

IN THE SUPREME COURT OF OHIO

11-0763

ROY E. HOSOM	:	On Appeal from the
	:	Franklin County Court of
Petitioner-Appellee	:	Appeals, Tenth Appellate
	:	District
vs	:	
	:	Court of Appeals
STATE OF OHIO	:	Case No. 10AP-671
	:	
Respondent-Appellant	:	

MEMORANDUM OPPOSING JURISDICTION OF PETITIONER-APPELLEE

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I. EXPLANATION OF WHY THIS CASE PRESENTS NEITHER A SUBSTANTIAL CONSTITUTIONAL QUESTION NOR MATTERS OF GREAT GENERAL INTEREST

This case does not present a substantial constitutional question nor a matter of great general interest because this appeal is simply a reiteration of the state's numerous previous requests for this Court to limit the remedy in *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, and its progeny. In essence, the state argues that contrary to the language of *Bodyke* and the remedy ordered in 160 sex offender cases, petitioners are not entitled to a judgment that recognizes that they are returned to their prior classifications.

Appellee's position can be condensed into four arguments. First, Appellee contends that the severance remedy of *Bodyke* bars trial courts from issuing judgments that recognize that they prevail and are returned to their prior classifications. Second, Appellee argues that the Attorney General's reclassification of offenders is valid in the absence of a corrective decision from the sentencing court. Appellee asserts that, "even if the Franklin County court had inherent jurisdiction [to issue a judgment], there would then be a need to remand the case to the lower court for that court to update petitioner's classification in a manner consistent with current law." (Memorandum of Appellant's State of Ohio in Support of Jurisdiction, p. 9) Third, Appellee contends that if that trial courts have continuing jurisdiction to issue judgment entries then they can place offenders into one of the tier classifications created by Adam Walsh, thereby, amending their prior judicial determinations and depriving offenders of any sense of finality. Finally, fourth, Appellee asserts that if petitions are dismissed because of severance, individuals convicted in other counties must petition the court of the county of conviction for relief (whereas, the Adam Walsh Act permitted individuals to file

petitions in the county of conviction or the county of residence). This final argument arises only if severance requires dismissal of petitions.

The Franklin County Prosecutor has consistently argued that since petitioners are not entitled to a remedy in their reclassification challenges, they must file separate civil actions, which would be without the assistance of appointed counsel. This approach has been repeatedly rejected by the Tenth District as being contrary to the express holding of *Bodyke* and this Court's recent holding in *State v. Gingell*, 2011-Ohio-1481, 128 Ohio St.3d 444.

The Tenth District did not err in applying the remedy fashioned by this Court in *Bodyke* and its companion cases – it simply approved a judgment entry that ended the petition process by recognizing that Appellee was reinstated to his status under prior law. Appellant's reasoning as to why the trial court is barred from issuing an entry, without further hearing, is hypertechnical and illogical.

In addition, Appellant's suggestion that petitioners are not returned to their original classifications in the absence of a decision from the sentencing court ignores the essence of *Bodyke* – that the attempt by the legislative and executive branches to annul or modify prior judicial determinations was invalid. *Bodyke* should have had the effect of automatically returning offenders to their positions under the prior law. The state now seeks to limit the *Bodyke* remedy by dismissing petition challenges and by requiring petitioners, without the benefit of appointed counsel, to individually file civil actions for reinstatement. The state could then challenge these civil actions on factual and procedural grounds. In the meantime, the state will likely argue that petitioners continue to be subjected to the stricter provisions of the Adam Walsh Act. At a

minimum, Appellee's approach creates unnecessary burdens and expenses on individuals and the courts. At a maximum, it denies relief to countless petitioners.

Finally, the State asks this Court accept and hold open this appeal pending its decision in *State v. Palmer*, Case No. 10-1660. The issues before this Court in *Palmer*, however, are not applicable to Mr. Hosom's case. In *Palmer*, it is the state in its response and not the Petitioner in his propositions of law that argued that severance under *Bodyke* bars trial courts from issuing judgment entries. Indeed, the propositions of law accepted in *Palmer* argue that pursuant to *State v. Champion*, 106 Ohio St.3d 120, 2005-Ohio-4098, 832 N.E.2d 718, the defendant, whose sex offense sentence was completed prior to the effective date of H.B. 180 (Ohio's Megan's Law) on July 1, 1997, should be excluded from coverage under Megan's Law and the Adam Walsh Act. In addition, Mr. Palmer argues that a trial court can address the defendant's registration obligation as part of a pre-trial motion in a prosecution for failing to register and that judges have the authority to order the county sheriff and the Attorney General to remove the defendant from reporting lists. Given the narrow challenges raised in the appeal, it would be inappropriate to accept jurisdiction in the present case pending decision in *Palmer*. *Palmer's* disposition will not affect Mr. Hosom's case.

