**[Cite as *State v. Prisby*, 2017-Ohio-9340.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**PORTAGE COUNTY, OHIO**

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| STATE OF OHIO, | : | **O P I N I O N** |
| Plaintiff-Appellee, | : | **CASE NO. 2017-P-0012** |
| - vs - | : | |
| TERRANCE A. PRISBY, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2016 CR 00503.

Judgment: Affirmed and remanded.

*Victor V. Vigluicci,* Portage County Prosecutor, and *Kristina Reilly,* Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

*John P. Laczko,* Assistant Public Defender, 209 South Chestnut Street, #400, Ravenna, OH 44266, and *Wesley C. Buchanan,* Buchanan Law, Inc., 12 East Exchange Street, 5th Floor, Akron, OH 44308 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, P.J.

**{¶1}** Appellant, Terrance A. Prisby, appeals his mandatory three-year sentence in the Portage County Court of Common Pleas, following his no contest plea to Failure to Provide Notice of Change of Address, having previously been convicted of gross sexual imposition. For the reasons that follow, we affirm and remand.

**{¶2}** On July 18, 2016, appellant was indicted for Failure to Provide Notice of Change of Address, a felony of the third degree, in violation of R.C. 2950.05.

Appellant's most serious sexually oriented offense was gross sexual imposition, a felony of the third degree. The indictment alleged that appellant, who is required to register with the County Sheriff, failed to provide the sheriff with notice of his change of address. The indictment further alleged that appellant had previously been convicted in 2015 for another failure to provide notice of a change of his address.

**{¶3}** On January 18, 2017, appellant pled no contest to the indictment, but challenged the mandatory nature of the three-year sentence. On February 27, 2017, the trial court heard argument on this issue. Appellant's counsel argued that because, in his view, the sentence was not mandatory, appellant was eligible for community control and "our position would be to ask the Court to grant him community control * * *."

**{¶4}** After the parties briefed the issue, the court entered judgment, finding that "[t]he sentence under 2950.05 'Failure to Provide a Change of Address,' a Felony of the Third Degree, has a mandatory three year prison term." Subsequently, the court sentenced appellant to a mandatory term of three years in prison. Appellant appeals his sentence, asserting the following for his sole assignment of error:

**{¶5}** "The trial court imposed a sentence contrary to law."

**{¶6}** Appellant argues that the trial court erred in imposing a mandatory three-year sentence because, in his view, R.C. 2950.99 does not provide for a mandatory sentence or, alternatively, this statute conflicts with certain provisions of Ohio's general sentencing statutes, at R.C. 2929.01 et seq. To resolve this issue, we must determine whether R.C. 2950.99 provides for a three-year mandatory sentence. Statutory interpretation is a question of law that we review de novo. *State v. Phillips,* 11th Dist.

Trumbull No. 2008-T-0036, 2008-Ohio-6562, ¶11. Contrary to the state's argument, appellant does *not* challenge the constitutionality of R.C. 2950.99.

**{¶7}** If the meaning of a statute is clear on its face, then it must be applied as written. *Phillips, supra*. A court can only interpret a statute if it is ambiguous. *Id*. at ¶12. An ambiguity exists if the language is susceptible to more than one reasonable interpretation. *State v. Swidas*, 11th Dist. Lake No. 2009-L-104, 2010-Ohio-6436, ¶17 (reversed on other grounds.). When a court must interpret a criminal statute, the language should be strictly construed against the state and liberally construed in favor of the accused. R.C. 2901.04(A). However, strict construction should not override common sense and evident statutory purpose. *State v. Sway*, 15 Ohio St.3d 112, 116 (1984).

**{¶8}** "'It is well settled that the General Assembly has the plenary power to prescribe crimes and fix penalties.'" *State v. Barnes*, 9th Dist. Lorain Nos. 13CA010502, 13CA010503, 2014-Ohio-2721, ¶7, quoting *State v. Banks*, 9th Dist. Summit No. 25279, 2011-Oiho-1039, ¶48. Further, specific sentencing provisions are controlling over general sentencing statutes dealing with the same subject. *State v. Taylor*, 113 Ohio St.3d 297, 2007-Ohio-1950, ¶14. In *Taylor*, the Ohio Supreme Court held that R.C. 2925.11 (regarding drug offenses) is a specific sentencing statute that controls over the general sentencing statute, and Taylor was thus "subject to the more specific mandatory-sentencing requirements of R.C. 2925.11." *Taylor, supra*. In support of its holding, the Taylor Court relied on the "'well settled rule of statutory construction that where a statute couched in general terms conflicts with a specific statute on the

same subject, the latter must control.'" *Id*. at ¶12, quoting *Humphrys v. Winous Co*., 165 Ohio St. 45, 48 (1956).

