

[Cite as *State v. Richey*, 2009-Ohio-4487.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-36
v.	:	(C.P.C. No. 08CR05-4216)
	:	
Aaron K. Richey,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on September 1, 2009

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*Ron O'Brien*, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

*Yeura R. Venters*, Public Defender, and *Paul Skendelas*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

FRENCH, P.J.

{¶1} Defendant-appellant, Aaron K. Richey ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted him of attempted failure to provide notice of a change of address. For the following reasons, we affirm.

{¶2} The Franklin County Grand Jury indicted appellant on one count of failure to provide notice of a change of address, a violation of R.C. 2950.05 and a fourth-

degree felony. According to the indictment, appellant had to comply with the address registration requirement because of a third-degree misdemeanor conviction in 2006 for sexual imposition.

{¶3} Appellant pleaded guilty to a stipulated offense of attempted failure to provide notice of a change of address, a fifth-degree felony. He signed a guilty plea form indicating that he understood that the trial court could impose a maximum of one year in prison for the offense to which he was pleading guilty. Appellant's counsel also signed the plea form to verify that appellant was knowingly, intelligently, and voluntarily pleading guilty. At the plea hearing, the court asked appellant if he wanted to plead guilty, and appellant said: "I mean, I was guilty. I didn't change my address." (July Tr. 7.) The court asked defense counsel if "this plea arrangement is in [appellant's] best interest," and defense counsel said, "[y]es, your Honor." (July Tr. 14.) The court asked appellant if he was satisfied with defense counsel's representation, and appellant said, "[y]es, your Honor." (July Tr. 15.) The court said: "Okay. You should be. She's given you a good job so far." (July Tr. 15.) Appellant said, "[m]ore than." (July Tr. 15.) The court accepted the guilty plea. The court said that appellant "appeared to understand his rights and knowingly, intelligently and voluntarily [gave] them up." (July Tr. 16.) The court scheduled a sentencing hearing for a different day.

{¶4} Appellant appeared for sentencing on December 15, 2008. As we detail below, at that hearing, appellant's counsel argued that imposing a felony penalty for a registration offense based on a misdemeanor is unconstitutional. The court sentenced

appellant to community control with a possibility of 12 months imprisonment if appellant violates community control conditions.

{¶5} Appellant appeals, raising a single assignment of error:

The trial court erred in failing to dismiss the charge of failing to register as appellant's registration requirement violated the constitutional prohibitions against cruel and unusual punishment that are set forth in the state and federal Constitutions.

{¶6} Appellant's appeal concerns the charge that he violated registration requirements triggered from his 2006 sexual imposition conviction. Appellant was convicted of sexual imposition when prior sex offender classification laws were in effect. That offense is now a Tier I offense under the Adam Walsh Act recently implemented under S.B. 10. See R.C. 2950.01(E). The Tier I offense contains address registration requirements. See R.C. 2950.04 and 2950.041. Presently, individuals convicted of third-degree misdemeanor sexual imposition who fail to comply with the registration requirements are in violation of R.C. 2950.05, a felony. R.C. 2950.99(A)(1)(a)(iii) and 2950.99(A)(1)(b)(iv). The violation would have been a misdemeanor under prior law. See Am.Sub.H.B. 473, 150 Ohio Laws, Part IV, 5,707, 5,808-5,810.

{¶7} In his assignment of error, appellant argues that the trial court should have dismissed the charge of failing to register because the registration requirement is unconstitutional. And in his brief, he argues that "the trial court erred in failing to grant the defense motion to dismiss the charges against him." At no time, however, did appellant ask the trial court to dismiss the failing to register charge. Instead, appellant

entered a guilty plea—a plea he does not challenge as unknowingly, involuntarily or unintelligently made—and the case proceeded to sentencing.

{¶8} At the sentencing hearing, appellant raised, for the first time, the argument that the punishment associated with his failure to register is unconstitutional.

