

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	Case No. 2011-212
Plaintiff-Appellee,	:	
	:	
v.	:	On Appeal from the Holmes County
	:	Court of Appeals, Fifth Appellate
Wesley Lloyd,	:	District, Case No. 09CA12
	:	
Defendant-Appellant.	:	

Memorandum in Support of Jurisdiction of Appellant Wesley Lloyd

Office of the Ohio Public Defender

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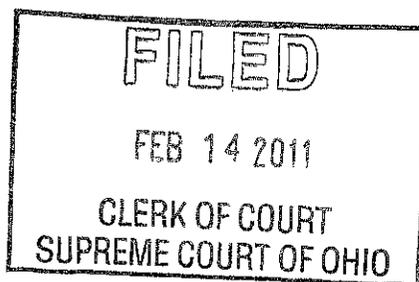


Table of Contents

Page No.

Explanation of why this Case Raises Substantial Constitutional Questions And is a Case of Great General and Public Interest 1

I. In practice, both defendants and law enforcement make mistakes when trying to abide by Ohio’s complex Sex Offender Registration and Notification (SORN) system..... 1

II. This case is ideal to resolve the issue as to how to deal with mistakes and allegedly missed deadlines because 1) Mr. Lloyd told law enforcement exactly what he was doing and where he was living and 2) law enforcement gave Mr. Lloyd objectively wrong information as to his registration requirements..... 1

III. The statute expressly provides that a defendant has not committed an offense when he misses the twenty-days-in-advance new address notification when he does not know he will be moving twenty days in advance..... 2

IV. This Court should review this case to determine whether R.C. 2901.21(B) and *State v. Johnson*, Slip Op. 2010-Ohio-6301, require the State to prove that a defendant recklessly violated the SORN laws. 2

Statement of the Case and the Facts 4

I. A 1995 Texas Conviction, a move to Ohio, an SB10 Reclassification Letter..... 4

II. Mr. Lloyd provides actual notice of his move to law enforcement the day of his move, but he cannot meet the deadlines in R.C. 2950.05 because he does not know he will move until less than twenty days in advance. 5

III. Two missed deadlines lead to first-degree felony convictions despite actual notice to law enforcement..... 6

IV. Convictions and sentence: Despite actual notice to law enforcement, Mr. Lloyd is sentenced to three years in prison. 6

V. Mr. Lloyd has abided by the terms of his bond..... 7

Table of Contents

Page No.

Argument.....	8
Proposition of Law No. I:	
The State must prove that a defendant acted recklessly to obtain a conviction for failure to register as a sexually oriented offender. R.C. 2901.21(B), <i>State v. Johnson</i> , Slip Op. 2010-Ohio-6301, applied.....	8
Proposition of Law No. II:	
A court should conduct an elemental comparison of an out-of-state offense when determining 1) whether the offense triggers the duty to register in Ohio under R.C. 2950.01, and 2) the punishment for failing to register in Ohio under R.C. 2950.99.	10
Proposition of Law No. III:	
It is impossible for a defendant to comply with the sex offender registration and notice statutes when he does not know he will move until less than 20 days before the move and when law enforcement informs him that he cannot register.....	13
Proposition of Law No. IV:	
The State failed to prove that Mr. Lloyd had a duty to register under Megan's Law.	14
Proposition of Law No. V:	
A conviction for failing to register or give notice of an address change as a Tier III offender must be vacate in light of <i>State v. Bodyke</i> , 126 Ohio St.3d 266, 2010-Ohio-2424 even where SB10 did not change a defendant's registration requirements.	15
Conclusion.....	15
Certificate of Service.....	16
Appendix:	
Judgment Entry and Opinion, Holmes County Court of Appeals Case No. 09CA12 (Dec. 30, 2010).....	A-1

**Explanation of why this Case Raises Substantial Constitutional Questions
And is a Case of Great General and Public Interest**

I. In practice, both defendants and law enforcement make mistakes when trying to abide by Ohio's complex Sex Offender Registration and Notification (SORN) system.

Both lower courts and law enforcement need guidance as to how to apply the detailed requirements of Ohio's Sex Offender Registration and Notification laws to the real lives of offenders and the practical realities of law enforcement. Under the State's theory in this case, adopted by the court of appeals, any mistake by an offender as to the form and date of compliance with notice and registration duties is a felony equal in degree to the offense that put the offender on the registration list.

II. This case is ideal to resolve the issue as to how to deal with mistakes and allegedly missed deadlines because 1) Mr. Lloyd told law enforcement exactly what he was doing and where he was living and 2) law enforcement gave Mr. Lloyd objectively wrong information as to his registration requirements.

This case is ideal to give the needed guidance because a reasonable jury could find that Mr. Lloyd honestly tried to comply with the law. The Auglaize County Sheriff's office admits that Mr. Lloyd called them the day he moved from Auglaize County to Holmes County. In fact, it was that phone call that led Holmes County officials to arrest him ten days later. And they found him in the house where he told the Auglaize County Sheriff he would be living.

Worse, the Auglaize County Sheriff's department admits that they told him (wrongly, it turns out), that he had to physically return to Auglaize County before registering in Holmes County.

The trial court left unresolved a factual question because the court mistakenly believed it was not relevant. The trial court did not resolve Mr. Lloyd's claim that he sent the Auglaize County a letter immediately after learning of his proposed move about ten days before the move. T.p. (sentencing) 6 ("Even if the defendant's letter have actually been sent and subsequently misplaced by Auglaize County, it was not twenty days prior to the defendant changing his residence"). Likewise, the court of appeals held that the misinformation from the Auglaize County Sheriff's Office was irrelevant because "the alleged impossibility was created by his original violation of the law in Auglaize County." Opinion at ¶75.

III. The statute expressly provides that a defendant has not committed an offense when he misses the twenty-days-in-advance new address notification when he does not know he will be moving twenty days in advance.

Both the trial court and the court of appeals fail to apply the express defense that R.C. 2950.05(G)(1) provides for exactly this situation. That section makes it a defense that the defendant did not know that he would move twenty days in advance.

IV. This Court should review this case to determine whether R.C. 2901.21(B) and *State v. Johnson*, Slip Op. 2010-Ohio-6301, require the State to prove that a defendant recklessly violated the SORN laws.

Mr. Lloyd's efforts to comply with the SORN laws, coupled with law enforcement misinformation, make this case a good case to use to give lower courts guidance as to how to apply the recklessness requirement of R.C. 2901.21(B) to the Ohio's SORN laws. In *State v. Johnson*, Slip Op. 2010-Ohio-

6301, this Court held that the General Assembly intended for R.C. 2901.21(B) to apply to statutes that contain no mental state, and R.C. 2950.04 and 2950.05 contain no mental state. Further, the federal law that prompted SB10 requires the government to prove a *knowing* violation of registration requirements, so it is difficult for the State to win the argument that Ohio's version of the federal statutes "plainly indicate[] a purpose to impose strict criminal liability. . . ."