**{¶9}** Appellant's argument is convoluted to say the least. He argues that because R.C. Chapter 2950 does not set forth the felony level or state that the three-year sentence for a second violation of R.C. 2950.05 is "mandatory," R.C. Chapter 2950 must be read in conjunction with the general sentencing provisions in R.C. 2929.01 et seq. However, he argues that R.C. Chapter 2950 does not apply to the general sentencing statutes and that the general statutes do not mention R.C. Chapter 2950. He argues this creates a conflict between R.C. Chapter 2950 and the general sentencing statutes, creating an ambiguity and, thus, the trial court could only impose a definite, rather than a mandatory, sentence on him. However, the argument lacks merit because R.C. 2950.99(A)(2)(b), the specific sentencing statute for repeat nonreporting sex offenders, *sets forth the felony level of appellant's current offense and the mandatory nature of the sentence.* Thus, there is no need to look to the general sentencing statutes for guidance. As the First District stated, "R.C. 2950.99 delineates the felony level and, in some cases, the penalty for sex offenders who fail to comply with various registration and notification requirements." *State v. Wilson,* 1st Dist. Hamilton No. C-090436, 2010-Ohio-2767, ¶5. Thus, R.C. 2950.99, rather than the general sentencing statutes, controls these issues and there is no ambiguity.

**{¶10}** R.C. 2950.05, the notification-requirement statute, provides an offender who is required to register "shall provide written notice of any change of residence address * * * to the sheriff with whom the offender * * * most recently registered the

address * * *." R.C. 2950.05(A). Further, "[n]o one who is required to notify a sheriff of a change of address * * * shall fail" to do so. R.C. 2950.05(F).

**{¶11}** Pursuant to R.C. 2950.99(A)(1)(a)(ii), appellant's current violation of the notice-requirement statute is a felony of the third degree. That section provides, in pertinent part:

> **{¶12}** If the most serious sexually oriented offense * * * that was the basis of the * * * change of address notification * * * requirement that was violated * * * is a felony of the first, second, third, or fourth degree * * *, *the offender is guilty of a felony of the same degree as the most serious sexually oriented offense* * * * that was the basis of the * * * change of address * * * requirement that was violated * * *. (Emphasis added.)

**{¶13}** Since appellant's sexually oriented offense that was the basis of his notification requirement was gross sexual imposition, a felony of the third degree, his violation of R.C. 2950.05 was likewise a felony of the third degree.

**{¶14}** Further, while R.C. 2950.99 does not specifically state the three-year sentence for the notification violation is mandatory, the statute describes this sentence as such. R.C. 2950.99(A)(2)(b) provides, in pertinent part:

> **{¶15}** In addition to any penalty or sanction imposed under division (A)(1)(b)(i), (ii), or (iii) of this section or any other provision of law for a violation of * * * [R.C.] * * * 2950.05 * * *, if the offender previously has been convicted of * * * a violation of * * * [R.C.] * * * 2950.05 * * * when the most serious sexually oriented offense * * * that was the basis of the requirement that was violated * * * is a felony * * *, the court imposing a sentence upon the offender *shall impose a definite prison term of no less than three years. The definite prison term imposed under this section * * * shall not be reduced to less than three years pursuant to any provision of Chapter 2967. or any other provision of the Revised Code.* (Emphasis added.)

**{¶16}** Thus, R.C. 2950.99(A)(2)(b) imposes a definite sentence of no less than three years on an offender who fails to notify the sheriff of a change of address if (1) he

has previously been convicted of failing to provide notice of a change of address, and (2) the sexual offense that gave rise to the duty to notify was a felony. *Barnes, supra*, at ¶5. We note the three-year sentence is consistent with the general sentencing statutes, which provides that the maximum sentence for a third-degree felony is 36 months. R.C. 2929.14(A)(3)(b). Further, pursuant to R.C. 2950.99(A)(2)(b), the three-year sentence cannot be reduced by R.C. Chapter 2967 or any other provision of the Revised Code. R.C. Chapter 2967 provides for, among other things, parole, sentence reduction or early release due to overcrowding emergency, days of credit earned, and post-release control. R.C. 2929.19(B)(4)2 provides for community control sanctions. R.C. 2929.20 provides for judicial release. Thus, R.C. 2950.99(A)(2)(b) would prevent appellant from obtaining any of the foregoing reductions to his three-year sentence.

