

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio

Case No. 2012- 12 - 0346

Plaintiff-Appellant,

On Appeal from the
Montgomery County Court
of Appeals, Second
Appellate District

vs.

Billy L. Cook

Court of Appeals
Case No. 24611

Defendant-Appellee.

MEMORANDUM IN SUPPORT OF JURISDICITON
OF APPELLANT, STATE OF OHIO

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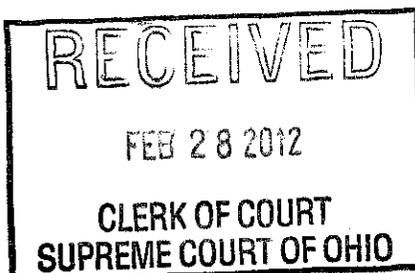
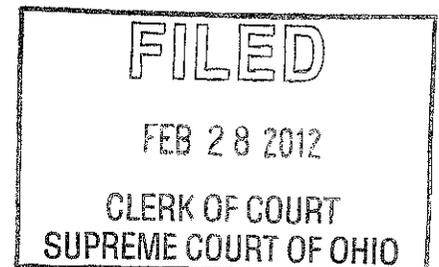


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**EXPLANATION OF WHY THIS FELONY CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

This case presents a significant constitutional question that has not been addressed by this Court, but which recent decisions issued by this Court have now made it the next question to be answered: Should the offender be sentenced according to the penalties codified in R.C. 2950.99 that exist at the time the registration offense is committed or at the time the offender was originally classified?

The court of appeals held that when a sex offender commits a registration offense the penalty that must be applied to the new charge is the penalty that was in effect at the time the offender originally committed his underlying sex offense, and that retroactive application of the new, increased penalties is unconstitutional and therefore, the sentence is void. *State v. Harrison*, 2nd Dist. No. 24471, 2011-Ohio-6803. As a result, the court of appeals vacated the sentence on a late petition for post conviction relief. *Id.* See also *State v. Eads*, 2nd Dist. No. 24696, 2011-Ohio-6307, Sup.Ct. No. 2012-0115, jurisdiction pending (*Res judicata* does not apply to a collateral challenge of an underlying classification that is void.); *State v. Pritchett*, 2nd Dist. No. 24183, 2011-Ohio-5978, Sup.Ct. No. 2012-0003, jurisdiction pending (Crim.R. 32.1 motions to withdraw a plea authorizes the court to correct a manifest injustice or a void judgment.)

The problem: Ohio courts are misinterpreting the decisions in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, *State v. Gingell*, 128 Ohio St.3d 444, 2011-Ohio-1481, 946 N.E.2d 192, and *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, and have reversed felony sentences finding that R.C. 2950.99 cannot be retroactively applied to an offender's registration offense, if they committed their underlying sex offense prior to its enactment. See *State v. Brunning*, 8th Dist. No. 95376, 2011-Ohio-1936, jurisdiction

accepted, Sup.Ct. No. 2011-1066; *State v. Grunden*, 8th Dist. No. 95909, 2011-Ohio-3687, Sup.Ct. No. 2011-1553, jurisdiction accepted and held for the decision in *Brunning*; *State v. Campbell*, 8th Dist. No. 95348, 2011-Ohio-2281, Sup.Ct. 2011-1061 jurisdiction accepted; and *State v. Gilbert*, 8th Dist. No. 95084, 2011-Ohio-1928, Sup.Ct. 2011-1062 jurisdiction accepted, all citing *State v. Page*, 8th Dist. No. 94369, 2011-Ohio-83 (Stewart, J. dissenting), Sup.Ct. No. 11-0305, jurisdiction denied, motion for reconsideration pending; *State v. Johnson*, 2nd Dist. No. 24029, 2011-Ohio-2069, Sup.Ct. No. 11-0819, jurisdiction denied; *State v. Alexander*, 2nd Dist. No. 24119, 2011-Ohio-4015, Sup.Ct. No. 2011-1427, jurisdiction denied, both citing *State v. Milby*, 2nd Dist. No. 23798, 2010-Ohio-6344, Sup.Ct. No. 11-0292, jurisdiction denied; *State v. Howard*, 2nd Dist. No. 24680, 2011-Ohio-5693, Sup.Ct. No. 2011-2126, jurisdiction pending; *State v. Alltop*, 2nd Dist. No. 24324, 2011-Ohio-5541, Sup.Ct. No. 2011-2065, jurisdiction pending.

