

ORIGINAL

IN THE SUPREME COURT

CASE NO. 2011-1383

STATE OF OHIO
Appellee

v.

KYLE RABER
Appellant

APPELLANT KYLE RABER'S MERIT BRIEF

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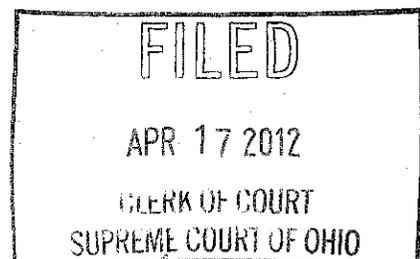


TABLE OF CONTENTS

Page

I.	Table of Authorities	3
II.	Statement of the Case and Facts	4
III.	Argument in Support of Propositions of Law	5
	A. <u>Proposition of Law No. 1:</u>	
	The Trial Court Lacked Subject Matter Jurisdiction To Reopen This Case Eleven (11) Months after The Final Judgment Entry Was Journalized And Add To The Sentencing Order	5
	B. <u>Proposition of Law No. 2:</u>	
	The Trial Court Violated Ohio Law and The Rules of Criminal Procedure When It Held The March 2, 2010 Evidentiary Hearing	10
	1. O.R.C. §2505.02 and Ohio R. Crim. P. 32(C)	10
	2. <u>State v. Clayborn</u> , 2010-Ohio-2123	12
	C. <u>Proposition of Law No. 3:</u>	
	The Trial Court Violated The Appellant’s Constitutional Rights When it Re-Opened The Case And Held A Sex Offender Hearing Sixteen (16) Months After Final Judgment Entry Was Journalized	13
IV.	Conclusion	14
	Signature	14
	Certificate of Service	15
	Appendix	16

I

TABLE OF AUTHORITIES

Table of Cases	Page
<u>Colley v. Colley</u> (1989), 43 Ohio St.3d 87.....	5
<u>In re C.P.</u> , 2011-Ohio-1446.....	9, 14
<u>State v. Baker</u> (2008), 119 Ohio St.3d 197.....	5, 6, 11
<u>State v. Bodyke</u> 2010-Ohio-2424.....	9
<u>State v. Carlisle</u> , 2011-Ohio-6553.....	5-11
<u>State v. Clayborn</u> , 125 Ohio St.3d 450.....	9, 12, 13
<u>State ex rel. Cruzado v. Zaleski</u> , 2006-Ohio-5795	5
<u>State v. Raber</u> , 2011-Ohio-3888	5-9, 12
<u>State ex rel. White v. Junkin</u> (1997), 80 Ohio St.3d 335.....	5, 6
<u>State v. Williams</u> 2011-Ohio-3374.....	9

Table of Statutes and Rules

O.R.C. 2505.02	10, 11
O.R.C. 2950.03(A)(2).....	11
Ohio R. Crim. P. 32(C)	10, 11
U.S. Const., amend. V.....	13

II

STATEMENT OF THE CASE AND FACTS

In this case, the Appellant, Kyle Raber, was found guilty of misdemeanor sexual imposition on December 1, 2008, which was a situation that involved himself, age 18, and his then 18-year old girlfriend while both were high school students. On February 18, 2008, Appellant and his girlfriend had been engaging in consensual, vaginal intercourse that later involved an attempt at anal intercourse, which the victim claimed was non-consensual, resulting in the Appellant later pleading guilty to sexual imposition, a 3rd degree misdemeanor.

On December 1, 2008, pursuant to a plea agreement, Appellant Kyle Raber was found guilty of sexual imposition and sentenced to sixty days in jail, fined and placed on probation. See December 1, 2008 Judgment Entry. Subsequently, Appellant served his jail time, paid his fine and completed his probation requirements. Despite the State of Ohio failing to appeal the trial court's December 1, 2008 final judgment entry, this case was re-opened more than eleven (11) months after that final judgment entry and transferred to another Common Pleas Court with Judge Mark Wiest. See November 19, 2009 Judgment Entry. Several months later on March 2, 2010, an evidentiary hearing took place to determine whether the underlying conduct that gave rise to the criminal charge against the Appellant was consensual or not. See March 4, 2010 Judgment Entry. At this March 2, 2010 hearing, the Trial Court determined that the conduct was not consensual and the Trial Court then provided notice to the Appellant that he would have to register as a Tier 1 sex offender. See March 4, 2010 Judgment Entry.

On April 13, 2010, the Trial Court conducted the Sexual Offender Registration Hearing. See April 14, 2010 Judgment Entry. On May 6, 2010, Appellant timely filed

his appeal to the Ninth District Court of Appeals. On August 8, 2011, the Ninth District Court of Appeals issued its ruling that affirmed the trial court's prior decisions. See State v. Raber, 2011-Ohio-3888. On February 22, 2012, this Court accepted jurisdiction over this case and decided to hear this appeal.

This matter is now before this Honorable Court.

