

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee

-vs-

WESLEY LLOYD

Defendant-Appellant

CASE NO. 2011-212

On Appeal from the Holmes
County Court of Appeals,
Fifth Appellate District,
Case No. 09CA12.

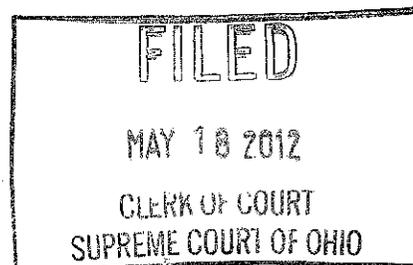
**PLAINTIFF-APPELLEE STATE OF OHIO'S MOTION FOR
RECONSIDERATION, MOTION FOR SUPPLEMENTAL BRIEFING, AND
MOTION FOR ORAL REARGUMENT**

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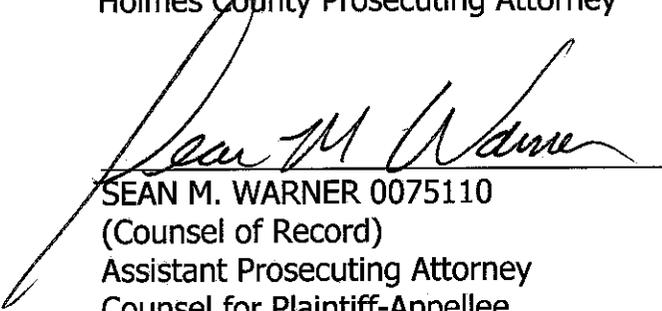


**PLAINTIFF-APPELLEE STATE OF OHIO'S MOTION FOR
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MOTION FOR ORAL REARGUMENT**

Pursuant to S.Ct.Prac.R. 11.2, and for the reasons stated in the following memorandum in support, Plaintiff-Appellee State of Ohio respectfully requests that this Court reconsider the 6-1 decision issued on May 8, 2012. Upon such reconsideration, the State further respectfully requests that this Court order supplemental briefing on the duty to register issue and order an oral reargument.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

In a 6-1 opinion, the majority reversed defendant Defendant's two convictions for violating R.C. 2950.04(E) and R.C. 2950.05(F)(1). The majority concluded it "must set aside Defendant's convictions because the state failed to prove that Defendant was under a duty to register in Texas as a result of his 1995 conviction when he moved to Ohio, as it was required to do." Opinion ¶ 58. The dissent noted "This court did not accept Defendant's fourth proposition of law that '[t]he State failed to prove that Mr. Defendant had a duty to register under Megan's Law"; thus, any challenge to the sufficiency of the evidence supporting his convictions is not properly before the court." Id. ¶ 61. The State now seeks reconsideration because of legal errors in the majority opinion and because the majority deprived the State of a fundamentally fair appellate review.

A. Lack of Notice and Opportunity to Be Heard

After reviewing the facts and procedural history of this case, the majority considered the question presented and acknowledged "The **sole** proposition of law before us asserts: 'A court should conduct an elemental comparison of an out-of-state offense when determining 1) whether the offense triggers the duty to register in Ohio under R.C. 2950.01 and 2) the punishment for failing to register in Ohio under R.C. 2950.99.'" Id. at ¶ 12 (emphasis added). Pursuant to S.Ct. Prac. R. 3.6(A)(1), the "Supreme Court will review the jurisdictional memoranda filed and determine whether to accept the appeal and decide the case on the merits." S.Ct. Prac. R. 3.6(B)(2) states if the appeal is a discretionary appeal involving a felony, the Supreme Court will either:

(a) Deny leave to appeal, refusing jurisdiction to hear the case on the merits; or

(b) Grant leave to appeal, accepting the appeal, and either order the case **or limited issues in the case** to be briefed and heard on the merits...

In this case Defendant presented five propositions of law in his Memorandum in Support of Jurisdiction.