The court of appeals and other Ohio courts are mistaken. The decisions of this Court in *Bodyke*, *Gingell*, and *Williams* addressed the “classification scheme” enacted by S.B. 10 – reclassification and retroactive application - to offenders who committed their underlying sex offense **prior** to its enactment, and did not address the new increased penalties, enacted by S.B. 97, for registration offenses committed by offenders **after** the effective date of its enactment.

Mandatory felony sentences of repeat sex offenders are being reversed for the lower penalty in effect at the time their original sex offense was committed and these offenders are not receiving the new, higher penalty in effect at the time they commit their new registration offense as the Ohio General Assembly intended. This substantial constitutional question should be answered by this Court.

STATEMENT OF THE CASE

On February 25, 2011, Appellant Billy L. Cook was charged by indictment with one count of failure to notify (underlying offense in aggravated murder, murder or F1), a felony of the first degree, in violation of R.C. 2950.05. On March 17, 2011, Cook entered a guilty plea to the offense but as a third degree felony. The State objected, arguing that the offense was a felony of the first degree. The trial court accepted Cook's plea to the offense as a third degree felony. On March 30, 2011, the trial court sentenced Cook for a felony of the third degree to community control sanctions not to exceed five years. The court of appeals affirmed the trial court's decision. *State v. Cook*, 2nd Dist. No. 24611, 2012-Ohio-198.

STATEMENT OF FACTS

Cook was convicted of rape (by force and victim under 13) on September 12, 1991 and sentenced to 7-25 years in prison. On July 1, 1997, Ohio's version of Megan's Law went into effect. While still incarcerated, on November 12, 1999, Cook was brought before the court and classified a sexually oriented offender, which required a ten year period of annual registration upon his release from prison. Former R.C. 2950.07(B)(3).

On January 1, 2008, Ohio's version of the Adam Walsh Act ("S.B. 10" and "S.B. 97") went into effect. S.B. 10 implemented a Tier structure, whereby an offender is classified into a Tier based solely upon his conviction for the sex offense. S.B. 97 increased the penalties for which offenders would be subject if they fail to comply with their registration requirements. Both statutes went into effect on January 1, 2008.

Under S.B. 10, Cook was reclassified a Tier III sex offender based upon his rape conviction. A Tier III offender must register every 90 days for life. R.C. 2950.06(B)(3) and R.C. 2950.07(B)(1). However, on June 3, 2010, this Court struck down as unconstitutional R.C.

2950.031 and 2950.032, which required the Attorney General to reclassify sex offenders who have already been classified by court order under former law. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 60-61. This Court remedied the constitutional violation by severing R.C. 2950.031 and 2950.032, and held that those provisions “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.” *Id.* at ¶ 66. As a result, Cook’s previous classification and accompanying notification and registration requirements were reinstated.

Between the dates of December 1, 2010 through January 18, 2011, Cook failed to notify the Sheriff of his change of address, and was charged accordingly.

In July 2011, while his appeal was pending, this Court rendered its decision in *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, in which this Court held that the classification scheme under S.B. 10 cannot constitutionally be applied retroactively to an offender who committed his underlying sex offense prior to the effective date of that statute, and remanded the case to the trial court for Cook to be classified under Megan’s Law, the classification scheme in effect at the time he committed his underlying sex offense.

