

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

-vs-

PAUL E. PALMER,

Appellant.

Case No.: 2010-1660

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

Case Nos. 09AP-956
09AP-957

REPLY BRIEF OF APPELLANT
PAUL E. PALMER

Yeura R. Venters 0014879
Franklin County Public Defender

-and-

David L. Strait 0024103
(Counsel of Record)

Shayla L. Werner 0083998
Assistant Franklin County Public Defender
373 South High Street, 12th Floor
Columbus, Ohio 43215
Telephone: 614/525-8872
Facsimile: 614/461-6470

*Attorneys for Appellant
Paul E. Palmer*

Ronald J. O'Brien 0017245
Franklin County Prosecuting Attorney

-and-

Steven L. Taylor 0043876
(Counsel of Record)

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

*Attorney for Appellee
State of Ohio*

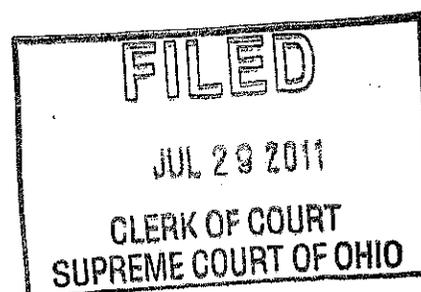


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ARGUMENT

First Proposition of Law

R.C. 2950.031 and 2950.032 are unconstitutional and unenforceable. Given the unconstitutionality of these sections, they provide no basis for reclassification of any sexual offender into the tier classification system created by the Adam Walsh Act and no registration duties arise from these sections. [*State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, applied.]

In its brief, the State of Ohio goes to great lengths defending the decision of the Tenth Appellate District. The State, like the lower court, takes the position that S.B. 10 applied to Palmer even if Megan's Law did not. According to the Court,

“...we can conclude only that defendant's duties under the AWA are not premised on the time frame referenced in the law cited in **Champion but on the language of the AWA which requires compliance, regardless of when defendant pleaded guilty to the offense.** Accordingly, the provisions of the AWA apply to defendant.”

State v. Palmer, Franklin App. 09AP-956, 957, 2010-Ohio-2421, at ¶24.

(Emphasis added.)

Now, there is absolutely no question that this holding was erroneous. In *State v. Williams*, Slip Opinion No. 2011-Ohio-3374, this Court conclusively resolved retroactivity issues arising from the enactment of Senate Bill 10.. In *Williams*, the Court held in syllabus:

“2007 Am.Sub.S.B. No. 10, as applied to defendants who committed sex offenses prior to its enactment, violates Section 28, Article II of the Ohio Constitution, which prohibits the General Assembly from passing retroactive laws.”

The Court went on to explain its holding in clear and unqualified language:

“{¶ 21} The General Assembly has the authority, indeed the obligation, to protect the public from sex offenders. It may not, however, consistent with the Ohio Constitution, “impose[] new or additional burdens, duties, obligations, or liabilities as to a past

transaction.” *Pratte*, 125 Ohio St.3d 473, 2010-Ohio-1860, 929 N.E.2d 415, at ¶ 37. If the registration requirements of S.B. 10 are imposed on Williams, the General Assembly has imposed new or additional burdens, duties, obligations, or liabilities as to a past transaction. *We conclude that S.B. 10, as applied to Williams and any other sex offender who committed an offense prior to the enactment of S.B. 10, violates Section 28, Article II of the Ohio Constitution, which prohibits the General Assembly from enacting retroactive laws.*

“{¶ 22} We reverse the judgment of the court of appeals and remand the cause for *resentencing under the law in effect at the time Williams committed the offense.*”

(Emphasis added.)