Appellant's counsel stated:

[Appellant's charge of failing to register] stems from a misdemeanor offense of sexual imposition. And it would be our presumption and our assertion, I guess, that the punishment for a felony, when it stems from the misdemeanor, would violate the Ohio and United States Constitution, the reason being, \* \* \* the offense of the failure to provide a notice of change of address is of lesser gravity than, of course, the original underlying offense on which the duty to register is based. Where a maximum punishment of 60 days in jail and a maximum fine of \$500 was possible for the underlying offense, any greater sanction for the registration offense, we would assert, would be unconstitutional.

Additionally, Judge, we would submit that the Revised Code Section 2950.99(A)(1)(a)(iii), which imposes felony penalties for a registration offense that is based on a misdemeanor of the third degree, would be facially unconstitutional.

In addition to that, Judge, I would just let the Court know that we do have other matters and other pending issues in different courts, and if we prevail in those matters, Judge, we will probably be back here asking the Court to withdraw the plea.

(Dec. Tr. 3-4.)

{¶9} In his brief before this court, appellant presents a broader argument. He argues that it is unconstitutional (1) to impose S.B. 10's onerous registration requirements on a defendant whose underlying crime was a misdemeanor, and (2) to

impose felony punishment on a defendant whose underlying crime was a misdemeanor and who violates the registration requirements.

{¶10} Plaintiff-appellee, the state of Ohio ("appellee"), asserts that appellant's guilty plea waived these arguments. Appellee's argument is contrary to the Supreme Court of Ohio's holding in *State v. Wilson* (1979), 58 Ohio St.2d 52, paragraph one of the syllabus: "While a counseled plea of guilty is an admission of factual guilt which removes issues of factual guilt from the case, a defendant is not precluded from raising on appeal other issues which attack the constitutionality of the statute under which he has been convicted." See also *Menna v. New York* (1975), 423 U.S. 61, 62, 96 S.Ct. 241, 242; *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, ¶79; *State v. Atchley*, 10th Dist. No. 04AP-841, 2005-Ohio-1124, ¶15. But see *State v. Boatwright*, 7th Dist. No. 02 CA 176, 2003-Ohio-5010, ¶1, 8-14, and *State v. Yodice*, 11th Dist. No. 2001-L-155, 2002-Ohio-7344, ¶26-27 (both stating that a defendant's guilty plea waives appellate challenges to the constitutionality of the statute under which he was convicted). Nevertheless, a defendant can still forfeit a constitutional challenge by failing to raise it in the trial court. See *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus (holding that a constitutional issue not raised at trial is forfeited and "need not be heard for the first time on appeal"); accord *State v. Harris*, 10th Dist. No. 08AP-723, 2009-Ohio-1188, ¶3.

{¶11} Before addressing this question of whether appellant forfeited his constitutional challenge, we consider appellant's attempt to avoid the forfeiture issue altogether by characterizing his constitutional arguments as a jurisdictional challenge,

which he can raise at any time, regardless of whether he raised it below. Appellant's arguments concern the constitutionality of the law used to prosecute and sentence him, i.e., S.B. 10. In *Awan*, the Supreme Court of Ohio held that whether a statute used to prosecute a defendant is constitutional is not a question that relates to the trial court's jurisdiction, and it can be forfeited. *Id.* at 121-22. *Awan* "is a repudiation" of the contention that the constitutionality of a statute used to prosecute a defendant is never forfeited. *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 171. Accordingly, we characterize appellant's challenge as constitutional, and we turn to the question whether appellant forfeited that challenge by failing to raise it timely.

{¶12} As we noted, appellant argued to the trial court that it is unconstitutional to impose felony punishment upon a defendant whose underlying crime was a misdemeanor and who violates registration requirements. Before this court, appellant makes this same argument, but also adds the argument that it is unconstitutional to impose S.B. 10's onerous registration requirements on a defendant whose underlying crime was a misdemeanor. Because appellant did not make an overall challenge to the registration requirements in the trial court, and did not ask the court to dismiss the failing to register charge, we decline to address the question whether the registration requirements imposed by S.B. 10 are constitutional. See *Awan*, syllabus.