In its decision, the court of appeals cited *State v. Huffman*, 2nd Dist. No. 23610, 2010-Ohio-4755, and noted that: “According to *Bodyke*, Huffman’s reclassification as a Tier I offender cannot be enforced, and his original classification as a sexually oriented offender will be reinstated. * * * However, * * * Huffman was required to register once per year even before his reclassification from a sexually oriented offender to a Tier I offender. He failed to do so and was appropriately prosecuted, convicted and sentenced.” *Id.* ¶ 22. The court of appeals concluded that since the defendant’s classification as a sexually oriented offender would be reinstated under

Bodyke, any claims about the registration requirements under the Adam Walsh Act would be moot. *Id.* at ¶ 27.

Similarly, Cook was required to notify the police of his address upon his release from prison, and upon changing his residence address, and his classification as a Tier III offender was not relevant to this duty. Cook failed to comply with the notification requirement, and was properly convicted for that crime. However, at that time, the penalty for failure to notify was a first degree felony. R.C. 2950.99. The State charged Cook with a first degree felony offense because that was the penalty prescribed by statute when he committed his conduct. However, as a result of this Court's decision in *Bodyke*, the court of appeals vacated Williams' "void" sentence on his registration offense, a felony of the first-degree, and remanded to the trial court for Cook to be sentenced under Megan's Law as having committed a felony of the third-degree, the penalty in effect when he was classified.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I:

Because the General Assembly can enact laws that increase the penalty for crimes, the version of R.C. 2950.99 in effect at the time of the registration offense applies, not the version in effect at the time the sex offender was originally classified.

The court of appeals relying on *Bodyke* held that when a sex offender commits a registration offense the penalty that must be applied to the new charge is the penalty that was in effect at the time the offender originally committed his underlying sex offense, and that retroactive application of the new, increased penalties is unconstitutional. *State v. Cook*, 2nd Dist. No. 24611, 2012-Ohio-198.

The court of appeals' reliance on *Bodyke* is misplaced. The decision in *Bodyke* addressed the "classification scheme" enacted by S.B. 10 – retroactive application - to offenders who

committed their underlying sex offense prior to its enactment and not the retroactive application of the new increased penalties enacted by S.B. 97 for new registration offenses committed by offenders after the effective date of its enactment.

A violation of the registration requirements is a new, separate offense. And the new increased penalties in R.C. 2950.99 are not being retroactively applied when the offender's criminal conduct occurs after the effective date of the statute. Ohio has thousands of registered sex offenders, whose duties arose under Megan's Law, and most of which often violate their registration duties. As a result, it is not uncommon or improper for the General Assembly to increase the penalty for these violations. Ohio's Adam Walsh Act, as was Megan's Law, was enacted to protect public safety against sex offenders and the legislature increased the penalties for failure to comply with the registration requirements as a result – just like it did before in 2003 through S.B. 5 which passed constitutional muster. R.C. 2950.02; *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110.

In fact, “[t]he enhanced penalty provision of the [Adam Walsh Act] is not couched in terms of the new classifications. It refers only to “violations” of the reporting statutes, not to the type of Tier offender involved. It is well-established that statutes which enhance the penalty for repeat offenders based upon criminal conduct occurring prior to the passage of the enhancement provision do not constitute ex post facto or retroactive application of legislation because the enhancement provisions do not punish the past behavior, but merely increase the severity of the penalty imposed for criminal conduct that occurs after the passage of the enhancement legislation. *Blackburn v. State* (1893), 50 Ohio St. 428, 438, 36 N.E. 18; *State v. Sargent* (1998), 126 Ohio App.3d 557, 567, 710 N.E.2d 1170.

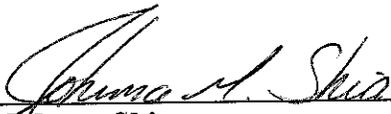
A court is required to sentence a defendant in accordance with the sentencing statute in effect at the time an offender committed his criminal conduct for which he was convicted (the new registration offense). The court of appeals was wrong in holding otherwise. R.C. 2950.99 is not being retroactively applied, but prospectively applied to registration offenses committed after its enactment. Ohio courts are committing error and will continue to do so, unless this Court addresses this substantial constitutional question in this felony case.

