

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : NO. 2011-1066

Appellant :
-vs- :
LINDELL W. BRUNNING JR. :
Appellee :

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 95376

MEMORANDUM IN OPPOSITION TO JURISDICTION

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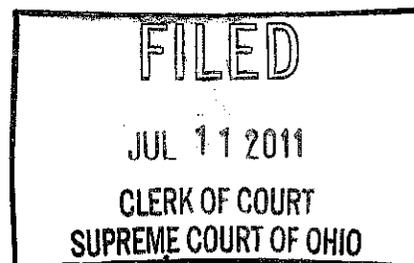
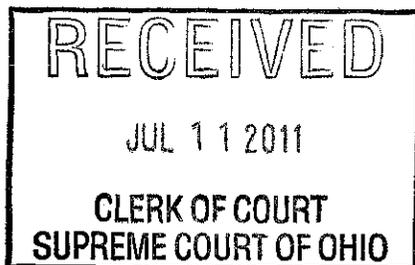


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EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST:

Appellee Lindell Brunning, Jr. asks this Court to deny the State's request for jurisdiction because the Eighth District's decision in this case was a straightforward application of this Court's decision in *State v. Bodyke* (2010), 126 Ohio St. 3d 266. This Court recently denied the State's request for jurisdiction over an identical proposition of law in *State v. Page*, Ohio Sup. Ct. Case No. 2011-305 (appeal dismissed on May 25, 2011).

In *Bodyke*, this Court held that the Adam Walsh Act provisions requiring the Attorney General to reclassify offenders previously classified under Megan's Law violated the separation-of-powers' doctrine. *Id.* at paragraphs two and three of the syllabus. To remedy that constitutional violation, this Court severed the AWA "reclassification provisions" and provided that "the classifications and community-notification provisions and registration orders imposed by judges [under Megan's Law] are reinstated." *Id.* at 280-81. In essence, *Bodyke* provides that Megan's Law registrants can only be subjected to the obligations set forth in Megan's Law.

Here it is undisputed that Lindell Brunning is a Megan's Law registrant who was classified as a sexually oriented offender under Megan's Law. His obligations and the penalties attendant to non-compliance with those obligations are, in light of *Bodyke*, dictated by Megan's Law and not the Adam Walsh Act.

In its first proposition of law, the State seeks to undermine the legal effect of this Court's *Bodyke* decision. The State argues that its prosecution of Brunning under the Adam Walsh Act is valid despite the fact that the Adam Walsh Act cannot, per *Bodyke*, be applied to him. The reason, according to the State, is that it *could have* prosecuted Brunning for violating his registration obligations under Megan's Law. Perhaps it could have. However, a conviction

based on an unconstitutional classification cannot stand merely because the defendant could have been prosecuted under a different statutory scheme.

In its memorandum, the State argues that “the Eighth District has excused a sex offender’s registration obligations.” (State’s MSJ at 1). That is not accurate. The Eighth District simply held that the State cannot prosecute Brunning based on his unlawful AWA reclassification. The issue of whether Brunning complied with his Megan’s Law obligations was not before the Court.

In sum, this case is not worthy of this Court’s attention as it involves the straightforward application of this Court’s decision in *Bodyke*.

STATEMENT OF CASE AND FACTS

In 1983, Lindell Brunning was convicted of rape and received an indefinite prison sentence of 10-25 years. In 1997, the trial court classified Brunning as a sexually oriented offender under Ohio’s Megan’s Law. Under Megan’s Law, Mr. Brunning was required to verify his address annually for ten years and notify the Sheriff’s Office of any change of address. Former R.C. 2950.05 and 2950.06. The failure to comply with these registration requirements were felonies of the third degree. Former R.C. 2950.99. There were no mandatory minimum prison terms for registration violations under Megan’s Law.

The Ohio General Assembly subsequently replaced Megan’s Law with Ohio’s Adam Walsh Act, effective January 1, 2008, thereby altering the classification, registration, and notification scheme for convicted sex offenders. As a part of this legislation, the General Assembly directed the Ohio Attorney General to reclassify Megan’s Law offenders under this new scheme and applied the enhanced registration and notification scheme retroactively to the

reclassified offenders. Pursuant to R.C. 2950.031 and 2950.032 of the Adam Walsh Act, the Ohio Attorney General reclassified Brunning as a Tier III sex offender under the AWA.

In January 2010, Brunning was indicted for failing to verify his address every 90 days as required by the AWA, failing to provide notice of a change of address, and tampering with a governmental record (i.e. failing to notify the Sheriff of a change of address).¹ The registration offenses were, due to their prosecution under the AWA, felonies of the first degree and the tampering charge was a felony of the third degree.