Proposition of Law No. IV reads "The State failed to prove that Mr. Defendant had a duty to register under Megan's Law." In his Memorandum, Defendant claimed the 5th District misinterpreted his testimony and pointed to his testimony at pgs. 104-105 of the Trial Transcript in support of his contention. *Appellant's Memorandum in Support of Jurisdiction 02/14/11* at P. 14. The State's Memorandum in Response briefly addressed Defendant's Proposition of Law No. IV by citing and quoting Defendant's same testimony. *Appellee's Memorandum in Response 03/16/2011* at Pgs. 6-7. On May 04, 2011 this Court accepted Defendant's appeal **only** on Proposition of Law No. II in spite of reviewing two separate Memorandums specifically addressing the sufficiency of the State's evidence as to Defendant's duty to register in Texas (Proposition of Law No. IV).

On May 08, 2012, the Majority decided the **only** issue before it then turned its attention to "a deficiency in the state's proof that is readily apparent from the record." Opinion ¶ 44. It is puzzling that a deficiency so "readily apparent" would escape the Majority's attention when accepting Defendant's appeal then become a glaring point of plain error after an entire year of both parties briefing and arguing a completely different proposition of law.

Consideration of this alleged error went beyond this Court's narrow grant of review. Going beyond a narrow grant of review is a ground for reconsideration. See Case No. 2007-0268, *State v. Smith* (after initial decision addressed issue not earlier granted review, Court granted review on the issue and allowed supplemental briefing).

By going beyond the narrow grant of review, the majority deprived the State of fair appellate review. This Court's own precedents require that the parties be given the opportunity to address issues that are raised. If this Court contemplates a decision upon an issue not briefed, it should give the parties notice of its intention and an opportunity to brief the issue. *Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 301 & n. 3; *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170.

The State was blindsided by the majority's consideration of a proposition of law this Court expressly declined to consider. Such consideration is made all the more inappropriate by the fact that the majority committed errors in its analysis. Such unfairness justifies reconsideration. The test generally used in ruling on a motion for reconsideration is "whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *Columbus v. Hodge* (1988), 37 Ohio App.3d 68, 68. The State respectfully submits that the majority committed an obvious error by depriving the State of fair notice.

B. Mistakes in the Majority's Analysis

There is a practical reason for giving the parties notice and an opportunity to be heard on matters before the Court. Without the reasoned advocacy of the parties, the

appellate court is more likely to make mistakes. Several mistakes occurred here resulting in the Majority finding the evidence insufficient to establish Defendant had a duty to register in Texas.

On December 8, 1995 the Defendant was convicted, in Texas, of Aggravated Sexual Assault (which the Majority found to be equivalent to Rape), a first degree felony. The Entry stating his conviction and noting his immediate remand into the custody of the Texas Department of Criminal Justice was offered into evidence as State's Exhibit A. Defendant's first registration document dated 11/30/1995 and titled "Notice of Registration Duties of Sexually Oriented Offender" was offered into evidence as State's Exhibit E-1. Exhibit E-1 reflects the Auglaize County authorities' conclusion (upon its initial meeting with the Defendant) that the Defendant is a "Sexually Oriented Offender" who is required to register once a year for ten years thereafter.¹ The Majority did not consider either of those exhibits when it concluded the state "failed to produce any evidence whatsoever" regarding the Defendant's duty to register in Texas. Opinion ¶ 47. The Majority also noted the state failed to produce evidence Defendant had registered as a sex offender in Texas or that he was provided notice of his duty to do so. The state is not required to produce any such evidence as actual registration or notice have no bearing on whether the Defendant had a legal duty to register in Texas.

¹ The State would appreciate the opportunity to brief whether proving the out-of-state conviction and resulting determination in Ohio is sufficient to prove a duty to register, but relies, for purposes of this Motion, on the cumulative evidence of the State's exhibits offered in its case-in-chief and the testimony of the Defendant at trial.

The Majority then considered the following Defendant's testimony on direct examination which the trial court, the 5th District Court of Appeals, and the Dissent found sufficient to establish the Defendant's duty to register:

Q So, when are you released from prison?

A In I believe it was July of 2005 I believe.

Q And when did you move to Ohio?

A I believe it was October or November of 2005.

Q And why did you come here?

A I was born in Ohio. The only reason I was really in Texas was because of my military duties; so this is kind of home for me Ohio is.

Q And did you go through certain procedures to establish your duty to register before you left Texas?