Because Mr. Lloyd did inform law enforcement of his plans, and because law enforcement provided him incorrect information about how to register (or even whether he could), a reasonable jury could find that he did not recklessly violate the law.

Statement of the Case and the Facts

I. A 1995 Texas Conviction, a move to Ohio, an SB10 Reclassification Letter.

As a result of a 1995 Texas conviction for the aggravated sexual assault of his then wife, Mr. Lloyd brought paperwork to the Auglaize County Sheriff's Office to explain his Texas conviction when he moved to Ohio in 2005. He registered there as a sexually oriented offender.

The State did not establish that Mr. Lloyd has a duty to register as a sex offender in Texas. The Court of Appeals misinterpreted Mr. Lloyd's statement that before he left Texas, he got a Texas form to bring to Ohio to "establish [his] duty to register." T.p. 104-5. Mr. Lloyd was only stating that he brought paperwork to Ohio to accurately explain his status. He was not admitting that he had a duty to register in Texas. The State concedes that it does not know how the State determined that Mr. Lloyd had any registration duty in Ohio as a sexually oriented offender. State's Supplemental Brief, Sept. 8, 2010, p. 3 ("The record is unclear whether Lloyd was initially classified as a sexually oriented offender by the Ohio Attorney General or by law enforcement").

In late 2007, the Ohio Attorney General sent him an SB10 letter telling him that he was no longer a "sexually oriented offender." Instead, Mr. Lloyd was, according to the Attorney General, a Tier III Offender with far more extensive and intrusive registration requirements.

II. Mr. Lloyd provides actual notice of his move to law enforcement the day of his move, but he cannot meet the deadlines in R.C. 2950.05 because he does not know he will move until less than twenty days in advance.

Mr. Lloyd did not decide to move from Auglaize County to Holmes County until thirteen or fourteen days before the move in 2008. Twelve days before he moved, Mr. Lloyd sent a letter to the Auglaize County Sheriff to inform him of the move. The Auglaize County Sheriff denies receiving the letter. The trial court found that the parties disputed whether the letter was sent, but the trial court did not resolve the dispute.

It is undisputed that he called the Auglaize County Sheriff the day that he completed the move. As a result of Mr. Lloyd's call to the Auglaize County Sheriff, that sheriff called the Holmes County Sheriff. An Auglaize County Sheriff's official conceded that he told Mr. Lloyd that he could not register in Holmes County until Mr. Lloyd personally returned to Auglaize County to complete paperwork, but no such requirement exists in Ohio law:

- Q. And I want to make it clear, you told him that he could not register in Holmes County until he c[a]me in to see you?
- A. Yes, sir. He has to register with us before he can register in another county.

T.p. 44. The officer repeated that he told Mr. Lloyd that Mr. Lloyd had to personally appear in Auglaize County before registering in Holmes County.

T.p. 51 ("I told him he has to come in and change it."). The office also admitted that it did not understand how the twenty-day deadline worked for defendants who did not know of a move that far in advance:

- Q How is he going to supply the address 20 days in advance if he doesn't know what that address is?

A I don't know how that part of it works, sir. All I know he is supposed to give us an address 20 days before moving.

T.p. 51.

The Holmes County Sheriff arrested Mr. Lloyd ten days after his arrival in Holmes County for failing to register within three days and for failing to provide twenty days advance notice of the move.

III. Two missed deadlines lead to first-degree felony convictions despite actual notice to law enforcement.

After a contested bench trial, the Holmes County Common Pleas Court convicted Mr. Lloyd of failing to provide twenty days advance notice of his move to both the Auglaize and Holmes County Sheriffs, as well as the failure to register in person in Holmes County within three days of his move. The trial court imposed a three-year prison term, but stayed it pending appeal. As of the morning of the filing of this memorandum, both this Court and the court of appeals are considering whether to further stay proceedings.

IV. Convictions and sentence: Despite actual notice to law enforcement, Mr. Lloyd is sentenced to three years in prison.

The trial court convicted Mr. Lloyd of: 1) failing to register in Holmes County within three days of moving to that county, R.C. 2950.04(E); 2) failing to provide written notice of his intent to move to Holmes County to the Holmes County Sheriff at least twenty days in advance, R.C. 2950.04(E); and 3) failing to give Auglaize County notice at least twenty days in advance of his intent to move to Holmes County, R.C. 2950.05(F)(1). The trial court sentenced him to three years for each offense, to be run concurrently. Opinion, ¶5-6.

The court of appeals affirmed the first and third convictions, but vacated the second because it was based on Mr. Lloyd's erroneous reclassification to Tier III under the Adam Walsh Act. Opinion, ¶88.

V. Mr. Lloyd has abided by the terms of his bond.

The State has never alleged that Mr. Lloyd has violated any term of his trial or appellate bonds. He works as a newspaper carrier and supports his fiancée and family.

Mr. Lloyd has an honorable discharge from the Army. He left as a sergeant. He was injured in the head from an explosion while working on top of a decontamination truck during Operation Desert Storm, but he reports that he has not been evaluated for the potential of traumatic brain injury. Moreover, those injuries may have some impact on this case, as his convictions in this case result from not correctly following detailed reporting requirements that most lawyers do not understand.

Argument

Proposition of Law No. I:

The State must prove that a defendant acted recklessly to obtain a conviction for failure to register as a sexually oriented offender. R.C. 2901.21(B), *State v. Johnson*, Slip Op. 2010-Ohio-6301, applied.

The State must prove that a defendant recklessly failed to provide notice to law enforcement before obtaining a conviction for failure to timely register as a sex offender or to give advance notice of a move. Recklessness is an element of the offense of failure to properly register under R.C. 2950.04 and 2901.21(B) because R.C. 2950.04 contains no mental state for any element.

The issue is particularly strong given that 1) this Court held in *State v. Johnson*, Slip Op. 2010-Ohio-6301 that the General Assembly intended for R.C. 2901.21(B) to apply to statutes that contain no mental state; 2) the federal law that prompted SB10 requires the government to prove a knowing violation of registration requirements; 3) it is uncontested that Mr. Lloyd orally notified the sheriff of Auglaize County the day he moved to Holmes County; and 4) Mr. Lloyd raised this issue in the trial and appellate courts.

