

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee

-vs-

WESLEY LLOYD

Appellant

CASE NO. 11-0212

**On Appeal from the Fifth
District Court of Appeals
Case No. 09-CA-12**

**APPELLEE STATE OF OHIO'S RESPONSE IN OPPOSITION TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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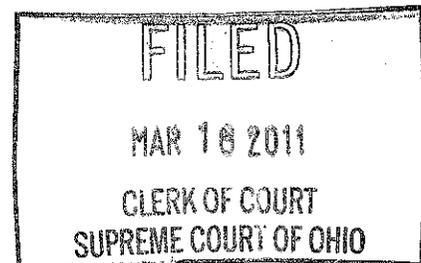
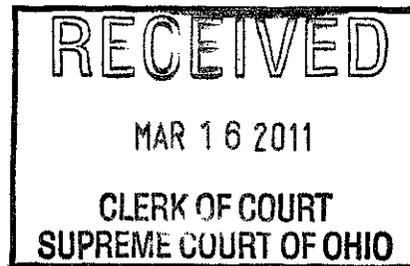


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THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT A CASE OF GREAT GENERAL OR PUBLIC INTEREST.

This case does not involve a substantial constitutional question, nor is it a case of great general or public interest. The plain facts of this matter are that Defendant-Appellant, Wesley Lloyd ("Lloyd") is a sex offender as defined by Ohio law, he was required to register with law enforcement, and he failed in his duty to do so. After he was informed by law enforcement that he had committed a violation and advised to take curative action, Lloyd did nothing for ten days before being arrested in Holmes County. Now, nearly three years after committing first degree felonies, Lloyd is sparing no effort to avoid punishment for his crimes. If Lloyd had put forth any effort to comply with the law between June 2 and June 12, 2008 he would not be facing prison.

Lloyd is attempting to recast straightforward facts indicating a clear violation of law into novel constitutional questions that simply do not fit the facts of this case. While doing so, he is presenting facts which were not offered into evidence and attempting to raise defenses not raised at the trial or appellate level. Lloyd's obtuse reference to the injuries he sustained and their possible impact on this case should be stricken as his assertions were never entered into evidence and never argued at either the trial or appellate level. The same should be done to his assertion that the trial and appellate court failed to apply a defense available to him. It is not the responsibility of the courts, but Lloyd's alone, to proffer his defenses.

Lloyd was found guilty on Count One of the indictment for failure to register with the Holmes County Sheriff within three days of moving to Holmes County, in violation of

R.C. 2950.04(E). Lloyd was convicted on Count Three for failing to provide the Sheriff of Auglaize County with notice of his intent to move to Holmes County twenty days prior to moving to Holmes County, in violation of R.C. 2950.05(F)(1). The constitutionality of Ohio's sexual offender registration laws, codified in ORC Chapter 2950, is well settled. *State v. Cook* (1998) 83 Ohio St. 3d 404, *State v. Williams* (2000) 88 Ohio St. 3d 513.

The Fifth District Court of Appeals has already vacated Count Two, the only Count affected by this Court's decision in *State v. Bodyke*. Lloyd's registration requirements pertaining to Counts One and Three were the same both before and after passage of the Adam Walsh Act and they remained the same after this Court's *Bodyke* decision. His duty to provide advance notice of his intent to move and to personally register within three days of entering a new county (Counts One and Three) were based upon his status as a "sexually oriented offender" and not on any tier classification imposed by the Adam Walsh Act.

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

- 1/12/2009 Bill of Information filed
- 1/20/2009 Criminal Indictment filed
- 1/22/2009 Arraignment held. Appellant enters plea of "not guilty" and waives right to trial by jury.
- 2/10/2009 State's Motion for Joinder granted. There were three charges against Appellant as a result of Joinder of the two count January 12, 2009 Bill of Information and the January 20, 2009 one count Indictment. For simplicity's sake the offenses were referred to as Count I and II (the Bill of Information) and the separate Indictment being referred to as Count III.
- A. As to Count I Appellant failed to register with the Holmes County Sheriff within three days of moving to Holmes County in violation of Ohio Revised Code 2950.04(E). The penalty for such violation is a felony of the first degree pursuant to Ohio Revised Code 2950.99(A)(1)(a)(ii).
- B. As to Count II Appellant failed to provide to the Holmes County Sheriff written notice of his intent to reside in Holmes County 20 days prior to moving to Holmes County in violation of Ohio Revised Code 2950.04(E). The penalty for this violation is a felony of the first degree pursuant to Ohio Revised Code 2950.99(A)(1)(a)(ii).
- C. As to Count III Appellant failed to provide to the Sheriff of Auglaize County written notice of his intent to move to Holmes County 20 days prior to moving to Holmes County in violation of Ohio Revised Code 2950.05(F)(1). The penalty for this violation is a felony of the first degree pursuant to Ohio Revised Code 2950.99(A)(1)(a)(ii).
- 4/7/2009 Bench Trial held.
- 7/9/2009 Journal Entry, Decision and Verdict, Appellant found guilty on all three counts.
- 9/3/2009 Appellant files pro se Criminal Rule 29 motion for acquittal. The motion is denied.