A Yes. I had to get a form. They give you a form to take to the next place that you register and stuff. So I got the form and then when I moved to Auglaize County I had to take that form in to the Sheriff's office there and show them the form and they had the same issue that the codes weren't comparable, so Texas and the officer there talked over the phone and everything else and they said "We don't have this type of..." In Texas I was...

Q To cut to the chase.

A Okay.

Q You were classified as a sexually oriented offender.

A Sexually oriented offender because.

Q And you had to register once a year for ten years?

A For ten years, correct.

Q And you completed your first registration at that time, correct?

A Correct; I did. Trial Transcript pgs. 104-105.

The Majority concluded the Defendant's own testimony "did not constitute sufficient evidence to prove that at the time he moved to Ohio, he was under a duty to register in Texas as a result of the 1995 conviction." *Id* at ¶ 50.

The Majority characterizes the Dissent as an attempt to "employ clairvoyance to supplement the record" while in the very same paragraph it supplements the record with a hypothetical end to an unfinished sentence in the trial transcript. *Id* at ¶ 51. Then, in the very next paragraph the Majority speculates further "In an abundance of caution, Defendant **may** very well have notified Ohio authorities of his Texas conviction despite not having a duty to register in Texas." *Id. at* ¶ 52. This despite the Defendant's lack of caution prior to moving from Auglaize County to Holmes County. The Majority conclusion that Defendant's testimony established the Auglaize County Sheriff "was confused about **whether** or how to classify Defendant" is also unsupported. *Id. at* ¶ 52. Defendant's testimony revealed confusion only as to how to classify Defendant (what is the comparable code) which is the very proposition of law this Court agreed to decide in this case.

Finally, the Majority states it is unreasonable for the Dissent and others to assume the Auglaize County Sheriff's determination of Defendant's sex-offender status was legally and factually correct based upon the record. Yet there is nothing in the record to indicate that determination was incorrect. The Majority cites the corrections officers practice of signing the bottom of registration forms when they were not required to do so as proof that the prior determination of the offender's status was

incorrect. The Majority also incorrectly states a corrections officer dissuaded the Defendant from making a personal appearance in Holmes County when the Defendant never testified that he intended to make such an appearance prior to talking to the corrections officer.

C. Incorrect Application of Standard of Review

Fundamentally, the Majority did not correctly review what it perceived to be a case of insufficient evidence. When an appellate court reviews the sufficiency of the evidence, the inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 1997 Ohio 52, 678 N.E.2d 541; *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492. The standard of review is whether, after viewing the probative evidence and **inferences reasonably drawn therefrom in the light most favorable to the prosecution**, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *State v. Issa* (2001), 93 Ohio St.3d 49, 66, 2001 Ohio 1290, 752 N.E.2d 904. Furthermore, a reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). Reviewing courts will not overturn convictions on sufficiency of evidence claims unless reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Tibbetts* (2001), 92 Ohio St.3d 146, 2001 Ohio 132, 749 N.E.2d 226; *State v. Treesh* (2001), 90 Ohio St.3d 460, 2001 Ohio 4, 739 N.E.2d 749.

In reviewing sufficiency of the evidence claims, courts must remain mindful that the elements of an offense may be established by direct evidence, circumstantial evidence, or both. *State v. Durr* (1991), 58 Ohio St.3d 86, 568 N.E.2d 674. Circumstantial and direct evidence are of equal evidentiary value. *Jenks*, 61 Ohio St.3d at 272. When reviewing the value of circumstantial evidence, "the weight accorded an inference is fact-dependent and can be disregarded as speculative **only** if reasonable minds can come to the conclusion that the inference is not supported by the evidence." *Wesley v. The McAlpin Co.* (May 25, 1994) Hamilton App. No. C-930286, 1994 Ohio App. LEXIS 2235 , unreported (citing *Donaldson v. Northern Trading Co.* (1992), 82 Ohio App.3d 476, 483, 612 N.E.2d 754).

When reviewing the operative testimony in this case in the light most favorable to the prosecution (as the Majority is required to do) and drawing all reasonable inferences therefrom, the Defendant's duty to register in Texas is clear:

Q And did you go through certain procedures to establish your duty to register before you left Texas?