It would be difficult for the State to prove that the failure to register statute “plainly indicates a purpose to impose strict criminal liability” because the statute’s purpose was to implement the federal Adam Walsh Act, and that act requires the government to prove a “knowing” violation. Compare 18 U.S.C. § 2250(a)(3) with *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424 at ¶18-20 (Ohio adopted SB10 in response to federal legislation). In addition, federal regulations require that officials report the non-registration of sex offenders

only when a sex offender actually absconds. See, e.g., National Guidelines for Sex Offender Registration and Notification at 59 (“If a jurisdiction receives information indicating that a sex offender may have absconded, as described in the preceding bullets, and takes the measures described therein but cannot locate the sex offender, then the jurisdiction must . . .”).¹

The severity of the possible penalties militates against making this offense strict liability. The lower courts ruled that Mr. Lloyd’s Texas offense was the equivalent of a First Degree Felony, which makes any registration violation a First Degree Felony with a presumption of at least three years in prison and a mandatory five years of post-release control. R.C.

2950.99(A)(1)(a)(i). If this is a strict liability offense, a defendant who reports a move nineteen days in advance instead of twenty, or who reports to a sheriff four days after a move instead of three, faces a first-degree felony for a deadline miscalculation. And given that the State’s witnesses in this case did not or could not properly and consistently enforce the law, some defendants will innocently (or at least negligently) misinterpret their duties.

In this case, local sheriff’s officials conceded that their forms did not change with changes in the law. T.p 41. Sheriff officials, prosecutors, and lower court judges all incorrectly assume that an offender must always notify law enforcement of a planned move twenty days in advance. Compare T.p. 44-51 (Auglaize County Sheriff’s Office stating that notice must always be twenty days in advance) and T.p. (sentencing) 5 (trial court declining to resolve dispute

¹ << http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf>>

over whether Mr. Lloyd sent advance notice of the move because it was not at least twenty days in advance) with R.C. 2950.05(G)(1) (lack of knowledge of a move is a defense to a charge of violating the 20-day rule). In addition, a deputy sheriff admits that he told Mr. Lloyd (incorrectly) that Mr. Lloyd had to personally appear in Auglaize County before Mr. Lloyd could register in Holmes County. T.p. 43.

Law enforcement and trial courts created a minefield of contradictory, incomplete, and sometimes wrong information for Mr. Lloyd to navigate. As a result, this case puts the question of whether recklessness is the mental state for “untimely” notification squarely before this Court.

Proposition of Law No. II:

A court should conduct an elemental comparison of an out-of-state offense when determining 1) whether the offense triggers the duty to register in Ohio under R.C. 2950.01, and 2) the punishment for failing to register in Ohio under R.C. 2950.99.

Mr. Lloyd’s Texas conviction for aggravated sexual battery would constitute, at worst, sexual battery in Ohio. It is certainly not rape as the trial and appellate courts found.

Mr. Lloyd’s Texas jury was instructed the State has proven the offense only when it shows that “the person *intentionally or knowingly* causes the penetration of the mouth or female sexual organ of another person by the sexual organ of the actor without that persons consent, and by acts or words such person places the victim in fear that serious bodily injury or death will be imminently inflicted on any person.” Opinion at ¶31. By contrast, Ohio’s rape

statute requires that a defendant *purposefully* commit the offense. R.C. 2907.02(A)(2).

The trial and appellate courts in this case held that Mr. Lloyd's Texas offense would be rape in Ohio under R.C. 2907.02(A)(2). Opinion at ¶ 29-35. But the court of appeals erred by looking only at one similarity between Ohio's rape statute and the Texas sexual battery statute--that both statutes require some form of force. Opinion at ¶35.

The similarity of the force element does not convert a Texas aggravated sexual battery into an Ohio rape conviction because the Texas statute does not require the State to prove that a defendant acted purposefully. Instead, a Texas aggravated sexual battery conviction is more analogous to sexual battery in Ohio. Contrast R.C. 2907.03(A)(1) ("sexual conduct" when "[t]he offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution") with R.C. 2907.02(A)(2) ("sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.") This Court has held that an Ohio jury that found only that a defendant who "purposefully *or* knowingly" committed the offense would have found the defendant guilty of sexual battery. See, *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, at ¶10 (defendant guilty of least serious charge supported by elements the jury found). So when a defendant has been convicted of acting "intentional or knowingly," he has been convicted only of the offense supported by the "knowing" verdict.

The difference is critical because failing to register based on an out-of-state conviction is “a felony of the same degree as that offense committed in the other jurisdiction would constitute if committed in this state.” R.C. 2950.99(A)(1)(B)(ii). Accordingly, if Mr. Lloyd’s out-of-state conviction is a first-degree felony in Ohio, as the court of appeals and trial court incorrectly found, he faces first-degree-felony charges for failing to register. If the Texas offense were sexual battery, he would face third-degree felony charges. Moreover, if the Texas offense would not be a felony in Ohio, he faces no criminal sanction at all for failing to register.

The Fifth District’s focus on one similarity is in contrast to the elemental analysis the First District conducted in *Doe v. Leis*, 1st Dist. App. No. C-050591, 2006-Ohio-4507, ¶13. The First District conducted an elemental analysis to conclude that a Florida attempted sexual battery charge was not equivalent to an Ohio sexual battery conviction because the Florida statute did not require a threat of force. *Id.* (“The distinction between these statutes and the Florida statute is the requirement of force or threat of force.”)

The question is not, as the Fifth District held in this case, whether elements of an out-of-state offense overlap with an Ohio offense. The question is whether that out-of-state offense is an offense in Ohio, and, if so, which offense.

Proposition of Law No. III:

It is impossible for a defendant to comply with the sex offender registration and notice statutes when he does not know he will move until less than 20 days before the move and when law enforcement informs him that he cannot register.

Under R.C. 2950.05(G)(1), a defendant does not violate the twenty-day rule when shows that it was impossible for him to comply because he learns of the move less than twenty days in advance. The court of appeals and trial court treat the twenty-day deadline as absolute. Opinion, ¶75. But the deadline is not absolute under R.C. 2950.05(G)(1).

Further, the misunderstanding of the twenty-day deadline caused the trial and appellate courts to blame Mr. Lloyd for misinformation he received from the Auglaize County Sheriff's office. That office admitted that they told Mr. Lloyd that he could not register in Holmes County until he personally returned to Auglaize County to tell them again that he was leaving (except this time face-to-face):

- Q. And I want to make it clear, you told him that he could not register in Holmes County until he c[a]me in to see you?
A. Yes, sir. He has to register with us before he can register in another county.

T.p. 44. The officer repeated that he told Mr. Lloyd that Mr. Lloyd had to personally appear in Auglaize County before registering in Holmes County.

