registration and address verification on whether, as pertinent here, the defendant was released from incarceration on or after July 1, 1997. The AWA is much broader and specifically deletes the time frame references found in the former version of the statute. As a result, an offender, "regardless of when the sexually oriented offense was

committed," must comply with the requirements set forth in R.C. 2950.04(A)(2)(a), (b), (c), (d), and (e) if the offender was convicted of, pleaded guilty to or is convicted of or pleads guilty to a sexually oriented offense. *State v. Hollis*, 8th Dist. No. 91467, 2009-Ohio-2368, ¶¶22, 24 (noting S.B. 10 "clearly states that it applies to offenders whose crimes were committed before the act took effect," leaving the trial court with "no option but to apply the AWA, in spite of the date of [defendant's] offense"); *State v. Bundy*, 2d Dist. No. 23063, 2009-Ohio-5395, ¶¶54, 55, appeal allowed, 124 Ohio St.3d 1473 (stating that even if defendant "did not have an obligation to register his address at the time of his initial conviction in 2003, he was required to register when the new law became effective in January 2008" because "the law that became effective in January 2008, applies to all offenders who have been convicted of a sexually oriented offense, regardless of when the offense was committed").

{¶24} Based on the statutory language, we can conclude only that defendant's duties under the AWA are not premised on the time frame referenced in the law cited in *Champion* but on the language of the AWA which requires compliance, regardless of when defendant pleaded guilty to the offense. Accordingly, the provisions of the AWA apply to defendant. The state's second assignment of error is sustained.

{¶25} The state's third assignment of error asserts the trial court erred in removing defendant's name from the various lists that local, state, and federal governments maintain. Because the basis for the trial court order was its conclusion that defendant had no duty under the notification and registration provision of the AWA, the trial court's order to remove defendant's name from the stated lists likewise must be reversed. The state's third assignment of error is sustained.

A-16

X

{¶26} Having sustained the state's three assignments of error, we reverse the judgments of the trial court and remand for further proceedings consistent with this decision.

*Judgments reversed  
and cases remanded.*

SADLER and CONNOR, JJ., concur.

---

A-16