{¶13} As to the former argument, however—whether it was constitutional for the trial court to impose a felony sentence upon a defendant whose underlying crime was a misdemeanor, as authorized by R.C. 2950.99(A)(1)(a)(iii)—we conclude that appellant did not waive this sentencing issue by pleading guilty, and he raised it timely by raising

it at the sentencing hearing. See *State v. Mitchell*, 9th Dist. No. 22830, 2005-Ohio-6915, ¶8 ("[a]ppellant could not have waived a challenge to his sentence \* \* \* because the sentence was imposed after he pled guilty and after he signed the agreement"). The only question properly before us, then, is whether R.C. 2950.99(A)(1)(a)(iii), which applies felony sentencing to appellant, violates constitutional prohibitions against cruel and unusual punishment.

{¶14} The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment, and the amendment applies to the states pursuant to the Fourteenth Amendment. *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, ¶12. We should grant substantial deference to the broad authority that legislatures possess in determining the types and limits of punishments for crimes. *Id.* at ¶22. Thus, as a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment. *Id.* at ¶21.

{¶15} Appellant's felony sentence to community control with a possibility of 12-months imprisonment for violations of conditions falls within the terms of the sentencing statutes. See R.C. 2929.14(A), 2929.15, and 2929.17. Nevertheless, appellant asks us to disregard deference to the legislative authority in determining punishment for crimes and conclude that felony sentencing, pursuant to R.C. 2950.99, for his registration offense violates the cruel and unusual punishment clause as applied to him.

{¶16} Constitutional prohibition against cruel and unusual punishment is limited to extreme sentences that are grossly disproportionate to the crime. *Hairston* at ¶13. These sentences must be shocking to a reasonable person and to the community's

sense of justice. *Id.* at ¶14. Courts use a three-part analysis to assess whether the penalty imposed is disproportionate to the offense committed:

"First, we look to the gravity of the offense and the harshness of the penalty. \* \* \* Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. \* \* \* Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions." \* \* \*

*State v. Weitbrecht*, 86 Ohio St.3d 368, 371, 1999-Ohio-113, quoting *Solem v. Helm* (1983), 463 U.S. 277, 290-91, 103 S.Ct. 3001, 3010.

{¶17} A reviewing court need not reach the second and third prongs of the three-part test except in the rare case when a threshold comparison of the crime committed and the sentence imposed leads to an inference that the two are grossly disproportionate. *Weitbrecht* at 373, fn. 4, citing *Harmelin v. Michigan* (1991), 501 U.S. 957, 1005, 111 S.Ct. 2680, 2707 (Kennedy, J., concurring); accord *State v. Silverman*, 10th Dist. No. 05AP-837, 2006-Ohio-3826, ¶132.

{¶18} Appellant argues that felony sentencing, pursuant to R.C. 2950.99, acts as an unconstitutional enhancement to the punishment for his prior misdemeanor sex offense. Appellant relies on cases from other districts that held that the prosecution unconstitutionally used a felony charge to enhance punishment for misdemeanor conduct. See *State v. Gilham* (1988), 48 Ohio App.3d 293, 295 (concluding that a felony possession of criminal tools charge violated the cruel and unusual punishment clause because it improperly enhanced the punishment for the underlying misdemeanor

solicitation offense). See also *State v. Parson* (1990), 67 Ohio App.3d 201, 205-06 (concluding that the felony possession of criminal tools charge disproportionately enhanced the punishment for the underlying misdemeanor conduct). See also *State v. Harlan* (1995), 105 Ohio App.3d 756, 760 (holding that a felony possession of criminal tools charge was the prosecution's unconstitutional "attempt to bootstrap a felony charge from a misdemeanor").