CONCLUSION

For the reasons discussed above, the State of Ohio requests that this Court accept jurisdiction in this felony case so that this important constitutional issue will be reviewed on the merits, and hold it for this Court's decision in *State v. Brunning*, 8th Dist. No. 95376, 2011-Ohio-1936, jurisdiction accepted, Sup.Ct. No. 2011-1066. *See also State v. Grunden*, 8th Dist. No. 95909, 2011-Ohio-3687, Sup.Ct. No. 2011-1553, jurisdiction accepted and held for the decision in *Brunning*.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: 
Johnna Shia
Reg. No. #0067685

COUNSEL FOR APPELLANT,
STATE OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support was sent by first class mail on this 27th day of February, 2012, to the following: **Rebecca Barthelemy-Smith**, 7821 North Dixie Drive, Dayton, Ohio 45414 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215-2998.



Jenna Shia

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COUNSEL FOR APPELLANT,
STATE OF OHIO



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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellant	:	C.A. CASE NO. 24611
v.	:	T.C. NO. 11CR205
BILLY L. COOK	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellee	:	

OPINION

Rendered on the 20th day of January, 2012.

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Attorney for Defendant-Appellee

FROELICH, J.

Billy L. Cook pled guilty in the Montgomery County Court of Common Pleas to failure to notify, in violation of R.C. 2950.05, a third degree felony. The trial court sentenced him

to community control. The State appeals from Cook's conviction.

I.

In 1991, Billy L. Cook was convicted of rape, and in 1997, he was classified as a sexually oriented offender under Ohio's version of Megan's Law. While Cook was still in prison, the Attorney General notified him that he would be reclassified as a Tier III sex offender. That reclassification was unconstitutional under *State v. Bodyke*, 126 Ohio St.3d, 2010-Ohio-2424, 933 N.E.2d 753. In accordance with *Bodyke*, Cook's original classification as a sexually oriented offender and the registration requirements attendant thereto were reinstated.

In January 2011, Cook was charged by complaint with failing to notify the sheriff of a change of address, in violation of R.C. 2950.05. Cook pled guilty to the offense with the understanding that the offense constituted a third degree felony, pursuant to former R.C. 2950.99 and *State v. Milby*, 2d Dist. Montgomery No. 23798, 2010-Ohio-6344. At the plea hearing, the trial court informed Cook that it would not impose a sentence greater than two years in prison. After a pre-sentence investigation, the court sentenced Cook to community control. The State maintained throughout the case that Cook's offense constituted a first degree felony, and the prosecutor stated at both the plea and sentencing hearings that the State intended to appeal the trial court's treatment of the offense as a third degree felony.

The State timely appealed from Cook's conviction.

II.

The State's sole assignment of error states:

"THE FELONY SENTENCING STATUTE R.C. 2950.99 IS NOT APPLIED

RETROACTIVELY WHEN THE CONDUCT FOR WHICH A DEFENDANT IS CONVICTED AND SENTENCED OCCURRED AFTER THE EFFECTIVE DATE OF THE STATUTE OR JANUARY 1, 2008.”

The State claims that the trial court erred in treating Cook's violation of R.C. 2950.05 as a third degree felony under Megan's Law and in accordance with *Milby*. The State submits that “the sentencing provisions of R.C. 2950.99, which were not amended through S.B. 10 [Ohio's version of the federal Adam Walsh Act], are not among the classification, community-notification or registration duties that were reinstated under *Bodyke*.” The State asks that we reconsider *Milby* and hold that the enhanced penalty provisions in R.C. 2950.99 apply when the violation of the registration requirements occurred after January 1, 2008.