T.p. 51 ("I told him he has to come in and change it."). The office also admitted that it did not understand how the twenty-day deadline worked for defendants who did not know of a move that far in advance:

- Q How is he going to supply the address 20 days in advance if he doesn't know what that address is?

A I don't know how that part of it works, sir. All I know he is supposed to give us an address 20 days before moving.

T.p. 51.

The trial and appellate courts incorrectly denied Mr. Lloyd the opportunity prove that he had properly given less-than-twenty days notice of his intended move. As a result, they improperly blamed him for the impossibility of "timely" registration.

Proposition of Law No. IV:

The State failed to prove that Mr. Lloyd had a duty to register under Megan's Law.

The State did not establish that Mr. Lloyd has a duty to register as a sex offender in Texas. The Court of Appeals misinterpreted Mr. Lloyd's statement that before he left Texas, he got a Texas form to bring to Ohio to "establish [his] duty to register." T.p. 104-5. Mr. Lloyd was only stating that he brought paperwork to Ohio to accurately explain his status. He was not admitting that he had a duty to register in Texas. The State concedes that it does not know how the State determined that Mr. Lloyd had any registration duty in Ohio as a sexually oriented offender. State's Supplemental Brief, Sept. 8, 2010, p. 3 ("The record is unclear whether Lloyd was initially classified as a sexually oriented offender by the Ohio Attorney General or by law enforcement").

As a result, Mr. Lloyd's conviction deprived him of his right to be convicted only on prove beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307.

Proposition of Law No. V:

A conviction for failing to register or give notice of an address change as a Tier III offender must be vacate in light of *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424 even where SB10 did not change a defendant's registration requirements.

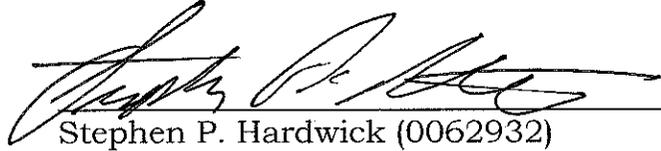
Mr. Lloyd was convicted of failing to register only as a Tier III offender was required to register. While SB10 did not change the timeliness requirements of reporting a move, at least one court of appeals has correctly held that *Bodyke* requires a complete reversal, even of convictions for failure to notify sheriffs of address changes. See, *State v. Godfrey*, 9th Dist No. 25187, 2010-Ohio-6425, ¶ 4, 8. In *Bodyke*, this Court restored a defendant's responsibilities under prior law, but severed that defendant's responsibilities under SB10. Accordingly, between the time that SB10 came into effect and the date that *Bodyke* was issued, the State was left without authority to require defendants to register. Accordingly, as in *Godfrey*, Mr. Lloyd's convictions should be vacated and this case remanded to the trial court for further proceedings.

Conclusion

Mr. Lloyd has demonstrated that he can successfully comply with an appellate bond. Further, this case has several issues that this Court would likely accept. Accordingly, Mr. Lloyd asks this Court maintain the status quo by staying the decision of the court of appeals as well as the trial court's judgment entry of sentence, conditioned on his continued compliance with the terms of the trial court's bond.

Respectfully submitted,

Office of the Ohio Public Defender



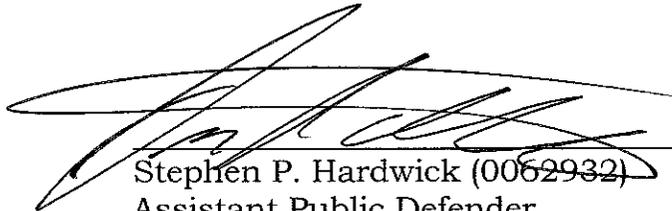
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Certificate of Service

I certify that on February 14, 2011, a copy of the foregoing was sent via e-mail to Sean Mathew Warner, Assistant Prosecuting Attorney, Holmes County Prosecutor's Office, 164 East Jackson Street, Millersburg, OH 44654 @ swarner@exchange.co.holmes.oh.us.



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IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	Case No. 2011-212
Plaintiff-Appellee,	:	
	:	
v.	:	On Appeal from the Holmes County
	:	Court of Appeals, Fifth Appellate
Wesley Lloyd,	:	District, Case No. 09CA12
	:	
Defendant-Appellant.	:	

Appendix to

Memorandum in Support of Jurisdiction of Appellant Wesley Lloyd

IN THE COURT OF APPEALS FOR HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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2010 DEC 30 AM 10:25

HOLMES COUNTY COURT
DORCAS L. MILLER, CLERK

STATE OF OHIO

Plaintiff-Appellee

-vs-

WESLEY LLOYD

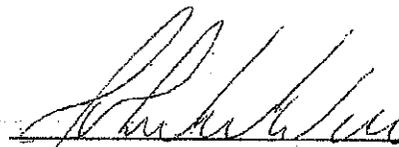
Defendant-Appellant

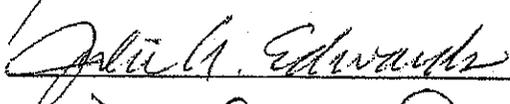
JUDGMENT ENTRY

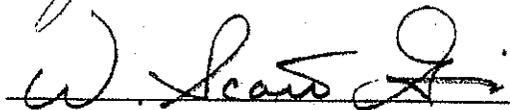
Case No. 09 CA 12

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Holmes County, Ohio, is affirmed in part and reversed in part. Appellant's conviction and sentence under Count II are hereby vacated.

Costs to be split evenly between appellant and the State of Ohio.







JUDGES

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED
2010 JUL 20 AM 10:25
COURT
HOLMES COUNTY
DORCAS L. MILLER, CLERK

STATE OF OHIO

Plaintiff-Appellee

-vs-

WESLEY LLOYD

Defendant-Appellant

JUDGES:

Hon. Julie A. Edwards, P. J.

Hon. W. Scott Gwin, J.

Hon. John W. Wise, J.

Case No. 09 CA 12

OPINION

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. 09 CR 1

JUDGMENT:

Affirmed in Part; Reversed in Part and
Vacated:

DATE OF JUDGMENT ENTRY:

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Wise, J.

{¶1} Appellant Wesley Lloyd appeals from his conviction, in the Holmes County Court of Common Pleas, on three counts of sexual offender registration violations. The appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2} In 1995, appellant was convicted, in the State of Texas, of one count of aggravated sexual battery, pursuant to the Texas Penal Code. He was sentenced in that case to seven years in prison. Appellant appealed, but on March 5, 1998, the Court of Appeals of Texas, Eastland, affirmed the conviction.