III

MEMORANDUM IN SUPPORT

A. Proposition Of Law No. 1

The Trial Court Lacked Subject Matter Jurisdiction To Reopen This Case Eleven (11) Months After The Final Judgment Entry Was Journalized And Add To The Sentencing Order

The Ohio Supreme Court has long held that a trial court is divested of jurisdiction of a case after the final entry is journalized by the clerk of courts. See State v. Carlisle, 2011-Ohio-6553; State v. Baker (2008), 119 Ohio St.3d 197; State ex rel. White v. Junkin (1997), 80 Ohio St.3d 335. The journalization of the judgment of conviction pursuant to Ohio Crim.R. 32(C) starts the 30-day appellate clock ticking and if no appeal is filed, the case is closed. See State v. Baker (2008), 119 Ohio St.3d 197.

A trial court's jurisdiction is established by statute and cannot be conferred otherwise, whether by a party's agreement or acquiescence or even a subsequent court order. See State v. Carlisle, 2011-Ohio-6553; see also State v. Baker (2008), 119 Ohio St.3d 197; see also Colley v. Colley (1989), 43 Ohio St.3d 87. Moreover, it is well settled that a trial court lacks authority to modify a final criminal judgment, even if errors existed in the entry. See Carlisle, supra at ¶9; see also State ex rel. Cruzado v. Zaleski, 2006-Ohio-5795.

In this case, the trial court improperly exercised jurisdiction over the Appellant, Kyle Raber, more than eleven (11) months after the trial court no longer had jurisdiction to do so. For example, on December 1, 2008, the trial court issued its final judgment entry and it was journalized by the Wayne County Clerk of Courts. See December 1, 2008 Judgment Entry. The State of Ohio failed to file an appeal. The judgment stood and the case was closed. On October 19, 2009, the case was re-opened by the trial court and transferred to another judge. See November 19, 2009 Judgment Entry. This was improper.

In Carlisle, this Court ruled that a trial court does not have jurisdiction to re-open a case when a final order had already been previously journalized. See State v. Carlisle, 2011-Ohio-6553.1, at ¶12; see also State v. Baker (2008), 119 Ohio St.3d 197 and State ex rel. White v. Junkin (1997), 80 Ohio St.3d 335. (*A criminal sentence is final upon the issuance of a final order*).

In Raber case, the Ninth District Court of Appeals denied Kyle Raber's appeal:

Essentially, Mr. Raber argues that the trial court did not have jurisdiction to determine whether he was a sex offender because it no longer had jurisdiction over the case after the final judgment of conviction and sentence. ... **We are not convinced the trial court lacked jurisdiction to proceed as it did.**

State v. Raber, (9th Dist.), 2011-Ohio-3888, ¶6-7 (Emphasis added).

The Ninth District then cited a string of cases involving sex offender classification proceedings as the basis for allowing the trial court to proceed as it did. See Raber, *supra* at ¶7. However, in Carlisle, this Court held that even mistakes in a judgment entry are not

a sufficient basis for a trial court to reclaim jurisdiction over a case where the judgment entry was a final order:

In [Carlisle's] case, a valid judgment of conviction was journalized on July 13, 2007, yet the trial court purported to modify Carlisle's sentence nearly two years later. The trial court's attempt to do so was improper. ... [*string cite of Supreme Court cases dating back to 1962*] (all recognizing that sentencing errors are an improper exercise of jurisdiction).

Carlisle, supra at ¶12.

The procedural facts in Carlisle and in Raber are identical, while the substantive facts are quite distinct.

In Carlisle, the defendant was convicted and sentenced in June of 2007 for felonious sex offenses involving his 6-year old foster daughter. See Carlisle, supra at ¶2. On July 13, 2007, Carlisle's conviction became a final appealable order after it had been journalized by the Clerk of Courts. Id. On February 19, 2009, the trial court re-opened the case after a motion was filed by the defendant and the trial court then modified its final judgment entry nineteen (19) months after the final order had been journalized. See Carlisle, supra at ¶4. On December 22, 2011, the Ohio Supreme Court ruled that the trial court was without the jurisdiction to re-open the case as it did in 2009 and it affirmed the Court of Appeals' reversal of said sentencing modification, although for different reasons. See Carlisle, supra at ¶17.

Here, in Raber, pursuant to a plea agreement, the Appellant was found guilty of misdemeanor sexual imposition on December 1, 2008, which was a situation involving himself, age 18, and his then 18-year old girlfriend while both were high school students. In Raber, both Appellant and his girlfriend had been engaging in consensual, vaginal

intercourse on February 18, 2008 that eventually involved an attempt at anal intercourse, which the victim claimed was non-consensual, resulting in the Appellant pleading guilty to sexual imposition, a 3rd degree misdemeanor.

On December 1, 2008, pursuant to a plea agreement, Appellant Kyle Raber was found guilty of sexual imposition, and sentenced to sixty days in jail, fined and placed on probation. See December 1, 2008 Judgment Entry. This judgment entry was a final appealable order. Subsequently, Appellant served his jail time, paid his fine and completed his probation requirements. No appeal of this entry was ever filed, timely or not. More than eleven (11) months later, on or about October 19, 2009, without a motion or any other type of procedural vehicle, the trial court re-opened the case in order to address a purported omission from the final judgment entry of December 1, 2008. See November 19, 2009 Judgment Entry. The matter then proceeded through the eventual evidentiary hearing that was conducted in March of 2010 and a finding that Appellant had to register as a sex offender. See March 4, 2010 Judgment Entry. The Appellant then timely appealed that decision but his appeal was rejected by the Ninth District Court of Appeals. See State v. Raber, (9th Dist.), 2011-Ohio-3888.

