

ORIGINAL

IN THE SUPREME COURT OF OHIO
2012

In re BRUCE S.,

Case No. 12-59

Appellee,

(State of Ohio,

Appellant)

On Appeal from
the Hamilton County
Court of Appeals, First
Appellate District

Court of Appeals
No. C-110042

**BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS
ASSOCIATION IN SUPPORT OF APPELLANT STATE OF OHIO**

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STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association (“OPAA”) offers this amicus brief in support of the State of Ohio’s certified-conflict appeal. The OPAA is a private non-profit membership organization that was founded in 1937 for the benefit of the 88 elected county prosecutors. Its mission is to assist county prosecuting attorneys to pursue truth and justice as well as promote public safety, to advocate for public policies that strengthen prosecuting attorneys’ ability to secure justice for crime victims, and to facilitate access to best practices in law enforcement and community safety.

The question presented is whether offenders committing their sexually oriented offenses after Senate Bill 10 became law on June 30, 2007, but before January 1, 2008, can benefit from the retroactive-law holding in *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108. In the interest of aiding this Court’s review of the present appeal, and in the interest of furthering justice, the OPAA offers the following amicus brief in support of the constitutionality of Senate Bill 10 as applied to such offenders.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history of the case set forth in the State’s merit brief.

ARGUMENT

Proposition of Law: Ohio's Adam Walsh Act (Senate Bill 10) became law on June 30, 2007. The Act is prospective, not retroactive, as to offenders who committed their sexually oriented offenses after June 30, 2007.

Certified-Conflict Question: "May Senate Bill 10's classification, registration, and community-notification provisions be constitutionally applied to a sex offender who had committed his sex offense between the July 1, 2007, repeal of Megan's Law and the January 1, 2008, effective date of Senate Bill 10's classification, registration, and community-notification provisions?"

A narrow constitutional question is presented here. The juvenile here committed his sexually oriented offense on September 1, 2007, two months after Senate Bill 10 had become law on June 30, 2007. The First District concluded that, pursuant to *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, the juvenile has a valid retroactive-law objection to the application of the Act to him, even though his sexually oriented offense post-dated the Act becoming law on June 30, 2007.

The juvenile bears the burden of proving unconstitutionality beyond a reasonable doubt. *State v. Cook*, 83 Ohio St.3d 404, 409, 700 N.E.2d 570 (1998). The juvenile cannot prove unconstitutionality under these circumstances. The answer to the certified question is "Yes."

A.

The juvenile's retroactive-law challenge lacks merit for the simple reason that he committed his offense after the Act became law, and therefore the Act is not a "retroactive law" as to him.

In *State v. Williams*, the Court held:

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 concluded 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,” violated the constitutional prohibition against enacting retroactive laws. *Id.* at ¶ 22 (emphasis added). Under *Williams*, the enactment date of Senate Bill 10 is the critical date.

Senate Bill 10 became law when it was passed on an emergency basis on June 27, 2007 and was later approved by the Governor on June 30, 2007. Article II, Section 16, Ohio Constitution (“If the governor approves an act, he shall sign it, it becomes law and he shall file it with the secretary of state.”); Article II, Section 1d, Ohio Constitution (“emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect.”). Therefore, in determining whether a “law” is “retroactive” or ex post facto, the reference point should be when the bill became “law,” not when the General Assembly, of its own choosing, set a delayed date in the operation of the law for administrative convenience. See *People v. Jenkins*, 35 Cal. App.4th 669, 41 Cal.Rptr.2d 502 (1995) (not ex post facto when crime committed between effective date and operative date), superseded on other grounds, *People v. Robinson*, 63 Cal.App.4th 348, 74 Cal.Rptr.2d 52 (1998).

The Court’s decision in *Williams* clearly and repeatedly stated that the date of *enactment* was dispositive. *Williams*, 129 Ohio St.3d 344, at syllabus, ¶¶ 7, 16, 20-22. *Williams* made it clear that it was referring to the 2007 enactment of the Adam Walsh

Act; it stated that “[t]he current statutory scheme, S.B. 10, was enacted in 2007 * * *.” *Williams*, ¶ 7. That date, June 30, 2007, preceded by two months the juvenile’s rape offense in the present case. Because the juvenile’s offense post-dated the new law, the new law applies to him and is not “retroactive” as to him.

The juvenile will contend that, as to the registration requirements for rapists/Tier III offenders like him, the new law did not become effective until January 1, 2008. But Senate Bill 10 was enacted as emergency legislation under Section 5 of the bill, which provided that “this act shall take immediate effect.” The Act was effective immediately, but its operation was postponed in certain respects. The juvenile is subject to the tier classifications contained in R.C. Chapter 2950.

Williams only benefits offenders who committed their offenses before the 2007 enactment. The juvenile loses under *Williams*.

B.

Two appellate districts have reached different conclusions. In *State v. Scott*, 8th Dist. No. 91890, 2011-Ohio-6255, the Eighth District focused on the “enactment” language of *Williams* and concluded that post-enactment offenders like this juvenile cannot prevail.