{¶3} After appellant was released from prison in Texas in 2005, he moved to Auglaize County, Ohio. Appellant thereupon registered as a sexually-oriented offender in Auglaize County, and continued to register as required in 2006 and 2007. In November 2007, appellant received a letter from the Ohio Attorney general indicating that he was being reclassified as a Tier III offender, requiring increased periodic registration. Appellant continued to register, pursuant to his Adam Walsh Act reclassification, in February 2008 and May 2008.

{¶4} On May 21, 2008, appellant purportedly sent a letter to the Auglaize County Sheriff, advising him of his intention to move to Holmes County. On or about June 2, 2008, appellant completed his move to Holmes County.

{¶5} On June 12, 2008, appellant was arrested in Holmes County on charges of failing to register as a sex offender. What we will label as Count I was based on appellant's failure to register with the Holmes County Sheriff within three days of moving into Holmes County. See R.C. 2950.04(E). Count II was based on appellant's failure to provide written notice to the Holmes County Sheriff of his intent to reside in Holmes

County at least twenty days prior to moving. See R.C. 2950.04(E). Furthermore, on June 17, 2008, appellant was indicted in Auglaize County for failure to give a twenty-day advance notice of an address change prior to moving. We will label this as "Count III." See R.C. 2950.05(F)(1).

{16} The charges were consolidated for trial in Holmes County. On April 7, 2009, the case was heard via a bench trial. On July 9, 2009, the court found appellant guilty on all three counts. On September 3, 2009, the court sentenced appellant to three years in prison on each count, to be served concurrently.

{17} On September 14, 2009, appellant filed a notice of appeal. He herein raises the following nine Assignments of Error:

{18} "I. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS WHEN HE WAS TRIED AND CONVICTED OF FELONIES FOR FAILURE TO NOTIFY OF CHANGE OF ADDRESS WHEN UNDER OHIO LAW HE WAS NOT REQUIRED TO REGISTER AS A SEX OFFENDER.

{19} "II. THE DEFENDANT-APPELLANT WESLEY LLOYD WAS DENIED DUE PROCESS WHEN HE WAS TRIED AND CONVICTED OF FELONIES OF THE FIRST DEGREE WHEN UNDER OHIO LAW HE SHOULD HAVE BEEN CHARGED WITH FELONIES OF THE THIRD DEGREE.

{10} "III. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS WHEN HE WAS CONVICTED OF A VIOLATION OF R.C. 2950.04(A)(2)(a) [SIC] AFTER BEING TOLD BY LAW ENFORCEMENT THAT HE COULD NOT REGISTER IN HOLMES COUNTY.

{¶11} "IV. THE DEFENDANT-APPELLANT WESLEY LLOYD WAS DENIED DUE PROCESS WHEN HE WAS CONVICTED OF VIOLATING R.C. 2950.04(E) AND R.C. 2950.04(G) WHEN R.C. 2950.04 ONLY APPLIES TO THE INITIAL REGISTRATION OF A SEX OFFENDER UPON RELEASE FROM PRISON OR UPON ENTERING INTO THE STATE.

{¶12} "V. THE DEFENDANT-APPELLANT WESLEY LLOYD WAS DENIED DUE PROCESS OF LAW WHEN HE WAS CONVICTED OF FAILING TO REGISTER IN HOLMES COUNTY WHEN THE EVIDENCE SHOWED THAT REGISTRATION BY LLOYD IN HOLMES COUNTY WAS IMPOSSIBLE.

{¶13} "VI. THE DEFENDANT-APPELLANT WESLEY LLOYD WAS DENIED DUE PROCESS WHEN HE WAS CONVICTED OF A STRICT LIABILITY OFFENSE WITHOUT RECEIVING NOTICE OF THE NEW REGISTRATION REQUIREMENTS.

{¶14} "VII. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN HE WAS CONVICTED OF COUNT I OF THE INDICTMENT UPON INSUFFICIENT EVIDENCE.

{¶15} "VIII. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS WHEN HE WAS CONVICTED OF VIOLATING R.C. 2950.04(E) UPON INSUFFICIENT EVIDENCE.

{¶16} "IX. THE DEFENDANT'S PROSECUTION UNDER TITLE 2950 OF THE R.C. VIOLATES DUE PROCESS BECAUSE R.C. 2950.031 AND R.C. 2950.032 ARE UNCONSTITUTIONAL PURSUANT TO THE OHIO SUPREME COURT'S DECISION IN *STATE V. BODYKE*."

IX.

{¶17} We will address appellant's Ninth Assignment of Error first.

{¶18} In *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, the Ohio Supreme Court severed R.C. 2950.031 and 2950.032, the reclassification provisions of the Adam Walsh Act, and held that after severance, those provisions could not be enforced. The Court further held that R.C. 2950.031 and 2950.032 may not be applied to offenders previously adjudicated by judges under "Megan's Law." See also *Chojniacki v. Cordray*, 126 Ohio St.3d 321, 933 N.E.2d 800, 2010-Ohio-3212, ¶15.

{¶19} The only Count potentially affected by *Bodyke* in this instance is Count II. In other words, the registration/notice requirements in Counts I and III were not impacted by the Adam Walsh Act. The State responds, however, that even Count II is not altered by *Bodyke*, because his Tier III classification did not disturb a ruling by the judicial branch. However, recently, in *State v. Clager*, Licking App.No.10-CA-49, 2010-Ohio-6074, this Court found that even out-of-state offenders are not subject to an Ohio Attorney General reclassification based on the doctrine of separation of powers.

{¶20} Appellant's Ninth Assignment of Error is therefore sustained in regard to appellant's Tier III – based offense in Count II.

I.

{¶21} In his First Assignment of Error, appellant contends his convictions for failure to register and notify of an address change violated due process, because he was not required to register as a sexually-oriented offender in Ohio. We disagree.

{¶22} R.C. 2950.04(A)(4) states as follows:

{¶23} "Regardless of when the sexually oriented offense was committed, each person who is convicted, pleads guilty, or is adjudicated a delinquent child in a court in another state **** for committing a sexually oriented offense shall comply with the following registration requirements if, at the time the offender or delinquent child moves to and resides in this state or temporarily is domiciled in this state for more than three days, the offender or public registry-qualified juvenile offender registrant enters this state to attend a school or institution of higher education, or the offender or public registry-qualified juvenile offender registrant is employed in this state for more than the specified period of time, the offender or delinquent child has a duty to register as a sex offender or child-victim offender under the law of that other jurisdiction as a result of the conviction, guilty plea, or adjudication:

{¶24} "(a) Each offender and delinquent child shall register personally with the sheriff, or the sheriff's designee, of the county within three days of the offender's or delinquent child's coming into the county in which the offender or delinquent child resides or temporarily is domiciled for more than three days.