**{¶17}** ""[A] mandatory sentence renders the defendant ineligible for probation or community control sanctions."" *State v. Walters*, 4th Dist. Adams No. 15CA1009, 2016-Ohio-5783, ¶13, quoting *State v. Brigner*, 4th Dist. Athens No. 14CA19, 2015-Ohio-2526, ¶14, quoting *State v. Balidbid*, 2d Dist. Montgomery No. 24511, 2012-Ohio-1406, ¶10. Further, "a mandatory sentence excludes an offender from judicial release." *Taylor, supra*, at ¶11.

**{¶18}** Thus, while R.C. 2950.99(A)(2)(b) does not expressly state the definite, three-year minimum sentence is a "mandatory term," the statutory restrictions on this term render it the functional equivalent of a mandatory term.

**{¶19}** Significantly, appellant does not try to distinguish or even mention the provision in R.C. 2950.99(A)(2)(b) that the three-year term cannot be reduced by R.C. Chapter 2967 or any other provision of the Revised Code.

**{¶20}** We note that Ohio Appellate Districts have repeatedly stated, albeit in dicta, that the three-year minimum sentence for repeat nonreporting violators is mandatory. *Wilson*, *supra*, ("R.C. 2950.99(A)(2)(b) requires a court to impose a mandatory three-year prison term on repeat nonreporting offenders."); *State v. Ashford*, 2d Dist. Montgomery No. 23311, 2010-Ohio-1681, ¶9 ("R.C. 2950.99(A)(2)(b) imposes a minimum mandatory prison sentence for certain repeat offenders."); *State v. Koch*, 5th Dist. Knox No. 16-CA-16, 2016-Ohio-7926, ¶14 ("R.C. 2950.99(A)(2)(b) * * * requires a mandatory minimum sentence of three years."); *State v. Hoselton*, 6th Dist. Lucas No. L-09-1150, 2011-Ohio-1396, ¶9 (same); *Barnes, supra* (Ninth District) (same). Appellant does not cite any cases holding or even suggesting that the three-year sentence is not mandatory.

**{¶21}** Since the trial court is required to impose a definite sentence of "no less than three years" and that sentence cannot be reduced to less than three years pursuant to R.C. Chapter 2967 or any other provision of the Revised Code, we hold that R.C. 2950.99(A)(2)(b) provides for a mandatory sentence of three years.

**{¶22}** For the first time on appeal, the state argues that, in addition to the three-year mandatory term, the trial court was also authorized to impose on appellant an additional prison term of 9, 12, 18, 24, 30, or 36 months pursuant to R.C. 2929.14(A)(3)(b) for his failure-to-notify conviction. In support, the state references the provision in R.C. 2950.99(A)(2)(b) that, "[i]n addition to any penalty or sanction imposed * * * for a violation of * * * [R.C.] * * * 2950.05 * * *, * * * the court * * * shall impose a definite prison term of no less than three years." The state argues this provision contemplates an additional prison term and that since the court did not impose an

additional prison sentence for the notification violation, the case should be remanded for the court to do so. For the reasons that follow, we do not agree.

**{¶23}** First, since R.C. 2950.99(A)(2)(b), a specific sentencing statute, authorizes only a three-year prison term, that statute controls over R.C. 2929.14.

**{¶24}** Second, R.C. 2950.99(A)(2)(b) does not say anything about the trial court having the authority to impose an additional prison term under R.C. 2929.14.

**{¶25}** Third, while the phrase in R.C. 2950.99(A)(2)(b), "in addition to any penalty or sanction imposed * * * for a violation of * * * [R.C.] * * * 2950.05" is not specific as to what other penalty or sanction may be imposed for a violation of R.C. 2950.05, certainly, it would include a fine and post-release control. And, since the court also imposed a $300 fine on appellant and a discretionary three-year term of post-release control, the trial court has already imposed an additional "sanction or penalty."

**{¶26}** Fourth, to support its argument, the state refers to the three-year term as a "specification." However, R.C. 2950.99(A)(2)(b) does not refer to this term as a specification.