{¶ 3} In *Williams*, the court held as follows: “S.B. 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.” (Emphasis added.) *Id.* at ¶ 20. S.B. 10, a.k.a. the Adam Walsh Act (“the AWA”), was enacted on June 27, 2007, and made effective on January 1, 2008.

{¶ 4} Here, the subject offenses took place during the date range of July 1, 2007 through August 31, 2007. *Scott*

argues that he cannot be classified as a sex offender because his offenses occurred between the repeal of Ohio's Megan's Law and the effective date of the AWA, thereby evading Ohio's sexual registration laws. We disagree.

{¶ 5} Consistent with the holding in *Williams*, we find Scott's classification under the AWA was constitutional because the offenses took place after the "enactment" of S.B. 10 in June 2007. Therefore, we uphold his sex-offender classification under the AWA.

The First District below failed to address *Williams*' "enactment" focus. Instead, the First District focused on the fact that Megan's Law was still in effect at the time of the juvenile's offense.

{¶ 4} "Where an act of the General Assembly amends an existing section of the Revised Code * * *, postpones the effective date of the amended section for [a certain period of time] after the effective date of the act, and repeals the 'existing' section in a standard form of repealing clause used for many years by the General Assembly for the purpose of complying with Section 15(D) of Article II of the Constitution of Ohio, the constitutionally mandated repealing clause must be construed to take effect upon the effective date of the amended section in order to prevent a hiatus in statutory law, during which neither the repealed section nor the amended section is in effect." *Cox v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 501, 508, 424 N.E.2d 597.

{¶ 5} The repealing clause of a statute does not take effect until the amended provisions of the act come into operation. Senate Bill 10's classification, registration, and community-notification provisions became effective on January 1, 2008. Prior to that date, including the period from Senate Bill 10's enactment to its January 1, 2008 effective date, Ohio's former sex-offender classification, registration and community-notification provisions were in effect.

{¶ 6} Bruce S. committed his offense on September 1, 2007, prior to the effective date of Senate Bill 10's registration, classification, and community-notification

provisions, and during the time that Megan's Law was in effect. Therefore, Senate Bill 10's classification, registration, and community-notification provisions may not be applied to him. See *State v. Williams*, supra. The judgment of the juvenile court classifying Bruce S. as a Tier III juvenile sex offender under Senate Bill 10 must be reversed, and this cause must be remanded for Bruce S.'s sexual-offender classification under Megan's Law. (Some Citations Omitted)

If the issue were a matter of statutory construction, the First District's analysis might make some sense. If there was some doubt about whether the General Assembly intended the juvenile's case to be governed by Megan's Law as opposed to AWA, or if there was a question about whether there was a hiatus in the statutory law, then an analysis of the Megan's Law repeal date and the *Cox* rule would come into play. But the *Cox* rule for an "existing section" repealer is a mere rule of statutory construction that would not overrule evident legislative intent.

No statutory construction is needed here. There is no doubt here that, statutorily, the General Assembly intended that the AWA scheme would apply, since the juvenile was adjudicated a delinquent for his rape offense and therefore was subject to classification under the AWA Tier system. See R.C. 2152.83(A)(1)(a) & (B)(1)(a) (applying to offenses as far back as January 1, 2002). Offenders committing their offenses after June 30, 2007, had notice that the new AWA Tier system would apply to cases adjudicated after January 1, 2008.

Instead of being a matter of statutory construction, the question here is a matter of constitutional analysis. The juvenile can avoid an AWA classification only if it would be unconstitutional to apply that classification to him. For all of the reasons stated in this brief, there is no improper retroactivity in applying the Tier classification system to this

juvenile when the enactment of that system occurred before the juvenile's offense.

C.

Some might contend that the "effective date" controls because some prior cases have referenced the "effective date" of the legislation they were reviewing. *Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, 847 N.E.2d 414; *Vogel v. Wells*, 57 Ohio St.3d 91, 99, 566 N.E.2d 154 (1991). But the question is what "effective date" would be controlling. Under Article II, Section 1c, of the Ohio Constitution, the Constitution commands that laws generally shall not go into effect until 90 days after the Governor's approval and filing with the Secretary of State. But, under Section 1d, emergency laws represent one of the exceptions to this general rule, and such emergency laws "shall go into immediate effect."

The true "effective date" for constitutional purposes here was the June 30, 2007, date when the Governor approved the legislation. As a matter of Ohio constitutional law, the Act "became law" on that date, and went into "immediate effect" on that date. See, e.g., *Vogel*, supra (addressing an emergency Act and using Governor's date of approval as "effective date").

Statutorily, of course, the General Assembly set forth another "effective date" for several AWA provisions as January 1, 2008. But this was only the statutorily-set "effective date," not the constitutionally-compelled "effective date" set by the Ohio Constitution. The General Assembly's decision to delay the operation of some provisions as a mere matter of administrative convenience should not control the constitutional matter of whether such provisions are "retroactive."