{¶25} "(b) Each offender or public registry-qualified juvenile offender registrant shall register personally with the sheriff, or the sheriff's designee, of the county immediately upon coming into a county in which the offender or public registry-qualified juvenile offender registrant attends a school or institution of higher education on a full-time or part-time basis regardless of whether the offender or public registry-qualified juvenile offender registrant resides or has a temporary domicile in this state or another state.

{¶26} "(c) Each offender or public registry-qualified juvenile offender registrant shall register personally with the sheriff, or the sheriff's designee, of the county in which the offender or public registry-qualified juvenile offender registrant is employed if the offender resides or has a temporary domicile in this state and has been employed in that county for more than three days or for an aggregate period of fourteen days or more in that calendar year.

{¶27} "(d) Each offender or public registry-qualified juvenile offender registrant shall register personally with the sheriff, or the sheriff's designee, of the county in which the offender or public registry-qualified juvenile offender registrant then is employed if the offender or public registry-qualified juvenile offender registrant does not reside or have a temporary domicile in this state and has been employed at any location or locations in this state for more than three days or for an aggregate period of fourteen or more days in that calendar year."

{¶28} In order to define "sexually oriented offense" for purposes of the first paragraph of R.C. 2950.04(A)(4), supra, we turn to the definition found in R.C. 2950.01(A)(11): "A violation of *** any existing or former municipal ordinance or law of another state or the United States *** that is or was *substantially equivalent* to any offense listed in division (A)(1), (2), (3), (4), (5), (6), (7), (8), (9), or (10) of this section." (Emphasis added).

{¶29} Among the Ohio offenses listed in division (A)(1) of R.C. 2950.01 are rape and sexual battery. The pertinent rape section, R.C. 2907.02(A)(2), states: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." The pertinent sexual battery section,

R.C. 2907.03(A)(1), states: No person shall engage in sexual conduct with another, not the spouse of the offender, when *** [t]he offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution."

{¶30} In appellant's 1995 Texas conviction for aggravated sexual assault, the jury was instructed as follows pursuant to Texas Penal Code Title 5, Chapter 22, Sec. 22.201:

{¶31} "Our law provides that a person commits the offense of aggravated sexual assault if the person intentionally or knowingly causes the penetration of the mouth or female sexual organ of another person by the sexual organ of the actor without that person's consent, and by acts or words such person places the victim in fear that serious bodily injury or death will be imminently inflicted on any person.

{¶32} "Such assault is without the other person's consent if the actor compels the other person to submit or participate by threatening to use force or violence against the other person, and the other person believes that the actor has the present ability to execute the threat. * * *

{¶33} "A person acts intentionally, or with intent, with respect to the nature of his conduct when it is his conscious objective or desire to engage in the conduct.

{¶34} "A person acts knowingly or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result."

Appellant's Appendix at A-1, A-2.

{¶35} In essence, appellant contends that since rape under Ohio law (R.C. 2907.02(A)(2)) has a "purpose" element, while sexual battery (R.C. 2907.03(A)(1)) has

a "knowing" element, no single Ohio statute is "substantially equivalent" to aggravated sexual assault under the aforesaid Texas statute, which includes either purpose (intention) or knowledge. However, upon review, we find appellant's argument lacks merit, and we are further unpersuaded by appellant's reliance on the decision of the First District Court of Appeals in *Doe v. Leis*, Hamilton App.No. C-050591, 2006-Ohio-4507, as that case focused on variances between Ohio and Florida law as to the element of "force" in a criminal sexual assault context.

{¶36} Appellant's First Assignment of Error is therefore overruled.

II.

{¶37} In his Second Assignment of Error, appellant contends his first-degree felony convictions, as opposed to third-degree felonies, violated due process. We disagree.

{¶38} R.C. 2950.99(A)(1)(a) states as follows:

{¶39} "Except as otherwise provided in division (A)(1)(b) of this section, whoever violates a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code shall be punished as follows:

{¶40} ****

{¶41} "(ii) *** [I]f the most serious sexually oriented offense or child-victim oriented offense that was the basis of the registration, notice of intent to reside, change of address, or address verification requirement that was violated under the prohibition is a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the same degree as that offense committed in the other jurisdiction would constitute if committed in this state."

{142} Appellant maintains that because of the "intentionally or knowingly" language of the Texas aggravated sexual assault statute, it is impossible to know if the Texas jury's determination was equivalent to rape or to sexual battery under Ohio law; hence, due process requires that the lesser degree of culpability apply, which in this instance would be sexual battery, a third-degree felony. However, the Texas indictment at issue includes "use of physical force and violence" allegations on the aggravated sexual assault count, and we therefore find no error or violation of due process in appellant's first-degree felony convictions for failure to register at the same degree as the offense of rape.

{143} Appellant's Second Assignment of Error is overruled.

III.

{144} In his Third Assignment of Error, appellant contends his conviction under Count I (failure to register in Holmes County within three days of relocating) violated due process. We disagree.

{145} Appellant first argues the forms utilized under the electronic sexual offender system ("eSORN") are insufficient under Ohio law. He directs us to R.C. 2950.04(B) and (C), which state as follows:

{146} "(B) An offender or delinquent child who is required by division (A) of this section to register in this state personally shall obtain from the sheriff or from a designee of the sheriff a registration form that conforms to division (C) of this section, shall complete and sign the form, and shall return the completed form together with the offender's or delinquent child's photograph, copies of travel and immigration documents, and any other required material to the sheriff or the designee. The sheriff or designee

shall sign the form and indicate on the form the date on which it is so returned. The registration required under this division is complete when the offender or delinquent child returns the form, containing the requisite information, photograph, other required material, signatures, and date, to the sheriff or designee.