- 9/3/2009 Sentencing held. Appellant is ordered to serve 3 year prison term on each count. Sentences are to be served concurrently for a total sentence of 3 years.
- 9/14/2009 Notice of Appeal filed in 5th District Court of Appeals.
- 12/30/2010 Memorandum-Opinion and Judgment Entry filed affirming in part and reversing in part. Lloyd's conviction and sentence under Count II vacated.

II. STATEMENT OF FACTS

At trial, the following facts were established upon evidence:

- A. Lloyd was convicted in 1995 of Aggravated Sexual Assault, a felony of the first degree and sentenced to seven years in prison.
- B. Lloyd originally registered as a "sexually oriented offender" in the State of Ohio in Auglaize County starting in 2005 after he was released from prison in Texas having been convicted of Aggravated Sexual Assault, a felony of the first degree. (State's Exhibits E1-10). Lloyd continued to register in Auglaize County, the most recent occasion being May 19, 2008 (State Exhibit E-8).
- C. Lloyd moved to Holmes County no later than June 2, 2008
1. Lloyd called the Auglaize County Sheriff's Dept. on June 2, 2008 and spoke with Corrections Officer Neal Brincefield (T. 29-53). Lloyd told C.O. Brincefield that he was now living in Holmes County and provided C.O. Brincefield an address.
 2. Lloyd's Auglaize County residence was observed to be vacant by Auglaize County Detective Rusty Krugh (T. 53-64) on both June 2 and June 6, 2008.
 3. Det. Krugh advised Holmes County Sheriff's dispatcher Sgt. Eric Troyer on June 6, 2008 that Lloyd had moved to Holmes County at least by June 2, 2008 and that he was no longer at his Auglaize County address.
- D. Lloyd was arrested at his Holmes County address by Holmes County Prosecutor's Investigator Chuck DeFelice and Holmes County Sheriff's Deputy Chris Schonauer on June 12, 2008.

1. Lloyd was released on bond on June 14, 2008.
 2. Lloyd appeared at the Auglaize County Sheriff's Office on June 14, 2008 to register his new Holmes County address (see State's Exhibit E-10).
 3. Lloyd appeared at the Holmes County Sheriff's Office on June 16, 2008 and registered his new address (see Defendant's Exhibit N).
- E. The Auglaize County Sheriff's Dept. did not receive any notification, written or otherwise, of a change of address from Lloyd at any time prior to Lloyd moving to Holmes County (T. 56).
- F. Lloyd's only contact with the Auglaize County Sheriff's Dept. upon moving to Holmes County was his phone call of June 2, 2008 to C.O. Brincefield. Lloyd did not appear in person at the Auglaize County Sheriff's Dept. until June 14, 2008 after his arrest and release from Holmes County.
- G. Prior to Lloyd moving to Holmes County the Auglaize County Sheriff did not receive anything in writing from Lloyd of his intention to change his residence to Holmes County, contrary to Lloyd's allegation that he sent a letter dated May 21, 2008 (Defendant's Exhibit G) to the Auglaize County Sheriff. Further, Lloyd never mentioned such a letter in any conversations that he had with Auglaize County Sheriff's Office employees, including his June 2, 2008 phone conference with C.O. Brincefield.
- H. There is no evidence that Lloyd provided written notification to the Holmes County Sheriff of Lloyd's intention to move to Holmes County at any time prior to his move to Holmes County.
- I. Lloyd did not appear at the Holmes County Sheriff's Office to personally register his new address in Holmes County until after his arrest on June 12, 2008 (Defendant's Exhibit N). Lloyd was in Holmes County for 10 days prior to his arrest, but took no action to cure his notification error from June 2, 2008 until June 14, 2008.

ARGUMENT OPPOSING JURISDICTION

The facts of Lloyd's case do not raise any substantial question as to the application of the Adam Walsh Act or this Court's decision in *State v. Bodyke*. Lloyd failed to properly notify both the county he was leaving (Auglaize County) and the county he was moving to (Holmes County). Lloyd was required to provide such notice pursuant to R.C. 2950.05(F)(1) and R.C. 2950.04(E) respectively. Lloyd's duty did not change upon the passage of the Adam Walsh Act as his duty to register was based upon his status as a sex offender who committed a sexually oriented offense as defined in R.C. 2950.01.

