

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio

Plaintiff-Appellant,

vs.

Donny Howard

Defendant-Appellee.

Case No. 2011-2126

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

Court of Appeals
Case No. 24680

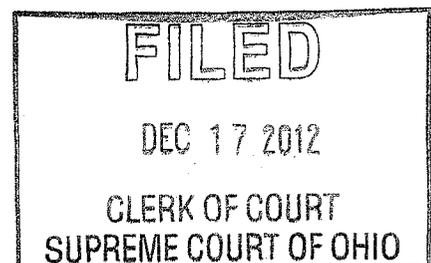
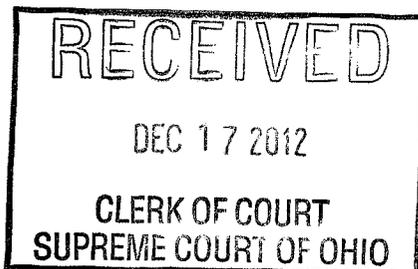
APPELLANT'S AMENDED MOTION FOR RECONSIDERATION, MOTION FOR
SUPPLEMENTAL BRIEFING, AND MOTION FOR ORAL REARGUMENT

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Now comes Appellant, the State of Ohio, and hereby moves this Honorable Court to reconsider its decision that R.C. 2950.99, in its current form, does not apply to sex offenders originally classified under Megan's Law. *State v. Howard*, Slip Opinion No. 2012-Ohio-5738, ¶ 30. This amended motion for reconsideration is filed pursuant to S.Ct.Prac.R. 8.7 and 11.2. The reasons for reconsideration are set forth in the accompanying memorandum.

Respectfully submitted,

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BY 
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Memorandum

In the decision issued on December 6, 2012, this Court ruled that, as a Megan's Law offender, Donny Howard is not only subject to the sex-offender registration obligations under *former* R.C. 2950.05, he is likewise subject to the penalty provisions under *former* R.C. 2950.99. Specifically, this Court stated: "R.C. 2950.99 describes punishments for people who violate the requirements of the AWA – it does not reach back to cover offenders who must abide by Megan's Law. Former R.C. 2950.99 addresses punishments for offenders who violate the provisions of Megan's Law, including former R.C. 2950.05. Current R.C. 2950.99 applies to a different statutory landscape; by its own terms it applies to offenders who violate current R.C. 2950.05." *Howard*, ¶ 19.

The Court's decision is problematic for several reasons: 1) It is a mistake to tie the operation of R.C. 2950.99 to a sex offender's status as a Megan's Law offender, or an AWA offender; 2) The "current" law versus "former" law distinction breaks down where the Megan's Law version of R.C. 2950.05 *is the current law* for offenders like Donny Howard; and 3) Even if the Megan's Law version of R.C. 2950.05 is not "current" law for offenders in Howard's position, R.C. 1.54 and 2901.04(D) make amended R.C. 2950.99 applicable to the registration offenses as defined by "former" law.

Operation of R.C. 2950.99

The operation of the penalty section in R.C. 2950.99 is in no way affected by whether an offender's registration duties arise under Megan's Law or under the AWA. The penalties under R.C. 2950.99, as amended by S.B. 97, are tied to, and dependent upon, the degree of the sex offense underlying the duty to register. Nothing in the penalty statute defining a defendant's registration offense as a felony would require that the defendant first be classified as a "Tier"

offender. Thus, striking out a sex offender's Tier classification and reinstating his Megan's Law classification has no effect upon the application of the penalties in R.C. 2950.99, as amended by S.B. 97.

Furthermore, the General Assembly has broad, plenary discretion in prescribing crimes and fixing punishments, and the power to do so rests with the legislature alone. *State v. Morris*, 55 Ohio St.2d 101, 112-113, 378 N.E.2d 708 (1978). Thus, even if the legislature had not created the AWA Tier system of classification and increased sex offenders' registration duties, it always possessed inherent authority to increase penalties on a prospective basis for violating already-existing registration requirements under Megan's Law. As a result, the separation-of-powers and retroactive-law doctrines provide no basis for the judicial branch to interfere with a punishment prescribed by the General Assembly for prospective application, whether it be a punishment for violating Megan's Law, or the AWA.

Megan's Law As "Current" Law

As this Court acknowledged in *State v. Brunning*, Slip Opinion No. 2012-Ohio-5752, decided the same day as the instant case, where an amendment to a statute is later found unconstitutional, the amendment is invalid, and the law reverts to the prior version of the statute. *Brunning*, ¶ 21, citing *State v. Sullivan*, 90 Ohio St.3d 502, 739 N.E.2d 788 (2001), paragraph two of the syllabus. The import of that principle in Howard's case, and for other offenders who benefitted from *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753 and *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, is that it makes the Megan's Law version of R.C. 2950.05 the "current" law for those offenders. Thus, even if R.C. 2950.99, as amended by S.B. 97, can correctly be read to refer only to "current" law, then it is

still referring to the version of R.C. 2950.05 that applies to Donny Howard, making Howard's 2010 failure to notify of his change of address a first-degree felony.

Revised Code 2950.99 Is Applicable To "Former" Law

Revised Code 1.54 instructs that, "A statute which is reenacted or amended is intended to be a continuation of the prior statute and not a new enactment, so far as it is the same as the prior statute," while R.C. 1.55 states that, "A reference to any portion of a statute of this state applies to all reenactments or amendments thereof." Furthermore, 2901.04(D) declares that, "Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense."

According to these rules of statutory construction, this Court's treatment of the version of R.C. 2950.99 contained in S.B. 97 as being separate from former R.C. 2950.99 is untenable. Current R.C. 2950.99, which is an amended version of former R.C. 2950.99 setting forth penalties for violations of sex offender registration obligations, cannot be deemed a new enactment but, rather, is a continuation of former R.C. 2950.99. See, R.C. 1.54. Moreover, much of R.C. 2950.05 was unchanged by the AWA and therefore the Megan's Law version of R.C. 2950.05 should not be deemed "former" in light of R.C. 1.54. And, to the extent *Bodyke* and *Williams* threw out the AWA amendments, the Megan's Law version of R.C. 2950.05 should be considered a "continuation" of the statute, according to R.C. 1.54.

What's more, under R.C. 2901.04(D) a statutory reference to a criminal statute, like R.C. 2950.05, would include existing or former law. Undoubtedly, the change-of-address crime under

Megan's Law is certainly "substantially equivalent" to the AWA version, as the statutory duty for many offenders to provide a change of address was unchanged by the AWA. Thus, when R.C. 2950.99 refers to R.C. 2950.05, it refers to that statute in both its current and former versions. See, R.C. 2901.04(D); *State v. Chappell*, 127 Ohio St.3d 376, 2012-Ohio-5991, 939 N.E.2d 1234. In that event, this Court's characterization of the Megan's Law version of R.C. 2950.05 as "former" does not prevent amended R.C. 2950.99 from applying to an offender whose obligation to provide notice of a change of address arises under Megan's Law.

Conclusion

The State asks this Honorable Court to grant this amended motion for reconsideration, permit supplemental briefing, and entertain oral re-argument of the issues herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Reconsider was sent by first class mail on this 14th day of December, 2012, to the following: Marshall Lachman, Counsel of Record, 75 North Pioneer Boulevard, Springboro, Ohio 45066; Daniel T. Van, Asst. Prosecuting Attorney, Cuyahoga County Prosecutor's Office, Amicus Curiae, 1200 Ontario Street, Cleveland, Ohio 44113, and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

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