In *Milby*, the defendant challenged his conviction for failure to notify, arguing, among other things, that his reclassification from a sexual predator to a Tier III sex offender was unconstitutional. Following *Bodyke*, we agreed with *Milby* that his original sexual predator classification and the community notification and registration orders attending that classification must be reinstated. *Id.* at ¶ 30. We found, however, that his failure to notify conviction was “not offended,” but held that the enhanced penalty for the failure to notify offense may be not applied. Specifically, we stated:

When *Milby's* original sexual predator classification and registration requirements are applied to the facts of his case, his failure to notify conviction is not offended. Under former law, *Milby* was required to provide notice of an address change twenty days prior to the change. R.C. 2950.05(A). This requirement did not change with the enactment of S.B. 10.

Therefore, because Milby had an ongoing duty since his release from prison to notify MCSO of any change of his registered address, neither S.B. 10 nor *Bodyke* changed this requirement or his duty. See *State v. Huffman*, Mont.App. No. 23610, 2010-Ohio-4755. AWA did increase the penalty for failure to notify to a first-degree felony. That penalty may not be applied to Milby. Under the former law, violation of the reporting requirement was a felony of the third degree. See former R.C. 2950.99(A)(1)(a)(i). Since the trial court improperly treated Milby's conviction as a first-degree felony, we will remand this matter to the trial court for resentencing as a third-degree felony conviction. *Milby* at ¶ 31.

We have had several opportunities to reconsider *Milby*. See *State v. Johnson*, 2d Dist. Montgomery No. 24029, 2011-Ohio-2069 (following *Milby*); *State v. Alexander*, 2d Dist. Montgomery No. 24119, 2011-Ohio-4015 (following *Johnson*); *State v. Alltop*, 2d Dist. Montgomery No. 24324, 2011-Ohio-5541; *State v. Howard*, 2d Dist. Montgomery No. 24680, 2011-Ohio-5693; *State v. Pritchett*, 2d Dist. Montgomery No. 24183, 2011-Ohio-5978; *State v. Harrison*, 2d Dist. Montgomery No. 24471, 2011-Ohio-6803.

In *Alltop*, we discussed the changes to the registration requirements occasioned by 2007 Am.Sub.S.B. 10, as well as the changes to the penalty structure for violations of R.C. 2950.05, which were enacted in 2007 Am.Sub.S.B. 97 without reference to the Adam Walsh Act. After setting forth the statutory changes in detail, we found that Alltop's "reliance on *Milby* in the matter at bar is appropriate," vacated his sentence, and "remanded to the trial court for resentencing as a third degree felony, consistent with the penalty for notification violations in force in Ohio at the time [Alltop] was convicted of the

underlying offense." *Alltop*, at ¶ 14-15. Similarly, in *Howard*, we expressly rejected the State's request that we reconsider *Milby*. We stated that "the fact that Howard had committed his offense of failure to notify after the effective date of S.B. 97 does not affect the outcome herein as the state asserts. Pursuant to *Milby*, we find that the trial court erred when it convicted Howard of a first-degree felony * * *." *Howard* at ¶ 12.

In *Pritchett*, the issue arose in the context of the defendant's appeal from the denial of his motion to withdraw his plea to failure to notify. We rejected Pritchett's argument that the trial court had erred in denying his motion to withdraw his plea, noting, in part, that "*Bodyke* did not change the fact that Pritchett had a duty to notify the sheriff of a change in his address of residence, and Pritchett's defenses were the same, whether he were a Tier III sex offender or a sexually oriented offender." *Id.* at ¶ 22.