Pursuant to *Williams*, S.B. 10 does not apply to Palmer. Further, he has no duties under prior law. Am.Sub.H.B. No. 180, 146 Ohio Laws, Part II, 2560, 2601 (“Megan’s Law”) provided for offender registration, classification, and community notification. But under that law, “a person whose prison term for a sexually oriented offense was completed before July 1, 1997, is not required to register under R.C. 2950.04(A)(1)(a) or periodically verify a current address under R.C. 2950.06(A)[.]” *State v. Champion*, 106 Ohio St.3d 120, 2005-Ohio-4098, 832 N.E.2d 718 at ¶13. Palmer—who completed his prison term before July 1, 1997-- therefore had no duty to register or verify his address under Megan’s Law.

Thus, the opinion and judgment of the Court of Appeals are in error. The trial court’s analysis and judgment were correct, given *Williams*. Accordingly, Appellant Palmer respectfully urges this Court to reverse the judgment of the Court of Appeals.

Second Proposition of Law

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

The State reasserts the argument that the trial court could not dismiss the indictment against Palmer, and that the issues were for the jury instead. The State ignores settled law holding that the question of whether a duty exists is a question of law for the court to decide. *Mussivand v. David* (1989), 45 Ohio.St.3d 314, 318, 544 N.E.2d 265. *Clemets v. Heston* (1985), 20 Ohio.App.3d 132, 20 O.B.R. 166, 485 N.E.2d 287. In its argument, the State confuses the general factual issues for trial—whether Palmer failed failing to provide notice of change of address and failing to periodically verify his address—with the legal issue of whether the indictment was predicated on Palmer’s unconstitutional reclassification.

The Cuyahoga County Court of Appeals addressed this issue in *State v. Ortega-Martinez*, Cuyahoga App. No. 95656, 2011-Ohio-2540. In *Ortega-Martinez*, the State raised the same argument it raises here:

{¶ 14} The state’s second assignment of error asserts that the trial court erred in dismissing the indictment where the indictment was valid on its face. The state argues that Ortega-Martinez’s motion questions the state’s ability to prove the indictment, and therefore, dismissal is not proper.

The Court went on to summarize the law on this point:

“{¶ 15} As a general rule, “[a] pretrial motion must not involve a determination of the sufficiency of the evidence to support the indictment. If the indictment is valid on its face, a motion to dismiss should not be granted.” *State v. Preztak*, 181 Ohio App.3d 106, 2009-Ohio-62, 907 N.E.2d 1254, ¶12, citing *State v. Eppinger*, 162 Ohio

App.3d 795, 2005-Ohio-4155, 835 N.E.2d 746. However, the Supreme Court of Ohio has carved out an exception to the general rule, noting that a court may consider material outside the face of the indictment if the “motion did not embrace what would be the general issue at trial.” *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶18; Crim.R. 12(C). The court may consider briefs, affidavits, testimony, and other exhibits in deciding the motion. *Id.* However, a court may not determine a pretrial motion to dismiss if it requires the trial court to also determine the general issue for trial. *Id.*”

The Court then concluded that the motion to dismiss did not “embrace. . . the general issue at trial” and that dismissal was appropriate:

“{¶ 16} In the instant case, the trial court did not impermissibly decide the issue for trial in ruling on Ortega–Martinez's motion to dismiss. Ortega–Martinez's motion did not address what would be the general factual issue for trial (whether the evidence showed Ortega–Martinez failed to verify his address on January 1, 2008); rather, it asserted that the question of whether Ortega–Martinez's indictment for failure to verify was predicated on an unconstitutional reclassification by the Ohio Attorney General. Because Ortega–Martinez's motion did not require a determination of the factual issue for trial, the trial court could properly consider the motion under Crim.R. 12(C).

“{¶ 17} This court has held that an unlawful reclassification under Ohio's AWA cannot serve as the predicate for the crime of failure to verify. *State v. Smith*, 8th Dist. No. 92550, 2010-Ohio-2880, ¶29, *State v. Page*, 8th Dist. No. 94369, 201-Ohio-83. Because appellant's indictment was predicated on an unlawful reclassification, he cannot be convicted of the offense charged. The trial court did not err by dismissing the indictment. The state's second assignment of error is overruled.”