**{¶27}** Fifth, the state argues that courts have referred to the three-year sentence as a sentencing "enhancement" to the other prison term to be imposed per R.C. 2929.14. However, to the contrary, Ohio courts have stated it is the offender's *prior notification conviction,* not an additional sentence, that enhances the penalty to a three-year mandatory term for the current notification conviction. *State v. Littlejohn*, 8th Dist. Cuyahoga No. 103234, 2016-Ohio-1125, ¶19; *Hoselton, supra*, at ¶8-11.

**{¶28}** It is interesting to note that none of the trial courts in any of the cases cited herein involving the three-year sentence in R.C. 2950.99(A)(2)(b) imposed a prison term under R.C. 2929.14 in addition to the three-year term.

**{¶29}** We note that the state never raised this argument in the hearings on this issue held by the trial court or in its sentencing memorandum. At sentencing, the state only asked the court to impose the three-year mandatory term. Moreover, on appeal, the state does not cite any cases holding that the trial court was authorized to impose an additional prison sentence. Nor did the state cross-appeal appellant's sentence pursuant to App.R. (3)(C)(1).

**{¶30}** In view of the foregoing analysis, we hold the trial court did not err in sentencing appellant to a mandatory term of three years in prison.

**{¶31}** We note, however, that, while counsel has not brought this to our attention, instead of indicating in the sentencing entry that appellant pled no contest, the court indicated he "entered a Written Plea of Guilty of No Contest." (Sic.) Further, we note that, while the court stated on the record at sentencing that appellant's three-year sentence was to be mandatory, the sentencing entry did not state the term was mandatory. Thus, on remand, the court shall prepare a nunc pro tunc sentencing entry correcting the sentencing entry in these two particulars. *See* R.C. 2929.19(B)(7); *State v. Johnson*, 5th Dist. Delaware No. 16CAA030011, 2016-Ohio-4617, ¶22.

**{¶32}** At oral argument, appellant argued that because the three-year minimum mandatory sentence provided for at R.C. 2950.99(A)(2)(b) is the maximum sentence for his felony-three notification violation, he had no incentive to plead. However, whether he had an incentive to plead is irrelevant because he did so. In any event, this

argument would only apply to a felony-three violation, which carries a three-year maximum sentence, and not to a first or second-degree violation, which carries a sentence of up to 11 years or eight years, respectively, only three years of which would be mandatory. While such sentence would, of course, be a "hybrid" sentence, it would not be legally impermissible because it is authorized by R.C. 2950.99(A)(2)(b).

**{¶33}** For the reasons stated in this opinion, the assignment of error is overruled. It is the order and judgment of this court that the judgment of the Portage County Court of Common Pleas is affirmed. The matter is remanded solely for the trial court to issue a nunc pro tunc sentencing entry stating that appellant pled no contest and providing that appellant's three-year sentence for Failure to Provide Notice of Change of Address is mandatory.

DIANE V. GRENDELL, J., concurs in judgment only,

THOMAS R. WRIGHT, J., concurs in part and dissents in part with Opinion.

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THOMAS R. WRIGHT, J., concurs in part and dissents in part with Opinion.

**{¶34}** While I concur in the affirmance of the three-year prison term, I disagree with the lead's decision to remand the case to the trial court for a nunc pro tunc sentencing entry. The lead cites R.C. 2929.19(B)(7) in support of its conclusion that the trial court is required to issue a judgment declaring the three-year term mandatory. This, however, conflicts with the unambiguous wording of the statute:

**{¶35}** "The failure of the court to notify the offender that a prison term is a mandatory prison term pursuant to division (B)(2)(a) of this section or to include in the

sentencing entry any information required by division (B)(2)(b) of this section *does not affect the validity of the imposed sentence or sentences*. If the sentencing court notifies the offender at the sentencing hearing that a prison term is mandatory but the sentencing entry does not specify that the prison term is mandatory, the court *may* complete a corrected journal entry and send copies of the corrected entry to the offender and the department of rehabilitation and correction, or, at the request of the state, the court shall complete a corrected journal entry and send copies of the corrected entry to the offender and department of rehabilitation and correction." (Emphasis added).

**{¶36}** If the state requests a correction, which it has not, the trial court shall complete such a judgment. In contrast, when the state does not ask for a correction, the trial court "may" issue a corrected judgment. The decision, therefore, to issue a corrected judgment lies within the trial court's discretion.

**{¶37}** As the validity of the judgment is unaffected by the absence of the word "mandatory," and misstatement as to the plea entered, no one is prejudiced and correction serves no purpose.