Lloyd's reclassification as a Tier III Sex Offender pursuant to Adam Walsh had no bearing on these particular registration requirements. *State v. Bodyke* effectively eliminated Lloyd's classification as a Tier III Offender and returned him to his general status as a sex offender. *Bodyke* negated Lloyd's duty under Count Two which was based upon his status as a Tier III Offender and the 5th District properly vacated Lloyd's conviction and sentence upon Count II. The 5th District correctly affirmed Lloyd's convictions upon Count I and III.

Lloyd argues in his Memorandum in Support of Jurisdiction that the State failed to prove he had a duty to register in Texas prior to moving to Ohio. At trial, Lloyd offered the following testimony on direct examination:

Q So, when are you released from prison?

A In I believe it was July of 2005 I believe.

Q And when did you move to Ohio?

A I believe it was October or November of 2005.

Q And why did you come here?

A I was born in Ohio. The only reason I was really in Texas was because of my military duties; so this is kind of home for me Ohio is.

Q And did you go through certain procedures to establish your duty to register before you left Texas?

A Yes. I had to get a form. They give you a form to take to the next place that you register and stuff. So I got the form and then when I moved to Auglaize County I had to take that form in to the Sheriff's office there and show them the form...

Lloyd, himself, gave direct testimony that he went through the process upon his release from prison in Texas to transfer his registration from Texas to Ohio. It is uncontested that Lloyd then registered in Ohio (in Auglaize County) for three years before committing the violations at issue in this case. It defies logic for someone in Lloyd's position to argue he never had a duty to register in Ohio.

Lloyd also did not comply with R.C. 2950.05(G)(1) which he claims is a defense for his violations. Again, Lloyd did not raise this defense at trial or in his appeal and is precluded from bringing it now. Even if Lloyd had raised this defense, he failed to comply with the subsection he claims exonerates him. Lloyd admitted at trial he knew of his new address 13 to 14 days before he moved. Appellant's Memorandum in Support of Jurisdiction, p. 5. As such Lloyd was required to give notice "by telephone immediately upon learning of the address change or, if the person did not have reasonable access to a telephone at that time, as soon as possible, but not later than the end of the first business day, after learning of the address change and having reasonable access to a telephone, and the person, as soon as possible, but not later than the end of the first business day, after providing notice of the address change to

the sheriff by telephone, provided written notice of the address change to that sheriff.” R.C. 2950.05(G)(1)(a). It was uncontested at trial that Lloyd never telephoned the Auglaize County Sheriff’s Department until after he had completed his move and 13 to 14 days after he knew he was moving and to what address. In summary, Lloyd is asserting an untimely defense which does not apply to the facts of this case.

RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

Proposition of Law No. 1

The State need not 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.

Lloyd is attempting to muddy crystal clear waters. R.C. 2950.05 imposes strict liability, and a mens rea element is not required. *State v. Stansell* 2010 Ohio 5756, 2010 Ohio App. LEXIS 4845. Generally, strict liability attaches to criminal offenses which are regulatory in nature and which are designed to protect the health, safety, and well-being of the community. Furthermore, when a statute reads "no person shall" engage in proscribed conduct, absent any reference to a culpable mental state, the statute indicates a legislative intent to impose strict liability. *Id.* at 5762-63 citing *State v. Finn*, Montgomery App. No. 22914, 2009 Ohio 4949. Sexual offender registration laws are 'mala prohibita,' acts made unlawful for the good of the public welfare regardless of the accused's state of mind, and therefore the failure to register is a strict liability offense. *Id.* at 5763. Failing to register under R.C. 2950.04 does not require a culpable mental state: "The act of failing to register alone, without more, is sufficient to trigger criminal punishment provided in 2950.99." *Cook*, supra. At 420. The case relied upon by Lloyd dealt with a conviction upon a firearm disability and had nothing to do with sexual offender registration. Lloyd ignores this Court's longstanding recognition of sexual offender registration violations as strict liability offenses based upon the paramount interest of protecting the public.

Proposition of Law No. II:

A court is not required to 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 or 2) the punishment for failing to register in Ohio under R.C. 2950.99.

Under Ohio law, individuals who commit a "sexually oriented offense" are required to register as sex offenders. The Ohio Revised Code ("O.R.C.") defines the term "sexually oriented offense" at Section 2950.01 which reads in pertinent part:

... (A) "Sexually oriented offense" means any of the following violations or offenses committed by a person, regardless of the person's age:

(1) A violation of Section 2907.02 (Rape), 2907.03 (Sexual Battery), ...

(11) A violation of any... law of another state... that is or was **substantially equivalent** to any offense listed in division (A)(1) ... of this section... (offense titles and emphasis added).