The Tenth District properly rejected the state's arguments by applying this Court's holding in *Bodyke*. Because the remedy in *Bodyke* is clear, expedient, and appropriate, further review is unwarranted. Respectfully, this Court should reject jurisdiction in this matter.

II. STATEMENT OF THE CASE AND FACTS

Appellee generally accepts the procedural history of this case as set forth in Appellant's statement of the case and facts. Appellee would add that on May 24, 2011, the Tenth District Court of Appeals denied Appellant's motion to certify the case to the Supreme Court because of a perceived conflict between the Tenth District and the opinion of the Twelfth District Court of Appeals in *Lyttle v. State*, 12th Dist. No. CA2010-04-089.

IV. ARGUMENT

APPELLEE'S PROPOSITION OF LAW

Individuals who filed petitions challenging their unlawful re-classification by the Ohio Attorney General following the enactment of Ohio's Adam Walsh Act are entitled to a judgment that reinstates their former classification pursuant to the holding of *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424.

In *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, the Ohio Supreme Court held that the Ohio Attorney General could not reclassify sex offenders who had already been classified by court order under former law, as such action would "impermissibly instruct the executive branch to review past decisions of the judicial branch and thereby violate the separation-of-powers doctrine." *Bodyke*, in syllabus. In so holding, the Court struck R.C. 2950.031 and R.C. 2950.032 in their entirety. As a result, the Court ordered classifications in existence when the Adam Walsh Act took effect to be reinstated. *Bodyke*, at ¶166. See, *Chojnacki v. Cordray*, 126 Ohio St.3d 321, 2010-Ohio-3212.

The Franklin County Prosecutor has maintained with respect to S.B. 10 reclassification petitions that the *Bodyke* decision requires courts to dismiss the

petitions rather than grant them. Specifically, it argues that *Bodyke* left petitioners without a judicial remedy because the Supreme Court severed R.C. 2950.031 and 2950.032, which permitted reclassification challenge petitions to be filed. Instead of simply granting judgment in light of the Supreme Court holding, which would give Appellant a written, enforceable order to protect him against the consequences of the state's illegal reclassification, the state takes the position that Appellant's challenge should be dismissed and that he should fend for himself. Indeed, Appellant suggests that petitioners are not returned to their original classification in the absence of a decision from the sentencing court. Appellee argues that, "even if the Franklin County court had inherent jurisdiction, there would then be a need to remand the case to the lower court for that court to update petitioner's classification in a manner consistent with current law." (Memorandum of Appellant's State of Ohio in Support of Jurisdiction, p. 9) In the absence of a judgment entry returning them to their prior reporting and registration status, petitioners, under this approach, might be subject to the enhanced obligations under the Adam Walsh Act. This approach is especially callous in light of the potential harm that petitioners faces from unlawful community notification, the potential for wrongful arrest, and their relative level of powerlessness with respect to the state.

The state's argument is wholly without merit. It is contrary to the express remedy of *Bodyke* and over 160 decisions remanded for judgment by the Ohio Supreme Court on cases that were held pending decision in *Bodyke*. The Supreme Court rejected the state's argument in reconsideration motions in *State v. Adams*, 2010-39, *State v. Paul*, 2010-593, *State v. Houston*, 2011-067, *State v. Jackson*, 2011-067, and *State v.*

Garnett, 2011-067. The state's argument has also been expressly and repeatedly rejected by the Tenth District. In *State v. Hickman*, 10th Dist. No. 09AP-617, the Tenth District noted the following: "This court has repeatedly recognized that, pursuant to *Bodyke*, reclassifications made under the severed statutes are to be vacated, and the prior judicial classifications are to be reinstated. See *State v. Watkins*, 10th Dist. No. 09AP-669, 2010-Ohio-4187, ¶¶12-13; *State v. Houston*, 10th Dist. No. 09AP-592, 2010-Ohio-4374, ¶¶12-13; *State v. Jackson*, 10th Dist. No. 09AP-687, 2010-Ohio-4375, ¶¶10-11." See also, *State v. Miliner*, 10th Dist. No. 09AP-643, 2010-Ohio-6117; *Edwards v. State*, 10th Dist. No. 10AP-645, 2011-Ohio-1492; and *Powell v. State*, 10th Dist. No. 10AP-640, 2011-Ohio-1382. The state's argument is without valid legal support and is contrary to the express acts of the Supreme Court.