Contrary to the holding of the Court of Appeals, then, the trial court below properly exercised its jurisdiction in dismissing the indictment.

Third Proposition of Law

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

Contrary to the State's argument, the trial court did not err when it ordered that his "name be removed from all sexually oriented lists maintained by the local, state or federal government." (Judgment Entry, September 16, 2009). This was a proper exercise of the court's jurisdiction.

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

Even in the absence of express statutory jurisdiction, this Court has recognized the inherent authority of trial courts to direct the sealing or expungement of records.. See, *e.g.*, *City of Pepper Pike v. Doe* (1981), 66 Ohio St.2d 374, 376-77, 20 O.O.3d 334, 421 N.E.2d 1303

"In Ohio, convicted first offenders may seek expungement and sealing of their criminal records under the authority of R.C. 2953.32. But, even absent statutory authorization, trial courts in unusual and exceptional circumstances expunge criminal records out of a concern for the preservation of the privacy interest. *State v. Drewlo* (Cuyahoga Co. App., April 17, 1980), Case No. 40543, unreported; *State, ex rel. Mavity v. Tyndall* (1946), 224 Ind. 364, 66 N.E.2d 755. Some courts order expungement and sealing of records in "appropriate circumstances" out of concern for due process rights. *Commonwealth v. Malone* (1976), 244 Pa.Super. 62, 366 A.2d 584. In all such jurisdictions, however, even individuals who have never been convicted are not entitled to expungement of their arrest records as a matter of course. *United States v. Linn* (C.A.10, 1975), 513 F.2d 925.

“In this case, the appellant was criminally charged with assault as a result of a domestic dispute. It is clear from the context and history of the matter that appellant's former husband and his current wife used the courts as a vindictive tool to harass appellant. The criminal charge and dismissal with prejudice were such unusual and exceptional circumstances as to make appropriate the exercise of the trial court's jurisdiction to expunge and seal all records in the case. The basis for such expungement, in our view, is the constitutional right to privacy. See *Roe v. Wade* (1973), 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147; *Wisconsin v. Constantineau* (1971), 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515; *Griswold v. Connecticut* (1965), 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510.

“In holding a right to expungement and sealing of all records in this case, we follow other jurisdictions which recognize the power to grant this judicial remedy. When exercising these powers, the trial court should use a balancing test, which weighs the interest of the accused in his good name and right to be free from unwarranted punishment against the legitimate need of government to maintain records. Where there is no compelling state interest or reason to retain the judicial and police records, such as where they arise from a domestic quarrel and constitute vindictive use of our courts, the accused is entitled to this remedy. There can be no compelling state interest or reason to maintain the records of the criminal proceedings against defendants like appellant here, a school teacher with a previously unblemished reputation in her community.”

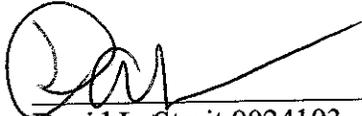
Ohio law, then, recognizes the judiciary's authority to direct the removal of offender's names from law records. Directing removal from records compiled as a result of an unconstitutional classification or reclassification was a necessary and proper exercise of this authority.

CONCLUSION

For the reasons set forth in his opening merit brief and herein, Appellant Paul E. Palmer respectfully urges this Court to reverse the judgment of the Franklin County Court of Appeals.

Respectfully submitted,

Yeura R. Venters 0014879
Franklin County Public Defender



David L. Strait 0024103

By D. Strait
per 4 JH ON

SHAYLA WERNER
Shayla L. Werner 0083998
373 South High Street, 12th Floor
Columbus, Ohio 43215
Telephone: 614/525-8872
Facsimile: 614/461-6470

*Attorneys for Appellant
Paul E. Palmer*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Reply Brief of Appellant Paul E. Palmer was served upon Steven L. Taylor, Assistant Franklin County Prosecuting Attorney, 373 S. High Street, Columbus, Ohio 43215 by hand delivery this 20th day of July 2011.



David L. Strait 0024103

*Attorney for Appellant
Paul E. Palmer*