A Yes. I had to get a form (**regarding registration**). They (**Texas authorities**) give you a form to take to the next place that you register (**indicating a first place you register, Defendant has not been anywhere other than the State of Texas between the date of his conviction and his release from prison**) and stuff. So I got the form (**regarding registration**) and then when I moved to Auglaize County I had to take that form in to the Sheriff's office there and show them (**Auglaize County Sheriff's personnel**) the form (**regarding registration which Defendant obtained in Texas and brought with him to Ohio**) and they (**Auglaize County Sheriff's personnel**) had the same issue that the codes weren't comparable (**the same question that this Court has just decided**), so Texas (**authorities**) and the officer there (**Auglaize County**) talked over the phone and everything else and

they(**Auglaize County Sheriff's personnel**) said "We don't have this type of..." In Texas I was...(**irrelevant**)...

...

Q You were classified as a sexually oriented offender.

A Sexually oriented offender because.

Q And you had to register once a year for ten years?

A For ten years, correct.

Based on the preceding passage, is it reasonable to conclude anything other than Defendant had a duty to register in Texas (the first place he had to register which precedes the "next place [he] had to register)? Is it reasonable to conclude that a convicted rapist does not have to register as a sexual offender in Texas?² It is unclear why the Majority gives the Defendant credit for calling his former county of residence after he has already failed to give his twenty day notice written advance notice which duty is clearly stated on his registration forms.³ This is especially confusing when Defendant presents as an intelligent person.⁴

Perhaps the majority is squeamish about a three year prison sentence for failing to register even though the legislature has seen fit, in the interest of public safety, to make such failures strict liability offenses. The Majority seems content that since law

² The State would also like to brief the issue whether the law of another jurisdiction i.e. Texas Penal Code Article 62.001 stating Aggravated Sexual Assault 22.021 is a "reportable conviction" is an evidentiary matter requiring offer of direct proof or is a matter more properly considered as legal argument.

³ The Majority mentions R.C. 2950.05(G)(1) without noting that the Defendant's actions in this case did not comply with that subsection. Defendant raised that affirmative defense at trial.

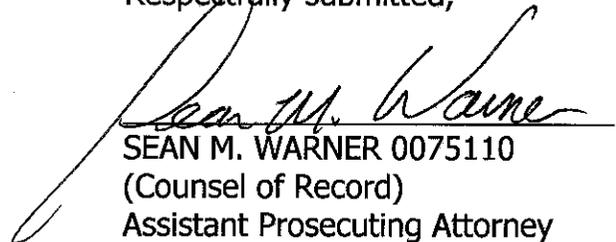
⁴ The Court may take judicial notice that Defendant has perfected a pro se civil appeal in this Court pending as Case No. 2012-0301.

enforcement in one county knew where the Defendant was in another county over two hours away, there was no harm resulting from the Defendant's failures. That view misses the point that even more important than law enforcement's need to know where a sex offender lives, the fathers, mothers, sisters, brothers, husbands and wives living, working, and raising children in Holmes County had a need to know who was living next to them in June of 1995. The Defendant's actions deprived them of that right.

D. Conclusion

In light of the foregoing, the State respectfully requests reconsideration of the May 8th decision. Upon such reconsideration, this Court should order supplemental briefing on duty to register issue and should order an oral reargument.

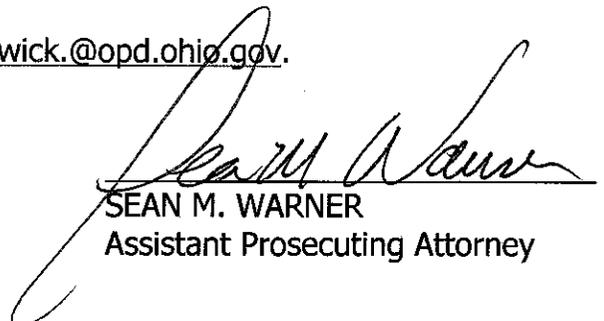
Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 18th day of May, 2012, to Stephen P. Hardwick, Assistant Public Defender and Counsel for Defendant-Appellant, Wesley Defendant at 250 East Broad Street, Suite 1400 Columbus, Ohio 43215 and stephen.hardwick@opd.ohio.gov.



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