The state's approach is troubling because dismissing reclassification petitions may leave individuals with no remedy until some harm actually befalls them. Moreover, petitioners may be precluded from seeking relief through other civil proceedings. For example, a declaratory judgment action under R.C. 2721.02(A) authorizes courts of record to "declare rights, status, and other legal relations whether or not other or further relief is or could be granted." However, a court may refuse to render a declaratory judgment or decree when no uncertainty or controversy would be terminated thereby. *Walker v. Walker* (1936), 132 Ohio.St. 137. A "controversy" exists for purposes of declaratory judgment where there is genuine dispute between parties having adverse legal interests of sufficient immediacy and reality to warrant issuance of a declaratory judgment. *Cassell v. Nasal*, 2010-Ohio-3443, ¶4; *Wagner v. City of Cleveland* (1988),

62 Ohio.App.3d 8. The state could move to dismiss a declaratory judgment action on the grounds that there is no controversy that remains to be resolved.

In dismissing reclassification petitions without judgment, this Court would leave petitioners with little recourse. They must then rely on the hope that the government that wrongly reclassified them would fully correct its error. Instead of requiring a trial court to determine the exact relief to which petitioners are entitled, it would be left to individual sheriffs to decide the duties and obligations of petitioners and to law enforcement agencies to determine whether individuals have violated the law. All this is done in an atmosphere in which no one wants to be seen as being too lenient on sex offenders. The reality is that Appellee and others similarly situated have no real ability to compel law enforcement officers to comply with the law, absent court decree. They face the prospect that law enforcement agencies will argue that *Bodyke* involved dissimilar or distinguishable facts. The difficulties they face are exemplified by the determined efforts of the Franklin County Prosecutor's office to challenge the breadth and application of *Bodyke* and to argue that offenders are not, for various legal reasons, entitled to relief.

In short, Appellant's arguments present little that is new, and the essence of the approach has been repeatedly rejected by this Court. Additionally, in numerous decisions, the Tenth District has overruled the claimed errors and denied applications for reconsiderations and motions to certify. First, Appellant concedes that Appellee's petition was properly filed in Franklin County, which means that the lower court had authority to address the still-pending reclassification petition following *Bodyke*. It is important to note that the trial court did not conduct a hearing pursuant to the petition

process; it merely issued a judgment entry that ended the process by applying this Court's remedy in *Bodyke*. The petitions in *Bodyke* and the companion cases of *Shwab*, and *Phillips* were not dismissed. The cases were remanded to the trial court for further action.

Second, the suggestion that petitioners are not returned to their original classification in the absence of a decision from the sentencing court ignores express language from this Court, which invalidated the reclassifications on those with prior judicial determinations. In *Bodyke*, the Court unequivocally stated that "R.C. 2950.031 and 2950.032 may not be applied to offenders previously adjudicated by judges under Megan's Law, and the classifications and community-notification and registration orders imposed previously by judges are reinstated." *Bodyke*, at ¶66. Without question, the attempt by the legislature to alter sex offender classifications "may not be enforced." *Bodyke*, at ¶66. Appellee's assertion that further court action is necessary to obtain relief is without legal basis. (See, Memorandum of Appellant's State of Ohio in Support of Jurisdiction, p. 9)

Third, trial court judges lack the authority to reclassify offenders under the Adam Walsh Act who had reporting obligations under the prior law. The attempt to judicially amend prior determinations is invalid as an improper modification of the final judgments that triggered the sex offender registration and reporting obligations. In *Bodyke*, this Court noted at ¶56 that registration and reporting obligations are part of the journalized final judgments. To the extent that the legislative and executive branches are barred from re-opening final judgments, trial courts would be similarly barred. A court cannot "annul, reverse, or modify a judgment" that it had previously imposed so that additional

burdens and responsibilities can be added. Appellee's approach would deprive offenders of any sense of finality by subjecting them to additional restrictions at the whim of trial courts well after their cases have been concluded.

Fourth, Appellee asserts that if petitions are dismissed because of severance, individuals convicted in other counties must petition the court of the county of conviction for relief. While Appellee is correct, this argument is dependent on the state succeeding in its attempt to limit the remedy in *Bodyke*. Such a decision, however, would create unnecessary hardship on petitioners and confusion in the lower courts and would serve no legitimate legal purpose.

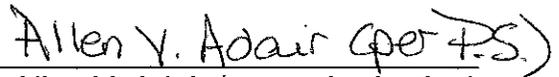
The state presents essentially the same arguments in its memorandum in support of jurisdiction that had been previously rejected by this Court on direct appeal and in numerous reconsideration motions. Given that the Court's recent holdings in *Bodyke* and *Gingell* are unambiguous and appropriate, leave to appeal based on Appellant's propositions of law should not be granted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present neither a substantial constitutional question nor matters of great general interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Opposing Jurisdiction was hand delivered to the office of Steven L. Taylor, Counsel of Record, Prosecuting Attorney, 373 South High Street, 13th Floor, Columbus, Ohio 43215 on this the 3rd day of June, 2011.



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