The Ninth District's decision affirming the trial court flies in the face of well-settled Ohio law and longstanding Supreme Court precedent regarding final orders and trial court jurisdiction as well as being in direct conflict with this Court's holding in Carlisle. In its August 8, 2011 decision, the Ninth District Court of Appeals relied on old precedent from the Megan's law era to justify the legal fiction that occurred in this case. See State v. Raber, 2011-Ohio-3888. In view of this Court's recent rulings that found

Ohio's Adam Walsh Act to be punitive and, in many ways, unconstitutional, those old Megan's Law precedents are unsound moving forward.

In Raber, the Ninth District Court of Appeals even asked for guidance from this Court on this issue:

Thus, Mr. Raber's argument that a trial court is impermissibly modifying a defendant's final judgment of conviction and sentence when it classifies a defendant as a sex offender post-sentence is not well taken.

Accordingly, until the Supreme Court *directs* this Court otherwise, we will continue to rely on our precedent and Clayborn. ...

State v. Raber, (9th Dist.) 2011-Ohio-3888 at ¶¶7, 8. (Emphasis added).

This Court's holding in Carlisle now provides the *direction* the Ninth District seeks.

It is now imperative this Court reconcile Raber with Carlisle and the recent case law concerning Ohio's Adam Walsh Act ("S.B.10") because this is where the Ninth District Court of Appeals got it wrong:

- State v. Clayborn 2010-Ohio-2123 (*the criminal case controls the sex offender civil proceedings therein*);
- State v. Bodyke 2010-Ohio-2424 (*S.B. 10 violates Separation of Powers Clause of Ohio Constitution*);
- State v. Williams 2011-Ohio-3374 (*S.B. 10 is punitive and violates Retroactive Clause of Ohio Constitution*);
- In re C.P. 2012-Ohio-1446 (*S.B. 10 is punitive and violates Eighth Amendment of the U.S. and Ohio Constitutions*)

If the trial court did not have jurisdiction to re-open Carlisle nineteen (19) months later to modify the final judgment entry, then, in Raber the trial court had no jurisdiction to do so eleven (11) months later either.

It is impossible from a criminal procedural standpoint to review the procedural facts of both Carlisle and Raber and come up with different outcomes. For example, in Carlisle, the trial court impermissibly reopened that case nineteen (19) months after the final judgment entry had been journalized. In Raber, the trial court impermissibly reopened this case in October of 2009; eleven months after the final judgment entry had been journalized on December 1, 2008. This Court was clear in Carlisle when it held, by a 7-0 decision, that the trial court had no jurisdiction to reopen the case. The same principle of law applies here and the same conclusion must be reached.

This Court must reverse both the Court of Appeals' August 8, 2011 decision and the Trial Court's rulings in 2009 and 2010. This case was closed in December of 2008 and this Court must follow its own precedent, the years of well settled Ohio law, and make this clear. Ohio law and the Rules of Criminal Procedure must be followed; in all cases without exception. To do otherwise would blur what should be a bright-line rule and render Ohio law, the Rules of Criminal Procedure and well-settled Supreme Court precedent meaningless.

B. Proposition of Law No. 2:

The Trial Court Violated Ohio Law and The Rules of Criminal Procedure When It Held The March 2, 2010 Evidentiary Hearing

1. O.R.C. 2505.02 and Ohio Crim.R. 32(C)

The December 1, 2008 Judgment Entry was a final appealable order pursuant to Section 2505.02 of the Ohio Revised Code and Rule 32(C) of the Ohio Rules of Criminal Procedure. Thus, as of that date, the trial court was without further jurisdiction over the case.

For example, Section 2505.02 of the Ohio Revised Code, "Final Orders," states:

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed ... when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment. ...

See O.R.C. 2505.02. Rule 32(C) of the Ohio Rules of Criminal Procedure states:

A judgment of conviction shall set forth the plea, the verdict or findings, and the sentence ... The judge shall sign the judgment and the clerk shall enter it on the journal.

Ohio Crim. R. 32(C). Moreover, the Ohio Supreme Court held as follows regarding final orders:

We now hold that a judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of courts.

See State v. Baker (2008), 119 Ohio St.3d 197 at p.201, ¶18. (Emphasis added).

Moreover, Ohio Revised Code Section 2950.03(A)(2) requires that a defendant shall be notified of his or her duty to register at the time of sentencing.

Here, the December 1, 2008 Judgment Entry sets forth the following: (1) a finding of guilty to the misdemeanor charge of Sexual Imposition; (2) the sentence to 60 days in jail, community control for 2 years, a fine of \$500.00 and related court costs; (3) the signature of Common Pleas Judge Robert Brown; and (4) the entry of journalization by the Clerk of Courts. See December 1, 2008 Judgment Entry. The Entry is silent on the issue of sex offender registration. However, as set forth in Carlisle, reopening a final

entry to address purported sentencing errors or omissions are not a valid or legal exercise of jurisdiction by a trial court. Accord Carlisle, supra.