{¶147} "(C) The registration form to be used under divisions (A) and (B) of this section shall include or contain all of the following for the offender or delinquent child who is registering:

{¶148} "(1) The offender's or delinquent child's name and any aliases used by the offender or delinquent child;

{¶149} "(2) The offender's or delinquent child's social security number and date of birth, including any alternate social security numbers or dates of birth that the offender or delinquent child has used or uses;

{¶150} "(3) Regarding an offender or delinquent child who is registering under a duty imposed under division (A)(1) of this section, a statement that the offender is serving a prison term, term of imprisonment, or any other type of confinement or a statement that the delinquent child is in the custody of the department of youth services or is confined in a secure facility that is not operated by the department;

{¶151} "(4) Regarding an offender or delinquent child who is registering under a duty imposed under division (A)(2), (3), or (4) of this section as a result of the offender or delinquent child residing in this state or temporarily being domiciled in this state for more than three days, the current residence address of the offender or delinquent child who is registering, the name and address of the offender's or delinquent child's employer if the offender or delinquent child is employed at the time of registration or if

the offender or delinquent child knows at the time of registration that the offender or delinquent child will be commencing employment with that employer subsequent to registration, any other employment information, such as the general area where the offender or delinquent child is employed, if the offender or delinquent child is employed in many locations, and the name and address of the offender's or public registry-qualified juvenile offender registrant's school or institution of higher education if the offender or public registry-qualified juvenile offender registrant attends one at the time of registration or if the offender or public registry-qualified juvenile offender registrant knows at the time of registration that the offender or public registry-qualified juvenile offender registrant will be commencing attendance at that school or institution subsequent to registration;

~~{152}~~ "(5) Regarding an offender or public registry-qualified juvenile offender registrant who is registering under a duty imposed under division (A)(2), (3), or (4) of this section as a result of the offender or public registry-qualified juvenile offender registrant attending a school or institution of higher education in this state on a full-time or part-time basis or being employed in this state or in a particular county in this state, whichever is applicable, for more than three days or for an aggregate of fourteen or more days in any calendar year, the name and current address of the school, institution of higher education, or place of employment of the offender or public registry-qualified juvenile offender registrant who is registering, including any other employment information, such as the general area where the offender or public registry-qualified juvenile offender registrant is employed, if the offender or public registry-qualified juvenile offender registrant is employed in many locations;

{153} "(6) The identification license plate number of each vehicle the offender or delinquent child owns, of each vehicle registered in the offender's or delinquent child's name, of each vehicle the offender or delinquent child operates as a part of employment, and of each other vehicle that is regularly available to be operated by the offender or delinquent child; a description of where each vehicle is habitually parked, stored, docked, or otherwise kept; and, if required by the bureau of criminal identification and investigation, a photograph of each of those vehicles;

{154} "(7) If the offender or delinquent child has a driver's or commercial driver's license or permit issued by this state or any other state or a state identification card issued under section 4507.50 or 4507.51 of the Revised Code or a comparable identification card issued by another state, the driver's license number, commercial driver's license number, or state identification card number;

{155} "(8) If the offender or delinquent child was convicted of, pleaded guilty to, or was adjudicated a delinquent child for committing the sexually oriented offense resulting in the registration duty in a court in another state, in a federal court, military court, or Indian tribal court, or in a court in any nation other than the United States, a DNA specimen, as defined in section 109.573 of the Revised Code, from the offender or delinquent child, a citation for, and the name of, the sexually oriented offense resulting in the registration duty, and a certified copy of a document that describes the text of that sexually oriented offense;

{156} "(9) A description of each professional and occupational license, permit, or registration, including those licenses, permits, and registrations issued under Title XLVII of the Revised Code, held by the offender or delinquent child;

{157} "(10) Any email addresses, internet identifiers, or telephone numbers registered to or used by the offender or delinquent child;

{158} "(11) Any other information required by the bureau of criminal identification and investigation."

{159} Upon review of the record in this case, we are unconvinced that any purported noncompliance by Auglaize and Holmes law enforcement officials with the data-collection requirements of R.C. 2950.04(B) and (C) would result in a due process violation regarding appellant or in any way excuse his failure to adhere to statutory relocation registration requirements.

{160} Appellant secondly contends that he was denied due process based on police entrapment and outrageous police conduct.

{161} In *State v. Doran* (1983), 5 Ohio St.3d 187, the Ohio Supreme Court held: "The defense of entrapment is established where the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute." In *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 375, 6 OBR 421, 453 N.E.2d 666, the Ohio Supreme Court described outrageous conduct as follows: "[S]o outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' " *Id.*

{¶62} The State's witnesses in this matter consistently recounted the basis for appellant's Count I violation: His failure to register in Holmes County based on his failure or refusal to first clear his name from the registration system in Auglaize County by properly and timely notifying officials there of his intent to move. Upon review, we find appellant's claims of police entrapment and outrageous police conduct unpersuasive.

{¶63} Appellant's Third Assignment of Error is overruled.

IV.

{¶64} In his Fourth Assignment of Error, appellant contends his convictions for failure to register or notify of an address change violated due process, because he was not required to register as a sexually-oriented offender in Ohio.

{¶65} We find this assigned error relates to Counts I and II only. Those Counts were based on R.C. 2950.04((E), which states: "No person who is required to register pursuant to divisions (A) and (B) of this section, and no person who is required to send a notice of intent to reside pursuant to division (G) of this section, shall fail to register or send the notice of intent as required in accordance with those divisions or that division."

Count I (3-Day Requirement in Holmes Co.)

{¶66} We first consider, by cross-reference within R.C. 2950.04((E), the requirement of R.C. 2950.04(A)(4)(a) that "[r]egardless of when the sexually oriented offense was committed, each person who is convicted *** in a court in another state *** for committing a sexually oriented offense shall comply with the following registration requirements if, at the time the offender *** moves to and resides in this state or temporarily is domiciled in this state for more than three days, the offender *** enters

this state to attend a school or institution of higher education, or the offender *** is employed in this state for more than the specified period of time, the offender *** has a duty to register as a sex offender or child-victim offender under the law of that other jurisdiction as a result of the conviction, guilty plea, or adjudication:

{¶167} "(a) Each offender *** shall register personally with the sheriff, or the sheriff's designee, of the county within three days of the offender's or delinquent child's coming into the county in which the offender or delinquent child resides or temporarily is domiciled for more than three days."

{¶168} Appellant essentially argues that R.C. 2950.04(A)(4)(a) applies only to out-of-state-offenders who are *initially* moving into Ohio. However, our reading of the above subsection indicates that the "moves to and resides in this state" language is instead merely tied to the question of whether an offender has a duty to register under another jurisdiction's law at the time he or she moves to Ohio.

{¶169} We therefore find no error on this basis as to Count I under R.C. 2950.04(A)(4)(a).

Count II (20-Day Intent to Reside Requirement for Holmes Co.)

{¶170} R.C. 2950.04(G) states as follows:

{¶171} "If an offender or delinquent child who is required by division (A) of this section to register is a tier III sex offender/child-victim offender, the offender or delinquent child also shall send the sheriff, or the sheriff's designee, of the county in which the offender or delinquent child intends to reside written notice of the offender's or delinquent child's intent to reside in the county. The offender or delinquent child shall

send the notice of intent to reside at least twenty days prior to the date the offender or delinquent child begins to reside in the county.

{172} Based on our redress of appellant's Ninth Assignment of Error, appellant's Tier III-based conviction in Count II is erroneous as a matter of law and will be ordered to be reversed.