At a change of plea hearing, Brunning entered into a plea agreement with the State in which he agreed to plead guilty to all three charges and both parties agreed that all three counts would merge for sentencing purposes. The Court also advised Brunning that the three counts would merge for sentencing and that “the maximum penalty you’re looking at on this case is between two to eight years.” Based on the representations of the State and the trial court, Mr. Brunning pled guilty to all three charges.

Mr. Brunning appeared for sentencing on June 8, 2010, just five days *after* this Court held, in *Bodyke*, that the AWA was unconstitutional. Based on the *Bodyke* decision, defense counsel argued that his client’s prosecution under the AWA was invalid and requested the dismissal of the charges. The trial court denied the motion and imposed a 21-year aggregate sentence for the three registration-related offenses. The sentence was comprised of three consecutive sentences of 8 years for failure to verify, 8 years for failure to provide notice of change of address, and 5 years for tampering with governmental records. The trial court did not

¹ The State’s appeal does not appear to be challenging the Eighth District’s decision to reverse Brunning’s failure to verify conviction.

provide any reason for disregarding the plea agreement and its own prior representations regarding the merger of the three charges.

Brunning filed a timely appeal with the Eighth District, arguing, among other things, that his plea was invalid because it was induced by false promises by the State and the trial court, that his three registration related offenses should have merged, and that his convictions must be vacated because “the law on which it is based, Ohio’s Adam Walsh Act, is unconstitutional as applied to appellant.” The Eighth District resolved the case based on the latter issue and held that the first two issues were moot. Specifically, the Eighth District held that Brunning’s “reclassification under the AWA is contrary to the law,” that any registration-related violations under the AWA are likewise contrary to law, and that convictions predicated upon that unlawful reclassification must be vacated. *Brunning*, 2011 Ohio 1936, at ¶¶ 11 and 13.

The State appealed.

LAW AND ARGUMENT

Proposition of Law I (as formulated by Appellant-State of Ohio): Even if the person does not have a legal obligation to complete the government record, a person can be convicted of tampering with records (R.C. 2913.42) if the person falsifies the government record.

With this proposition of law, the State asks this Court to conclude that individuals can be convicted of third-degree felonies if the State *unlawfully* compels them, under threat of criminal prosecution, to provide information and that information turns out to be inaccurate. Ohio law does not allow for criminal liability under such a circumstance. Nor should it.

The Eighth District did *not*, as argued by the State, add an element to the charge of ~~tampering with government records (R.C. 2913.42)~~. Rather, the Eighth District simply recognized that, under the circumstances of this case, the basic statutory requirements for criminal liability were absent. Aside from the specific elements of a particular criminal offense,

Ohio law provides that a person is not guilty of an offense *unless* “[t]he person’s liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing.” R.C. 2901.21(A)(1). Essentially, this provision requires that, for a person to be criminally liable, he or she must engage in a voluntary act or “fail to meet a prescribed duty.” R.C. 2901.21 (Notes from the Legislative Service Commission).

Although the Eighth District did not specifically cite R.C. 2901.21, its reasoning is perfectly consistent with that statute. It explained that “any tampering with evidence charge for falsifying documents stemming from the reporting violation, were based on the duty to register and verify *unlawfully* imposed. . . .” *Brunning*, 2011 Ohio 1936, ¶ 10. In other words, Brunning’s verification of his address with the Sheriff (the basis for the tampering charge) was both involuntary (he was ordered to do so under threat of criminal prosecution) and was not based on any obligation to meet a legally prescribed duty. Thus, since the basic prerequisites of criminal liability were absent, the Eighth District correctly vacated his conviction for tampering with records.

The State’s argument that “[t]his case has ramifications beyond sex offender registration” is misplaced. The State maintains that the Eighth District’s decision in this case will prevent it from obtaining convictions when individuals knowingly provide false information to obtain public benefits (worker’s compensation, unemployment, other government aid) or to obtain a driver’s license or vehicle registration.² The State’s analogies miss a critical distinction. Unlike

² Mr. Brunning also disagrees with the State theory’s that providing false information to a government official during a sex offender verification constitutes tampering with government records. On the contrary, such conduct constitutes falsification, a violation of R.C. 2921.13—which includes making a “false statement” with the purpose to “mislead a public official in performing the public official’s official function” and making a false written statement in a report that is required by law. Tampering with government records, in Brunning’s view, requires

Brunning, who was *unlawfully* compelled to provide certain information under threat of criminal prosecution, no one will go to jail if they do not apply for public benefits. Unlike Brunning, a person applying for public benefits or obtaining a driver's license is engaging in a voluntary act. Thus, the Eighth District's decision in *Brunning* simply has no application in those other contexts.