Pursuant to Section 2505.02 of the Ohio Revised Code, Ohio Criminal Rule 32(C) and the Ohio Supreme Court, the December 1, 2008 Judgment Entry was a final order. As a result, the trial court was without jurisdiction to modify it sixteen (16) months later.

2. State v. Clayborn – ‘The Criminal Case Controls’

In State v. Clayborn, 2010-Ohio-2123, this Court held that, while the sex offender classification hearings are civil in nature, they exist within a criminal case and it is the criminal case that controls the time frames and procedural aspects:

We have not converted sex-offender-classification proceedings into separate civil cases procedurally or assigned them a civil docket number.

Clayborn, 2010-Ohio-2123 at ¶10. Additionally, the Supreme Court held the time frames governing appeals set forth App.R.4(A) still apply:

Therefore, although the court reviews the classification matter on civil standards, the appeal requirements applicable to criminal cases nonetheless apply.

Clayborn, at ¶11.

In Clayborn, the defendant failed to file his appeal of the sex offender classification within the thirty (30) day period after the final judgment entry had been journalized. Clayborn, supra at ¶4, 5. The Ohio Supreme Court ruled that since the defendant missed the criminal appeal deadline, he needed to seek leave of court in order to file his appeal. Thus, the sex offender classification hearing was governed by the criminal case and the deadlines and procedures that accompanied it.

In its August 8, 2011 decision in Raber, the Ninth District Court of Appeals turned Clayborn on its head because in Clayborn, the defendant did eventually appeal the trial court's decision, albeit untimely. In this case, the State of Ohio failed to appeal the trial court's December 1, 2008 judgment entry. Thus, the case was closed and everything occurred after December 1, 2008 is a nullity; except for the fact that the Appellant served his sixty (60) day jail sentence, paid his fines and served probation.

As a consequence, Clayborn actually supports the Appellant's position, given that it was the State of Ohio who had the duty to appeal if, in fact, it was not satisfied with the trial court's December 1, 2008 judgment entry. The State's failure to do so should have been the end of this case.

C. Proposition of Law No. 3:

**The Trial Court Violated The Appellant's Constitutional Rights
When it Re-Opened The Case And Held A Sex Offender Hearing
16 Months After Final Judgment Entry Was Journalized**

Now that the Ohio Supreme Court has held O.R.C. §2950 ("S.B. 10") to be "punitive", it is clear that the trial court violated the Appellant's constitutional rights of Due Process and Double Jeopardy under the 5th Amendment of the United States Constitution when it re-opened the case long after final judgment and held further hearings. See U.S. Const., amend. V. Once divested of jurisdiction, trial courts cannot re-open cases and add further punishment a defendant's original sentence, even if the omission was accidental or otherwise. To do so is clear violation of a defendant's Fifth Amendment Rights against Due Process and Double Jeopardy. Here, the trial court did just that when it re-opened this case in October of 2009 and held the evidentiary hearing in March of 2010.

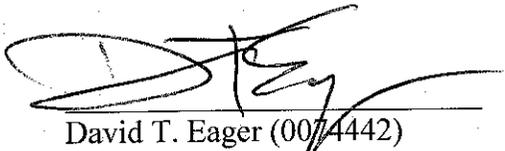
The fact is the State of Ohio had opportunities to address the omission of sex offender registration at the time the Appellant was sentenced and even thereafter up until the 30-day appeal deadline. However, the State of Ohio failed to do so: it failed to bring up the issue at the sentencing; it failed to seek a *nunc pro tunc* amendment to the final judgment entry; and the State of Ohio failed to appeal the decision. Thus, this case was closed after the 30-day time frame to appeal had expired.

This case should be reversed and rendered closed as of December 1, 2008.

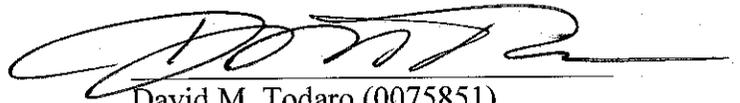
IV CONCLUSION

For the reasons set forth herein, this Court should grant Appellant Kyle Raber's appeal, reverse the Ninth District Court of Appeals decision and vacate the Trial Court's actions after December 1, 2008, thus rendering this case closed as of that date.

Respectfully submitted,



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Kyle Raber

CERTIFICATE OF SERVICE

A true and accurate copy of the Appellant's Merit Brief was delivered via hand delivery in the intra-office mail through the Wayne County Clerk of Courts to Latecia Wiles, Esq., of the Wayne County Prosecutor's Office on this 17th day of April 2012.



David T. Eager, Esq.
Counsel of Record for Appellant
Kyle Raber

APPENDIX

	Exhibit	Page(s)
Appellant's Notice of Appeal (August 12, 2011)	A	5
Judgment Entry of the Ninth District Court of Appeals (August 8, 2011)	B	5
Judgment Entry of the Wayne County Court of Common Pleas (December 1, 2008)	C	4, 6, 8, 11
Judgment Entry of the Wayne County Court of Common Pleas (November 19, 2009)	D	4, 6, 8
Judgment Entry of the Wayne County Court of Common Pleas (March 4, 2010)	E	4, 8
Judgment Entry of the Wayne County Court of Common Pleas (April 14, 2010)	F	4
U.S. Constitution, Amendment V	G	13
Ohio Revised Code Section 2505.02	H	10, 11
Ohio Rule of Criminal Procedure 32(C)	I	10, 11

APPENDIX A

IN THE SUPREME COURT
CASE NO.