{173} Appellant's Fourth Assignment of Error is therefore overruled in part and sustained in part.

V.

{174} In his Fifth Assignment of Error, appellant contends his conviction for failure to register in Holmes County violated due process, because the evidence purportedly shows it was impossible for him to do so.¹

{175} Appellant maintains that the computerized registration system prevented him from registering in Holmes County, because he had not been recognized in the system at that time as having been transferred out of Auglaize County. However, appellant was required to give a twenty-day advance notice to Auglaize County prior to leaving for Holmes County; this he failed to do. Thus, the trial court properly concluded that appellant could not rely on an impossibility defense when the alleged impossibility was created by his original violation of the law in Auglaize County.

{176} Appellant's Fifth Assignment of Error is therefore overruled.

¹ At this juncture, we have found appellant's Count II conviction to be reversible error. Furthermore, Count III concerns his Auglaize County notification. We will thus only consider Count I in this assigned error.

VI.

{¶77} In his Sixth Assignment of Error, appellant contends his conviction for failure to notify of an address change violated due process, because he was not notified of his "Tier III" requirements under R.C. 2950.04(G).

{¶78} Appellant's arguments in this assigned error are directed solely at Count II, which is his Tier III – based conviction. Based on our redress of his Ninth Assignment of Error, supra, we find further analysis of the present issue to be moot.

{¶79} Appellant's Sixth Assignment of Error is therefore found moot.

VII.

{¶80} In his Seventh Assignment of Error, appellant contends his conviction for failure to register under what we have labeled as Count III was not supported by sufficient evidence. We disagree.

{¶81} In reviewing a claim of insufficient evidence, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶82} Count III was based on R.C. 2950.05(F)(1), which reads as follows: "No person who is required to notify a sheriff of a change of address pursuant to division (A) of this section *** shall fail to notify the appropriate sheriff in accordance with that division." However, the indictment language for Count III references both division (A) and (B) of R.C. 2950.05, and charges that appellant failed to notify the appropriate

Sheriff "in accordance with these divisions ***." Appellant argues that the State was thus required to prove both R.C. 2950.05(A) and (B), which it failed to do.

{¶83} We find no merit in appellant's argument. The pertinent statute in Count III is R.C. 2950.05(F)(1), to which R.C. 2950.05(B) is wholly inapplicable, and the reference to R.C. 2950.05(B) set forth in the charge was superfluous. The State therefore sufficiently proved the elements of R.C. 2950.05(F)(1).

{¶84} Appellant's Seventh Assignment of Error is overruled.

VIII.

{¶85} In his Eighth Assignment of Error, appellant contends his conviction for failure to notify of an address change violated due process, because he was not required to register as a sexually-oriented offender in Ohio.

{¶86} R.C. 2950.04(A)(4), supra, imposes registration requirements if "the offender or delinquent child has a duty to register as a sex offender or child-victim offender under the law of that other jurisdiction as a result of the conviction, guilty plea, or adjudication." Appellant essentially contends the State failed to prove he had a duty under Texas law to register as a sex offender. However, the record reveals that appellant himself testified that he was required to register in Texas following his 2005 conviction. See Tr. at 104-105. Moreover, a review of appellant's multiple-ground oral motion for acquittal at the close of the State's case does not reveal that appellant asserted the present "duty under Texas law" argument to the trial court. See Tr. at 93-100. Under the invited error doctrine, a party will not be permitted to take advantage of an error which he himself invited or induced. See *He v. Zeng*, Licking App.No.

2003CA00056, 2004-Ohio-2434, ¶ 13, citing *State v. Bey* (1999), 85 Ohio St.3d 487, 493, 709 N.E.2d 484.

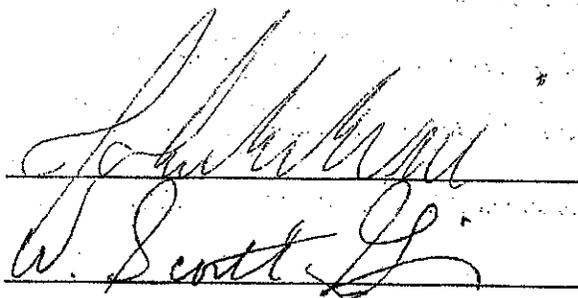
{¶87} Accordingly, appellant's Eighth Assignment of Error is overruled.

{¶88} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Holmes County, Ohio, is hereby affirmed in part and reversed in part. Appellant's conviction and sentence under Count II are hereby vacated.

By: Wise, J.

Gwin, J., concurs.

Edwards, P. J., concurs separately.



The image shows two handwritten signatures in black ink, each written over a horizontal line. The top signature is more stylized and cursive, while the bottom signature is more legible and appears to read 'W. Scott G.'. Below these two lines, there is a third, empty horizontal line.

JUDGES

JWW/d 1118

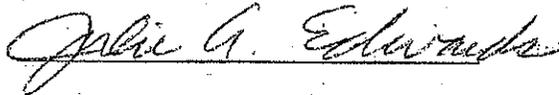
EDWARDS, P.J., CONCURRING OPINION

{¶89} I concur in the judgment of the majority. However, in the eighth assignment of error I would not find that appellant was required to move for acquittal on the basis that the State failed to prove he had a duty to register under Texas law in order to raise a sufficiency of the evidence claim on appeal.

{¶90} The Ohio Supreme Court has stated that a failure to timely file a Crim. R. 29(A) motion during jury trial does not waive an argument on appeal concerning the sufficiency of the evidence. *State v. Jones* (2001), 91 Ohio St.3d 335, 346, 744 N.E.2d 1163; *State v. Carter* (1992), 64 Ohio St.3d 218, 223, 594 N.E.2d 595. Because a conviction based on legally insufficient evidence constitutes a denial of due process, a conviction based upon insufficient evidence would almost always amount to plain error. *State v. Coe*, 153 Ohio App.3d 44, 790 N.E.2d 1222, 2003-Ohio-2732, ¶19. The rationale for requiring a criminal defendant to timely file a Crim. R. 29(A) motion at trial is to call the trial court's attention to the alleged insufficiency of the evidence and allow the trial court to correct the error. *Id.* at fn. 6.

{¶91} In the instant case, appellant's failure to raise the issue of the State's failure to prove he had a duty to register in Texas denied the trial court the opportunity to correct the error by directing a verdict at the close of the State's case, and prior to appellant taking the stand in his own case-in-chief.

Appellant then corrected the deficiency in the evidence himself by admitting that he had a duty to register in Texas following his 2005 conviction. Tr. 104-105. I therefore would find that appellant's conviction was not based on legally insufficient evidence.



Judge Julie A. Edwards

JAE/rad/rmn