{¶19} In *State v. Williams* (1993), 89 Ohio App.3d 288, 292, this court criticized these lines of cases and concluded that they should not be broadly interpreted. In any event, we conclude that the cases are inapposite. The cases pertain to the possession of criminal tools offense. The offense involves a person's intent to use an object to commit a crime; thus, the offense "contemplate[s] an intended 'underlying' crime." *Williams* at 291. Therefore, the cases that appellant relies upon are concerned with the misapplication of the possession of criminal tools charge to improperly enhance penalties for accompanying misdemeanor conduct. This is not the situation here. The trial court applied felony sentencing on appellant, pursuant to R.C. 2950.99, for the failure to register offense. Although appellant's sex offense triggered the registration requirements, punishment for failure to register violations flows not from the past sex offense, but from the failure to adhere to registration requirements, a new violation. *State v. Cook*, 83 Ohio St.3d 404, 421, 1998-Ohio-291. See also *Smith v. Doe* (2003), 538 U.S. 84, 101-02, 123 S.Ct. 1140, 1152 (noting that criminal prosecution for failure to comply with sex offender registration requirements is separate from the prosecution of the original sex offense). Thus, the trial court did not apply felony punishment, pursuant

to R.C. 2950.99, to enhance penalties for appellant's 2006 sex offense; the felony punishment flows from appellant's subsequent and independent registration violation.

{¶20} Appellant has also argued that R.C. 2950.99 unconstitutionally applies felony sentencing to him because the failure to register offense is "of lesser gravity" than the third-degree misdemeanor sex offense that triggered the registration requirements. (Dec. Tr. 3.) Appellant is incorrect. When a person commits a failure to register offense, he exhibits recidivist behavior given that (1) he already has a prior offense that triggered the registration requirements, and (2) the failure to register offense stems from a person's inability to follow the law and adhere to the registration requirements imposed upon him. See, e.g., R.C. 2929.12(D) (indicating that a defendant's prior criminal record and unfavorable response to previous sanctions demonstrates recidivism). The individual's status as a sex offender further exacerbates this recidivist factor. See *McKune v. Lile* (2002), 536 U.S. 24, 33-34, 122 S.Ct. 2017, 2024-25 (recognizing concerns that sex offenders have a high rate of recidivism). Severe penalties are warranted for recidivism. See *Solem*, 463 U.S. at 296, 103 S.Ct. at 3013. Given the recidivist factors, we conclude that it is not contrary to the cruel and unusual punishment clause for a failure to register offense to carry a felony penalty, despite a prior sex offense being a misdemeanor, just as an offender's prior misdemeanor would not necessarily bar felony sentencing under the cruel and unusual punishment clause for the offender's new crime of escaping the incarceration for the misdemeanor. See *State v. McKinney* (Aug. 16, 1995), 9th Dist. No. 2395-M (holding that a felony sentence imposed on a defendant for escaping while serving time for a

misdemeanor was not cruel and unusual punishment). Appellant notes that the failure to register violation would have been a misdemeanor under prior law. However, "[t]here are no guarantees that \* \* \* laws will not be modified." *State v. Smith*, 3d Dist. No. 5-07-23, 2008-Ohio-4778, ¶18.

{¶21} Finally, we note that the trial court could have sentenced appellant to 12 months in prison for his attempted failure to register. Instead, the court imposed only community control, a punishment that does not shock the conscience.

{¶22} Accordingly, we conclude that, when the trial court applied felony sentencing to appellant, pursuant to R.C. 2950.99, it did not impose a sentence grossly disproportionate to the failure to register offense. Therefore, we hold that R.C. 2950.99 does not violate the Eighth Amendment cruel and unusual punishment clause as applied to appellant. Appellant also provides a challenge under Section 9, Article I of the Ohio Constitution. This provision sets out the same restrictions as the Eighth Amendment. *Hairston* at ¶12. Thus, we similarly hold that R.C. 2950.99 does not violate the cruel and unusual punishment clause under the state constitution as applied to appellant.

{¶23} Consequently, we overrule appellant's single assignment of error. We affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

KLATT and CONNOR, JJ., concur.

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