11-1383

Appeal from the Court of Appeals
Ninth Judicial District
Wayne County, Ohio
Case No. 10 CA 0020

STATE OF OHIO
Appellee

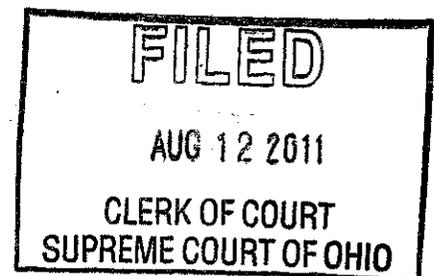
v.

KYLE RABER
Appellant

NOTICE OF APPEAL OF APPELLANT KYLE RABER

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NOTICE OF APPEAL OF APPELLANT KYLE RABER

Appellant Kyle Raber hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Court of Appeals, Ninth Judicial District, Wayne County, entered in Case No. 10-CA-0020 on August 8, 2011. A copy of the August 8, 2011 Judgment Entry is attached hereto.

This case raises substantial statutory and constitutional questions and is one of public or great general interest.

CERTIFICATE OF SERVICE

A true and accurate copy of the Appellant's Notice of Appeal was delivered via intra-office mail through the Wayne County Clerk of Courts to Latecia Wiles, Esq., of the Wayne County Prosecutor's Office on this 10th day of August, 2011.



David T. Eager, Esq.
Attorney for Appellant
Kyle Raber

APPENDIX B

STATE OF OHIO)
)ss: COUNTY OF WAYNE)

FILED
9TH DISTRICT
IN THE COURT OF APPEALS
COURT OF APPEALS
NINTH JUDICIAL DISTRICT

2011 AUG 8 AM 7 11

STATE OF OHIO

C.A. No. 10CA0020
TIM NEAL

Appellee

CLERK OF COURTS

v.

KYLE D. RABER

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 08-CR-0117

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 8, 2011

BELFANCE, Presiding Judge.

{¶1} Appellant, Kyle Raber, appeals from the order of the judgment entry of the Wayne County Court of Common Pleas. This Court affirms.

I.

{¶2} Mr. Raber pleaded guilty to a single count of sexual imposition, a third-degree misdemeanor. The court sentenced him to sixty days in jail, thirty of which were suspended, and placed him on community control for a period of two years. Mr. Raber did not appeal the December 1, 2008 judgment entry of his conviction and sentence.

{¶3} At the sentencing hearing, the court expressed uncertainty about whether Mr. Raber would be required to register as a sex offender. With the agreement of the parties, the court took the matter under advisement so that counsel could have the opportunity to brief issues related to sex offender classification. The court later determined that, pursuant to R.C. 2950.01(B)(2), Mr. Raber would be required to register as a sex offender only if the conduct

underlying Mr. Raber's conviction was non-consensual. The court held an evidentiary hearing at which it determined that the conduct was not consensual and that Mr. Raber was therefore required to register as a sex offender. Pursuant to R.C. 2950.03, the court subsequently held another hearing, journalized in its April 14, 2010 entry, at which it provided Mr. Raber with notice of the sex offender registration requirements.

{¶4} Mr. Raber appealed presenting three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

"The December 1, 2008 Judgment Entry Was a Final Order And, At That Time, The Trial Court Was Divested of Jurisdiction Over This Case[.]"

ASSIGNMENT OF ERROR II

"The March 4, 2010 And April 14, 2010 Court Orders Were Nullities Due To The Fact The Trial [Court] Had No Jurisdiction After The December 1, 2008 Judgment Entry Was Journalized[.]"

{¶5} In his first and second assignments of error, Mr. Raber asserts that the trial court lacked subject matter jurisdiction to conduct the March 2, 2010 evidentiary hearing or to issue any orders concerning sex offender classification after it filed its judgment entry of conviction and sentence on December 1, 2008.

{¶6} Essentially, Mr. Raber argues that the trial court did not have jurisdiction to determine whether he was a sex offender because it no longer had jurisdiction over the case after entering a final judgment of conviction and sentence. Mr. Raber contends that the trial court not only lacked jurisdiction to alter his final sentence but it also lacked authority to provide notice of and impose a sex offender classification after sentencing. In particular, he points to language in the current version of the Adam Walsh Act that the "judge shall provide the notice to the offender *at the time of sentencing*." (Emphasis in original.) See R.C. 2950.03(A)(2).