Addressing Pritchett's sentence, however, we discussed our decisions in *Milby*, *Johnson*, and *Alexander* requiring resentencing under the former version of R.C. 2950.99. We further stated:

Very recently, in *State v. Williams*, 129 Ohio St.3d 344, 952 N.E.2d 1108, 2011-Ohio-3374, the Supreme Court of Ohio held that the provision of 2007 Am.Sub. S.B. 10, which imposes greater penalties on sexual offenders, such as Pritchett, for violations of notification and registration requirements than applied when they were convicted of their underlying sexual offense, violates the prohibition against retroactive laws in Section 28, Article II of the Ohio Constitution. That section provides, in pertinent part: "The general assembly shall have no power to pass retroactive laws." Any law "passed" in violation of that section is therefore void. Further, because

such a law purports to apply retroactively, a holding that the law violates Section 28, Article II likewise applies retroactively to any person to whom the law was retroactively applied.

* * *

Under Megan's law (which had been applied to Pritchett in 2005), Pritchett with the 2005 prior failure to notify conviction was subject to sentencing for a felony of the third degree. As a result of a subsequent amendment of the law, Pritchett was instead sentenced for a second degree felony offense. That amendment of the law is void, per *Williams*. The sentence the court imposed pursuant to that law is likewise void. It would be a manifest injustice to continue Pritchett's incarceration on a void sentence.

Pritchett at ¶ 26, ¶ 28.

We vacated Pritchett's sentence and remanded for a new sentencing hearing.

We recently applied *Pritchett* to a defendant who appealed the denial of his petition for post-conviction relief following his guilty plea to failure to register, in violation of R.C. 2950.05(B)(F)(2). *State v. Harrison*, 2d Dist. Montgomery No. 24471, 2011-Ohio-6803. We concluded that Harrison was "entitled to have his sentence vacated since, subsequent to the Adam Walsh Act, the penalty for failure to register for an offender like Harrison with prior convictions was increased to a mandatory three-year term as a felony of the first degree. R.C. 2950.99." *Harrison* at ¶ 19. We held that Harrison's sentence was void, vacated the sentence, and remanded the case to the trial court for resentencing. *Id.* at ¶ 21.

We decline to depart from *Milby* and our cases following it and, instead, find *Milby*

to be controlling in the circumstances before us. Cook was convicted of rape in 1991 and classified as a sexually oriented offender under Ohio's version of Megan's Law. The trial court did not err in following *Milby* and applying the prior version of R.C. 2950.99, rather than the version enacted under S.B. 97, in sentencing Cook for failure to notify in violation of R.C. 2950.05.

The State's assignment of error is overruled.

III.

The trial court's judgment will be affirmed.

.....

DONOVAN, J., concurs.

FAIN, J., concurring:

If this were a case of first impression, I would reverse, for the reason set forth in Judge Hall's separate opinion in *State v. Howard*, 2d Dist. Montgomery No. 24680, 2011-Ohio-5693. On January 1, 2008, long before Cook committed the offense to which he pled guilty – Failure to Notify – the penalty for that offense was increased from a third-degree felony to a first-degree felony. In my view, it is neither a violation of Ohio's Retroactive Laws prohibition (Article II, Section 28 of the Ohio Constitution), nor a violation of the federal Ex-Post Facto Clause (Article I, Section 10 of the United States Constitution), to apply a statute increasing a penalty for an offense to an offense that is committed after the effective date of the statute.

But this is hardly a case of first impression. Therefore, I will follow stare decisis and join in the opinion and judgment of this court in this case.

.....

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Hon. Dennis Adkins

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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

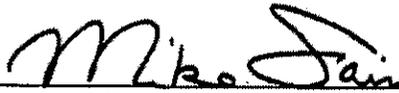
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STATE OF OHIO	:	
Plaintiff-Appellant	:	C.A. CASE NO. 24611
v.	:	T.C. NO. 11CR205
BILLY L. COOK	:	<u>FINAL ENTRY</u>
Defendant-Appellee	:	

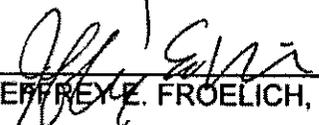
Pursuant to the opinion of this court rendered on the 20th day of January, 2012, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.


MIKE FAIN, Judge


MARY E. DONOVAN, Judge


JEFFREY E. FROELICH, Judge

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