To find the provisions unconstitutional under such circumstances would make the

issue of constitutionality turn on a purely legislative choice rather than any constitutional imperative. The General Assembly could have made the new Tier system partly or fully operational as soon as June 30, 2007, and not been “retroactive” in relation to that effective date for this emergency law. A finding of unconstitutionality here would mean that the General Assembly did not violate any constitutional imperative but, rather, created its own unconstitutionality by setting a delayed operation date that was not constitutionally compelled. In the final analysis, the constitutional “effective date” was June 30, 2007, for this emergency legislation, not the later “effective date” of January 1, 2008, set by the General Assembly solely as a matter of administrative convenience.

It must be emphasized that the Act *does* reach a juvenile’s sexually oriented offenses that occurred before January 1, 2008. So there is no issue of statutory construction involved here. The sole question is whether AWA is an impermissible retroactive “law” in reaching pre-January 1, 2008 offenses that occurred after the Act was enacted. *Williams* states that the date of enactment is the critical date. Using that date for this emergency legislation, the juvenile’s retroactive-law claim fails because AWA is not a “retroactive law” as applied to offenders who committed their offenses after the enactment of AWA.

D.

The juvenile would err if he would contend that the decision in *State v. Dunlap*, 129 Ohio St.3d 461, 2011-Ohio-4111, 953 N.E.2d 816, supports his argument that the 1-1-08 effective date is controlling. The juvenile might quote from paragraph 4 of the *Dunlap* decision, which references that effective date. But the reference to the 1-1-08 effective date was merely paraphrasing the offender’s *argument*: “Dunlap argues * * *.”

The Court gave no indication that it was adopting the 1-1-08 effective date as the critical date. Later in the decision, the Court quoted the *Williams* syllabus, which focused on the enactment date. *Dunlap*, ¶ 5. *Dunlap* cuts against an argument focusing on the statutorily-set “effective date.”

E.

The juvenile also would err if he would rely on the Court’s actions in *State v. Mentser*, Sup.Ct. No. 09-273. Even this Court’s entry ordering supplemental briefing in *Mentser* reaffirmed *Williams* and its focus on “enactment.” The Court ordered the parties to clarify “whether the offenses occurred prior to the enactment of S.B. 10.” (Emphasis added)

In the supplemental briefing, the prosecutor rightly argued that Mentser could not take advantage of *Williams* because Mentser’s offenses occurred after the enactment of the Adam Walsh Act. This Court simply remanded the case “for application of” *Williams*, thereby leaving application of *Williams* to the trial court.

If anything, the remand in *Mentser* “for application of” *Williams* shows that the Court saw no need to amplify its *Williams* ruling further. The Court in *Williams* explicitly set the critical date for “retroactive law” determinations as being the 2007 enactment date. The Court has not changed that ruling in any subsequent determination. And, even in *Mentser*, where the Court could have amplified or changed *Williams*, it did not do so. Remanding “for application of” *Williams* shows that the Court believed that *Williams* gave the remand court all of the tools it needed to rule.

Summary dispositions like *Mentser* are frequently bereft of precedential value because they are not designed to set forth law of precedential value. In *Mentser*, the

Court was merely remanding for application of *Williams*; it was not purporting to set forth some change in the enactment-date criterion of *Williams*. Merely because the Court could have pronounced new law does not mean that the Court in fact did pronounce new law. Issues often lurk in the record and are not decided by the appellate court. *Webster v. Fall*, 266 U.S. 507, 511, 45 S.Ct. 148, 69 L.Ed. 411 (1925).

In addition, this Court has specifically rejected the concept of “implicit” precedent. In *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, this Court stated that the “perceived implications” of its *Foster* decision were not binding and that later summary dispositions were “entitled to no consideration whatever as settling * * * a question not passed upon or raised at the time of the adjudication.” *Id.* ¶¶ 10-12; see also *B.F. Goodrich v. Peck*, 161 Ohio St. 202, 118 N.E.2d 525 (1954). In *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, 916 N.E.2d 1038, ¶ 31, this Court also refused to give precedential effect to an earlier summary reversal because the reversal had not come after full briefing and, under *Payne*, a “summary-remand decision of this court does not settle for future cases unaddressed issues * * *.” See also *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, 844 N.E.2d 335, ¶ 46.

The juvenile has not demonstrated unconstitutionality beyond a reasonable doubt in the present case. The application of the Act is not “retroactive” as to offenders who committed their offenses after June 30, 2007.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA supports the constitutionality of the Act as applied to this juvenile and therefore urges that this Court answer the certified question in the affirmative and reverse the judgment of the First District Court of Appeals.

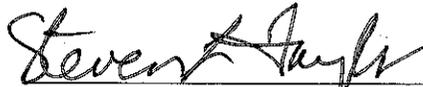
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed by regular U.S. mail on this 9th day of May, 2012, to the following known counsel involved in the case: (1) Paula E. Adams, Assistant Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202; and (2) Amanda J. Powell, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.


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