{¶7} We are not convinced that the trial court lacked jurisdiction to proceed as it did. In reaching that conclusion, we find *State v. Clayborn*, 125 Ohio St.3d 450, 2010-Ohio-2123, to be instructive. In addressing the current version of Chapter 2950 of the Ohio Revised Code, the *Clayborn* Court discussed the unique nature of sex-offender-classification proceedings. The Court noted that “[w]hile sex-offender-classification proceedings are civil in nature and require a civil manifest-weight-of-the-evidence standard, * * * an appeal from a *sexual offender classification judgment* is a civil matter within the context of a criminal case.” (Emphasis added.) *Id.* at ¶11. The above supports the notion that a determination that a defendant is a sex offender as specified by Chapter 2950 of the Ohio Revised Code constitutes a separate and distinct judgment from the judgment of conviction and sentence. See *id.*; see, also, *State v. Wood*, 5th Dist. No. 09-CA-205, 2010-Ohio-2759, at ¶14 (concluding sex offender classification is not part of the defendant’s sentence and thus determining there was no error in classifying defendant after imposing sentence); *State v. Williams*, 177 Ohio App.3d 865, 2008-Ohio-3586, at ¶¶10-11 (“Accordingly, in either a defendant’s or a state’s appeal, an appeal from the defendant’s classification is legally distinct from any appeal regarding his underlying sentence. Despite the fact that Williams’s sentence was void and had to be vacated pursuant to *Bezak*, the status of her sentence did not affect the status of her classification.”) Thus, Mr. Raber’s argument that a trial court is impermissibly modifying a defendant’s final judgment of conviction and sentence when it classifies a defendant as a sex offender post-sentence is not well taken.

{¶8} Accordingly, until the Supreme Court directs this Court otherwise, we will continue to rely on our precedent and *Clayborn*, which support the conclusion that the trial court possessed jurisdiction in this matter. See, e.g., *Clayborn* at ¶11; *Williams* at ¶¶10-11. Accordingly, we overrule Mr. Raber’s first and second assignments of error.

ASSIGNMENT OF ERROR III

“The March 2, 2010 Evidentiary Hearing Violated The Defendant-Appellant’s Rights Under The United States Constitution[.]”

{¶9} In his third assignment of error, Mr. Raber asserts that the trial court violated his right against Double Jeopardy, his right against self-incrimination, and his due process rights in conducting the March 2, 2010 evidentiary hearing to determine whether the sexual conduct involved in Mr. Raber’s offense was consensual.

{¶10} Mr. Raber did not raise these arguments in the trial court. Accordingly, Mr. Raber has forfeited them. See *State v. Cargile*, 123 Ohio St.3d 343, 2009-Ohio-4939, at ¶15 (“[T]here is no indication that Cargile * * * argued a violation of this right before the trial court. Cargile failed to raise this claim and has thereby waived it.”); *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, at ¶155 (“[A] constitutional right can be waived in criminal cases by the failure to make timely assertion of it.”); *State v. Childs* (1968), 14 Ohio St.2d 56, 61 (“It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court’s judgment could have called but did not call to the trial court’s attention at a time when such error could have been avoided or corrected by the trial court.”). Further, as Mr. Raber has not argued plain error on appeal, this Court declines to construct an argument for him. See *State v. Hoang*, 9th Dist. No. 09CA0061-M, 2010-Ohio-6054, at ¶21. Mr. Raber’s third assignment of error is overruled.

III.

{¶11} Mr. Raber’s assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas is affirmed.

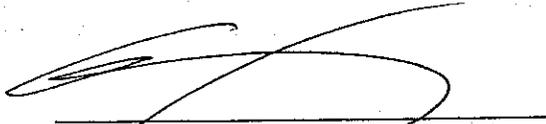
Judgment affirmed.

There were reasonable grounds for this appeal.

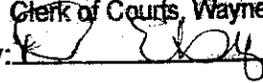
We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



EVE V. BELFANCE
FOR THE COURT I hereby certify that this is a true copy of the original on file.
WITNESS my hand and seal of the 9th District Court of Appeals This 20th day of Sept. 2011

TIM NEAL
Clerk of Courts, Wayne County, Ohio
By: 

MOORE, J.
CONCURS

DICKINSON, J.
CONCURS, SAYING:

{¶12} I concur in the majority's judgment and in most of its opinion. I do not concur in the majority's refusal to consider whether the trial court committed plain error by not holding an evidentiary hearing regarding whether the sexual conduct at issue was consensual until 15 months after Mr. Raber pleaded guilty. The trial court's failure did not constitute plain error, and, therefore, I agree that Mr. Raber's third assignment of error is properly overruled.

APPEARANCES:

DAVID T. EAGER, Attorney at Law, for Appellant.

DANIEL R. LUTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.

APPENDIX C

IN THE COURT OF COMMON PLEAS, WAYNE COUNTY, OHIO

2008 DEC 1 PM 8 30

STATE OF OHIO,

Plaintiff

TIM NEAL
CLERK OF COURTS

CASE NO. 08-CR-0117

vs.

KYLE D. RABER,

JUDGMENT ENTRY
SENTENCING AND PROBATION

Defendant

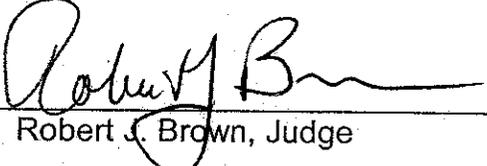
This matter came before the Court for sentencing on November 26, 2008. Defendant had previously entered a plea of not guilty at arraignment. The defendant appeared in court, having previously entered a plea of guilty to the following: Sexual Imposition, as amended, a Misdemeanor of the Third Degree. The Court hereby enters a finding of guilty to that offense.