Thus, a person convicted of an offense ("Aggravated Sexual Assault") under the law of another state (Texas) that was "substantially equivalent" to an Ohio sexually oriented offense (Rape O.R.C. 2907.02) would be required to register as a sex offender in Ohio. Defendant-Appellant Wesley Lloyd (hereafter "Lloyd") was convicted in Texas of one count of "Aggravated Sexual Assault" (Texas Penal Code Section 22.021) on December 8, 1995. Lloyd's Judgment Entry of Conviction was admitted at trial as State's Exhibit "A." The conviction states "Aggravated Sexual Assault" is a 1st degree felony. (State Exh. A pg. 2).

Chapter 2950 of the Ohio Revised Code does not require the commission of a *substantially identical* offense in another state, it only requires commission of a *substantially equivalent* offense. By the plain and ordinary meaning of the words,

"substantial equivalence" does not contemplate identical or even strict equivalence and presumes potential differences. Miller v. Cordray 184 Ohio App. 3d 754, 922 N.E. 2d 973 (2009).

Lloyd was convicted of three first degree felonies for failing to timely notify the Sheriffs of Auglaize and Holmes Counties of his change of address in violation of O.R.C. 2950.04(E) (Counts I and II) and O.R.C. 2950.05(F)(1) (Count III). The degree of his offenses is determined by O.R.C. 2950.99(A)(1)(a)(ii) which provides:

... whoever violates a prohibition in section 2950.04, 2950.041 [2950.04.1], 2950.05, or 2950.06 of the Revised Code shall be punished as follows:

...

(ii) ...if the most serious sexually oriented offense... that was the **basis** of the registration, notice of intent to reside, change of address notification, 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. (emphasis added)

Lloyd admits the Ohio offenses of Rape and Sexual Battery are comparable offenses to the Texas offense of Aggravated Sexual Assault. (Appellant Brief, pg. 15). The Texas offense of Aggravated Sexual Assault is a first degree felony as is the Ohio offense of Rape. Ohio's Sexual Battery is a third degree felony. Thus, on their face, Aggravated Sexual Assault and Rape appear more comparable than Aggravated Sexual Assault and Sexual Battery.

Aggravated Sexual Assault and Rape are more than comparable and are "substantially equivalent" as previously discussed. Furthermore, Ohio's Sexual Battery section does not require the offender use force or the threat of force to compel the victim to submit to the sexual act while Aggravated Sexual Assault in Texas and Rape in

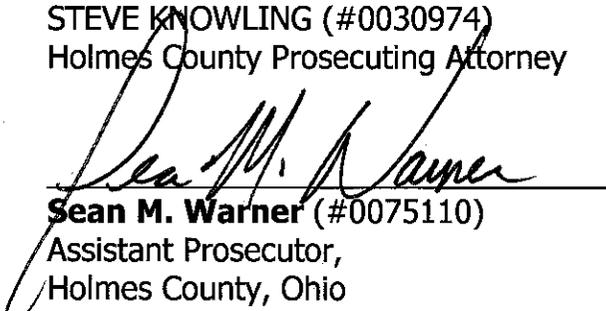
Ohio both contain those elements. Thus, the Trial Court had evidence that Lloyd was convicted of acts "substantially equivalent" to the acts considered Rape in Ohio.

CONCLUSION

Lloyd has not presented any substantial constitutional question and his case is not of great general or public interest. The constitutionality of Lloyd's registration requirements has been well established by the Court. This Court's decision in *Bodyke* has already been properly applied to Lloyd's case and one Count has been vacated by the 5th District Court of Appeals. The elements of Lloyd's crimes were established upon ample proof at trial, including Lloyd's duty to register in Texas prior to moving to Ohio. Lloyd's violations are strict liability offenses with no culpable mens rea required. This Court should deny Lloyd's appeal and leave the correct decisions rendered by the Holmes County Common Pleas Court and 5th District Court of Appeals undisturbed.

Respectfully submitted,

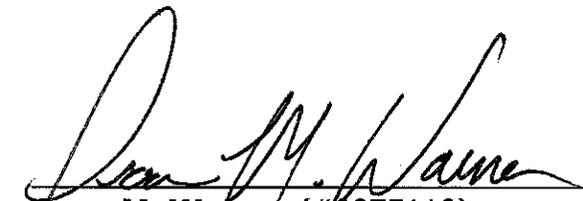
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing State's Memorandum in Response was sent via regular U.S. mail and email to Stephen P. Hardwick, Assistant Public Defender and Counsel for Appellant, Wesley Lloyd at 250 East Broad Street, Suite 1400 Columbus, Ohio 43215 and stephen.hardwick@opd.ohio.gov on March 14, 2011.



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