

IN THE SUPREME COURT OF OHIO

In re: J.T.,

A Minor Child

Supreme Court Case No. 11-1336

Court of Appeals Case No. 2010 CA 134

**ON APPEAL FROM THE LICKING COUNTY COURT OF APPEALS,
FIFTH APPELLATE DISTRICT OF OHIO**

APPELLEE'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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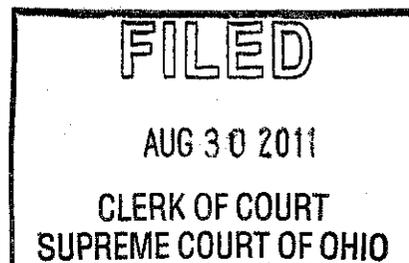


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**STATEMENT OF APPELLEE'S POSITION AS TO
WHETHER THE CASE IS OF PUBLIC OR GREAT
GENERAL INTEREST OR INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION:**

**This Case Does Not Involve a Matter of Public or Great
General Interest or a Substantial Constitutional Question**

Now comes the State of Ohio, and submits that this case involves neither a matter of public or great general interest, nor a substantial constitutional question. The Appellant waived his ability to argue constitutional issues by not raising them at the trial court. As such, the remaining issues involve plain error and the discretion of the trial court, and such general issues are not matters of public interest, matters of great general interest, or substantial constitutional questions.

The Appellant is asking this Court to take jurisdiction regarding juvenile sex offender registration, in relationship to the Eighth Amendment federal constitutional prohibition on cruel and unusual punishment. Appellant's failure to raise the constitutional issues on the trial level constitutes waiver.

As this Court stated in *State v. Barnes*(2002), 94 Ohio St.3d 21, 759 N.E.2d 1240, 2002-Ohio-68:

Under Crim.R. 52(B), “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, *i.e.*, a deviation from a legal rule. * * * Second, the error must be plain. To be “plain” within the meaning of Crim.R. 52(B), an error must be an “obvious” defect in the trial proceedings. * * * Third, the error must have affected “substantial rights.” We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.

Id. at 27. Citations omitted.

Plain error is determined at the time the trial court commits the alleged error. *Id* at 28. By the date of the Appellant's registration, this Court, as well as federal and appellate courts, had been consistent in finding sex offender registration constitutional under both the Ohio and the federal constitutions.¹ Based upon the state of the law at the time the trial court addressed the sex offender registration matter (as well as the state of the law presently), the registration of the juvenile as a sex offender was not error, and would certainly not be "plain" error. Even if that were not the case, where appellate courts disagree and this Court has yet to make a decision on a legal issue, this Court is precluded from finding plain error. *Barnes* at 28.

Further, the Appellant's registration did not impact a substantial right. Sex offender registration has consistently been determined by this Court to be civil in nature. See *State v. Ferguson*(2008), 120 Ohio St.3d 7, ¶42, 2008-Ohio-4824, 896 N.E.2d 110; *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264; As in prior versions of the sex offender law, "the legislative history supports a finding that it is a remedial, regulatory scheme designed to protect the public rather to punish the offender. *Ferguson* at ¶36. These civil classifications are "collateral consequences of the offender's criminal acts rather than a form of punishment per se." *Id* at ¶ 34. See also *Goodballet v. Mack*(N.D. Ohio 2003), 266 F.Supp. 2d 702: "Sexual predator

¹ *Connecticut Dept. of Public Safety v. Doe*(2003), 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98; *Smith v. Doe* (2003) 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164, *Kansas v. Hendricks*(1996), 521 U.S. 346, 117 S.Ct. 2072, 138 L.E.2d 501; *State v. Cook*(1998), 83 Ohio St.3d 404, 700 N.E.2d 570; *State v. Hayden* (2002) 96 Ohio St. 3d 211, 2002-Ohio-4169, 773 N. E. 2d 502; *Doe v. Michigan Dept. of State Police*, (C.A. 6, 2007), 490 F3d 491; *State v. Eismon*(Aug. 6, 2007), 5th App. Dist., Fairfield Cty. Case 06-CA-15, 2007 WL 2298136, 2007-Ohio-4121; *State v. Furlong*(Feb. 6, 2001), 10th App. Dist., February 6, 2001, Franklin Cty. Case 00AP-637, 2001 W.L. 95870; *State v. Wenhame*(March 20, 2000), 3rd App. Dist., Columbiana Cty. Case 97-CO-66, 2000 W.L. 288525; *State v. Melchoir*(March 18, 1999), 8th App. Dist., Cuyahoga Cty. Case 72695, 1999 W.L. 148464; *State v. Bair*(Feb. 1, 1999), 5th App. Dist., Stark Cty. Case 1997-CA-00232, 1999 W.L. 99032.

adjudication is a remedial collateral consequence, rather than punitive.” As a civil collateral consequence, registration does not impact a substantial right of the Appellant.

Finally, even if the three prongs of *Barnes* [that an error was made; that it was obvious; and that it impacts substantial rights], had been met, this Court would still have discretion to decline to address the issue. This Court may or may not choose to notice and recognize plain error. This notice must be done “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Long*(1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 373 N.E.2d 804, paragraph three of the syllabus.

As the Appellant has waived his opportunity to argue constitutional matters, as the issues do not involve “plain error,” and as in using utmost caution no exceptional circumstances or a manifest miscarriage of justice has been established, the State submits that no matter of public interest, no matter of great general interest, and no substantial constitutional question is properly before this Court.

ARGUMENT IN SUPPORT OF APPELLEE’S POSITION

Appellant’s Proposition of Law I:

“Applying Senate Bill 10 to juveniles in a way that classifies them based solely on their offense constitutes cruel and unusual punishment. Eighth Amendment to the United States Constitution.”

The Appellant argues that the registration law is cruel and unusual punishment. This argument is without merit. Sex offender registration proceedings are remedial and civil in nature, not criminal or punitive. See *Cook v. Cook*, (1998) 83 Ohio St.3d 404. “If a legislative restriction is an incident of the state’s power to protect the health and safety of its citizens, it should be considered as evidencing an intent to exercise that regulatory power rather than as an intent to punish.” *Ferguson* at ¶37. As the law is remedial and not punitive, it is constitutionally valid

under the Cruel and Unusual Punishment clause of the Eighth Amendment to the United States Constitution. A law cannot constitute cruel and unusual punishment if it is not, in fact, punishment.

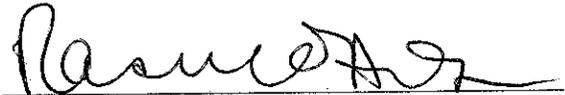
In Ohio, Chapter 2950 serves only to protect the public. There is simply no evidence that the statute is punitive in nature, regardless of the status of the offender being a juvenile or an adult. The application of the statute to a juvenile does not render the statute punitive in nature just because the offender is under age. Therefore Appellant's argument must fail. There is no punishment evident in the statute that would violate the prohibition on cruel and unusual punishment. This issue is also under review in *In Re Adrian R.*, Supreme Court Case No. 2009-0189.

CONCLUSION

For the foregoing reasons, Appellee respectfully submits that this case does not involve a substantial constitutional question, a matter of public interest, or a matter of great general interest.

Appellee respectfully requests that this Court decline to accept jurisdiction of this case.

Respectfully submitted;



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was duly served upon Todd Barstow, Attorney for Appellant, 4185 East Main Street, Columbus, OH 43213, and Thomas Gordon, Guardian Ad Litem, 8026 Woodstream Drive, N.W., Canal Winchester, OH 43110, by ordinary U.S. Mail, this 30th day of August, 2011.



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