The Court, after having reviewed the presentence investigation report, and after having afforded the defendant and defense counsel the opportunity to speak, sentences the defendant as follows: Sixty (60) days in the Wayne County Jail. Thirty (30) days of the sentence is suspended and the defendant is placed on community control for **two (2) years**, subject to the following terms and conditions:

1. Obey all local, state and federal laws.
2. Follow the guidance and instruction of your Probation Officer.
3. Abide by the rules and regulations of the Adult Probation Department.
4. Pay the costs of this action.
5. Perform -100- hours of community service work as directed by the Adult Probation Department.
6. Pay a fine of \$500.00 as directed by the Adult Probation Department.

JCR74-P. 222

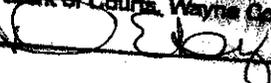
- 7. Pay probation maintenance fee of \$300.00.
- 8. Other conditions:
 - Defendant shall report to the Wayne County Jail on December 19, 2008.
 - Mental health services as directed by the Adult Probation Department.


 Robert J. Brown, Judge

JOURNALIZED

DEC - 1 2008

TIM NEAL
CLERK, WAYNE COUNTY, OHIO

I hereby certify that this is a true copy of
 the original on file.
 WITNESS my hand and seal of the Common
 Pleas Court This 20th day of SEP
 2011
 TIM NEAL
 Clerk of Courts, Wayne County, Ohio
 By: 

COPY TO ALL COUNSEL

MAILED _____
 Regular _____
 Certified _____
 Place in box Pros, Prob, WCSO
J. Johnson Jr., WCSO
 By: Wade
 Dep. Clerk
 P. 223

APPENDIX D

IN ~~FILED~~ COURT OF COMMON PLEAS
COMMON PLEAS COURT
WAYNE COUNTY, OHIO

09 NOV 19 AM 11:58

STATE OF OHIO,

TIM NEAL
CLERK OF COURTS

Plaintiff

vs.

KYLE D. RABER,

Defendant

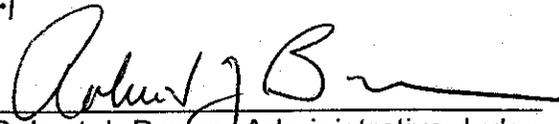
CASE NO. 08-CR-0117

JOURNAL ENTRY
TRANSFER OF CASE

For good cause, this case is transferred from the docket of Judge Brown to the docket of Judge Wiest.

IT IS SO ORDERED.

JCR-849 P.221


Robert J. Brown Administrative Judge

JOURNALIZED

NOV 19 2009

TIM NEAL
CLERK, WAYNE COUNTY, OHIO

COPY TO ALL COUNSEL ✓

MAILED

Regular Defy

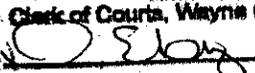
Certified

Placed in box Pris Prob Wiest

By Brown

Dep. Clerk Johnson Jr.
11-20-09

I hereby certify that this is a true copy of the original on file.
WITNESS my hand and seal of the Common Pleas Court This 20th day of Sept 2009

TIM NEAL
Clerk of Courts, Wayne County, Ohio
By: 

APPENDIX E

✓

FILED
IN THE COURT OF COMMON PLEAS, WAYNE COUNTY, OHIO
COMMON PLEAS COURT
WAYNE COUNTY, OHIO

STATE OF OHIO
2010 MAR 4 AM 11 46

Plaintiff TIM NEAL
CLERK OF COURTS
vs.

CASE NO. 08-CR-0117

KYLE D. RABER

JUDGMENT ENTRY

Defendant

On March 2, 2010 a hearing was held to determine whether the defendant is a sex offender subject to Tier 1 registration.

The court finds the following:

1. On April 7, 2008 the defendant was indicted for sexual battery in violation of R.C. 2907.03.
2. On October 28, 2008, pursuant to a plea agreement, the defendant entered a guilty plea to an amended indictment charging him with sexual imposition in violation of R.C. 2907.06(A)(1).
3. He was sentenced on November 25, 2008. The registration issue was not decided at that time. On November 19, 2009 the assigned judge due to a conflict, transferred the case to the undersigned.
4. The issue is whether the defendant is excluded from the definition of sex offender by reason of R.C. 2950.01(B)(2). If so, he is not subject to registration.
5. According to R.C. 2950.01(B)(2), if the offense involves consensual sexual conduct, the offender is not a "sex offender" for purposes of registration.
6. The court has concluded, after a review of the testimony, that the state has proven by clear and convincing evidence that the defendant forced the victim to have anal intercourse.
7. The defendant is a sex offender as defined in R.C. 2950.01(B)(1).

Kyle D. Raber

The defendant is subject to Tier 1 registration. Since Judge Brown did not provide notice at the time of sentencing, the defendant will have to appear so that the court can review with him the notice form required by R.C. 2950.03. A time to appear can be arranged by defendant's counsel.

IT IS SO ORDERED.