Proposition of Law II (as formulated by Appellant-State of Ohio): State v. Bodyke does not require vacation of convictions where the conduct of the sex offender, classified under Megan's Law, would have been a violation under both Megan's Law and the Adam Walsh Act.

The Eighth District in this case properly applied this Court's decision in *Bodyke* to conclude that the State cannot predicate a criminal prosecution on an unconstitutional classification under the AWA. The Eighth District reasoned that, because Gilbert's reclassification under the AWA is invalid pursuant to *Bodyke*, convictions arising from alleged reporting violations under the AWA are similarly invalid. *Brunning*, 2011 Ohio 1936, ¶¶ 11 and 13.

With this proposition of law, the State does *not* argue that it can prosecute Brunning based on his unconstitutional reclassification as a Tier III sex offender. It simply argues that Brunning would have been convicted even if he had been prosecuted based on his Megan's Law classification as a sexually oriented offender. Perhaps the State is correct. However, Brunning's Megan's Law classification was not the basis for the indictment and there is no shortcut to a proper prosecution. Improper convictions cannot be sustained merely because the defendant could have been prosecuted differently. This is particularly true when, as here, a criminal prosecution initiated under the wrong statutory provision has negative consequences for the

the falsification of an *existing* governmental record—one that is “kept by or belongs to” a governmental entity. That is not what was alleged in the instant case.

defendant. Because the State prosecuted Brunning based on his unlawful AWA reclassification (and not under Megan's Law), Brunning faced first-degree felonies, rather than third-degree felonies.

The Eighth District's decision stands for the uncontroversial proposition that an unconstitutional classification cannot serve as the basis for a criminal prosecution. Several appellate districts have reached the same conclusion with respect to criminal prosecutions predicated on unconstitutional reclassifications under the AWA. *State v. Owens*, Montgomery App. 23820, 2010 Ohio 4923, ¶ 17 (First District); *State v. Godfrey*, Summit App. No. 25187, 2010 Ohio 6454, ¶¶ 5-7 (Ninth District). In *State v. Milby*, Montgomery App. No. 23798, 2010 Ohio 6344, the Second District similarly recognized a problem with prosecuting improperly reclassified Megan's Law offenders under the AWA. However, it elected to remedy that problem by simply vacating the sentence premised on the AWA and remanding the case for sentencing under Megan's Law. *Id.* at ¶ 31. Thus, the Second District's decision in *Milby* does not, as suggested by the State, stand in "direct contrast" to the Eighth District's decision in this case.

In sum, the Eighth District properly applied *Bodyke* to Brunning's prosecution under the AWA in holding that his unconstitutional reclassification could not serve as the basis for a criminal prosecution.

Proposition of Law III (as formulated by Appellant-State of Ohio): A Defendant who pleads guilty to an offense waives any defect in an indictment except for plain error.

~~The State's third proposition of law is largely a reformulation of its first two propositions of law and has already been clearly addressed by this Court in *State v. Gingell* (2011), 128 Ohio St. 3d 444. As in its first proposition of law, the essential question here is whether or not an~~

AWA prosecution can be sustained based on an unlawful reclassification. *Gingell* makes clear that AWA prosecutions based on unlawful reclassifications are invalid *even* if the defendant pled guilty.

Each of the charges in this case was clearly premised on Brunning's purported non-compliance with a registration scheme (the Adam Walsh Act) which cannot lawfully be applied to him. "Since [Brunning] was charged after his reclassification and before *Bodyke*, there is no doubt that" he was indicted under the AWA. *Gingell*, 128 Ohio St. 3d at 445. Because the AWA cannot be applied to Brunning, the Eighth District correctly vacated convictions which were based on the AWA obligations and which led to AWA penalties.³ *See Gingell*, 128 Ohio St. 3d at 444-45 (vacating a conviction, which was based on a guilty plea to registration related offenses under the AWA, because the AWA could not be applied to the defendant).

CONCLUSION

For the foregoing reasons, Appellee Lindell Brunning respectfully asks this Court to decline jurisdiction over this matter as it does not present a substantial constitutional question for review.

Respectfully Submitted,



CULLEN SWEENEY, ESQ.
Counsel for Appellee

³ As discussed in Brunning's response to the State's Proposition of Law II, the tampering with records charge is also predicated on the unlawful reclassification and, without that unlawfully imposed reclassification, there is no criminal liability for tampering with records.

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum In Response was served upon WILLIAM D. MASON, ESQ., Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 7 day of July, 2011.



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