Mark K. Wiest

Mark K. Wiest, Judge

Dated: 3/3/10

JOURNALIZED

MAR 04 2010

TIM NEAL, CLERK
WAYNE COUNTY, OHIO

COPY TO ALL COUNSEL

FILED

Regular

Certified

Placed in box Pros Prob Johnson Jr.

Capt Hardman, W.C.S.

By

M. Hardman
Dep. Clerk

3-5-10

hereby certify that this is a true copy of the original on file.

WITNESS my hand and seal of the Common Pleas Court this 20th day of Sept

20

TIM NEAL
Clerk of Courts, Wayne County, Ohio

By: *[Signature]*

JCR-86a P13/6

APPENDIX F

FILED
COMMON PLEAS COURT
IN THE COURT OF COMMON PLEAS, WAYNE COUNTY, OHIO
WAYNE COUNTY, OHIO

STATE OF OHIO 2010 APR 14 PM 4 04

Plaintiff

TIM NEAL
CLERK OF COURTS

CASE NO. 08-CR-0117

vs.

KYLE D. RABER

JUDGMENT ENTRY

Defendant

The defendant was indicted for sexual battery on April 7, 2008. The case was assigned to Judge Brown. The case was scheduled for a bench trial on October 28, 2008. On October 28, 2008 the defendant entered a plea of guilty to an amended charge of Sexual Imposition, a misdemeanor of the third degree. The defendant was sentenced on that charge on November 26, 2008 to 2 years of community control.

R.C. 2950.03 specifies how a person convicted of a sexually oriented offense who has a duty to register pursuant to R.C. 2950.04 is to be notified of the registration requirements. R.C. 2950.03(A)(2) states in pertinent part . . . "if the person is an offender who is sentenced on or after January 1, 2008 for any offense . . . the judge shall provide the notice to the offender at the time of sentencing". This did not happen on November 26, 2008. Judge Brown took the matter under advisement due to an issue regarding the definition of sex offender under R.C. 2950.01(B)(2)(a). (The issue being whether the offense involved consensual sexual conduct). Judge Brown never decided the issue. He transferred the case to the undersigned on November 19, 2009. On March 2, 2010, the hearing was held to determine if the offense involved consensual sexual conduct pursuant to R.C. 2950.01(B)(2)(a). On March 4, 2010, this court filed an entry finding the sexual conduct was not consensual thereby making the defendant a sex offender as defined by R.C. 2950.01(B)(1) and subject to Tier 1 registration. Since Judge Brown did not provide notice at the time of sentencing, the defendant was scheduled to appear on April 13, 2010 so that the notice could be given. The defendant was so notified on April 13, 2010. A registration form was completed and signed by the defendant. The defendant has moved for a stay of the court's order of March 4, 2010 and a stay from all requirements that he register as a sex offender so that he can appeal. The motion for stay is granted. The defendant shall not be

required to register until further order of the court.

IT IS SO ORDERED.

Mark K. Wiest

Mark K. Wiest, Judge

Dated:

4/14/10

JOURNALIZED

APR 14 2010

TIM NEAL, CLERK
WAYNE COUNTY, OHIO

I hereby certify that this is a true copy of the original on file.

WITNESS my hand and seal of the Common

Plas Court This *20th* day of *Sept*, 20*10*

TIM NEAL

Clerk of Courts, Wayne County, Ohio

By: *[Signature]*

COPY TO ALL COUNSEL ✓

MAILED

Regular _____

Certified _____

Placed in box *Pros Prob Eager*

By *Capt Hardman*

Dep. Clerk *[Signature]*

4-16-10

JCR-88, P1/52

APPENDIX G

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

2505.02 Final orders.

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018, and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code;

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

Effective Date: 07-22-1998; 09-01-2004; 09-02-2004; 09-13-2004; 12-30-2004; 04-07-2005; 2007 SB7 10-10-2007

APPENDIX I

RULE 32. Sentence

(A) Imposition of sentence. Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:

(1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.

(2) Afford the prosecuting attorney an opportunity to speak;

(3) Afford the victim the rights provided by law;

(4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate.

(B) Notification of right to appeal.

(1) After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.

(2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.

(3) If a right to appeal or a right to seek leave to appeal applies under division (B)(1) or (B)(2) of this rule, the court also shall advise the defendant of all of the following:

(a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;

(b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;

(c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;

(d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf.

Upon defendant's request, the court shall forthwith appoint counsel for appeal.

(C) Judgment.

A judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence. Multiple judgments of conviction may be addressed in one judgment entry. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

[Effective: July 1, 1973; amended effective July 1, 1992; July 1, 1998, July 1, 2004; July 1, 2009.]

Staff Note (July 1, 2004 Amendment)

Rule 32(A) Imposition of sentence.

Criminal Rule 32(A) was amended to conform with the Supreme Court of Ohio's decision in *State v. Comer*, 99 Ohio St. 3d 463, 2003-Ohio 4165. The *Comer* decision mandates that a trial court must make specific statutory findings and the reasons supporting those findings when a trial court, in serious offenses, imposes consecutive sentences or nonminimum sentences on a first offender pursuant to R.C.2929.14(B), 2929.14(E)(4) and 2929.19(B)(2). Crim. R. 32(A) was modified to ensure there was no discrepancy in the criminal rules and the Court's holding in *Comer*.