[Cite as *State v. Metzger*, 2011-Ohio-3749.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2010-P-0077**
- vs -	:	
KEITH S. METZGER II,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Municipal Court, Ravenna Division, Case No. 2009 CRB 3008 R.

Judgment: Reversed and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Eric P. Finnegan*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellant).

Dan J. Weisenberger, 121 East Main Street, Ravenna, OH 44266 (For Defendant-Appellee).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, the state of Ohio, appeals from a decision of the Portage County Municipal Court, Ravenna Division, denying its motion to conduct a hearing in regard to the sexual offender classification of appellee, Keith S. Metzger II. We find merit in appellant's assignment of error and, thus, we reverse and remand this matter to the trial court for proceedings consistent with the opinion of this court.

{¶2} This case originates from a sexual encounter between appellee and a fourteen-year-old minor, B.L. The encounter came to light after B.L.'s mother intercepted a text message intended for her daughter. The message alerted her that B.L. had participated in sexual intercourse with appellee. When confronted by her mother, B.L. initially denied having sexual intercourse with appellee. The next day, however, B.L. admitted to having intercourse with appellee while spending the night at a friend's house.

{¶3} On November 13, 2009, appellee was charged with one count of unlawful sexual conduct with a minor, a violation of R.C. 2907.04(A). Appellee pled guilty to the offense charged and was sentenced, inter alia, to a $1,000 fine, a suspended sentence of 180 days in jail, and three years probation. At sentencing, the trial court denied appellant's motion to conduct an evidentiary hearing as to appellee's sexual offender classification under Ohio's Adam Walsh Act.

{¶4} Appellant filed a timely notice of appeal and asserts the following assignment of error for our review:

{¶5} "This Court's *de novo* review of the law on the issue of holding an evidentiary hearing to determine the issue of consent, prior to a sexual classification hearing, will find merit in reversing the trial court's decision."

{¶6} Appellee pled guilty to one count of unlawful sexual conduct with a minor, a violation of R.C. 2907.04(A), which states:

{¶7} "No person who is eighteen years of age or older shall engage in sexual conduct with another who is not the spouse of the offender, when the offender knows

the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard."

{¶8} Violation of R.C. 2907.04 is generally a felony of the fourth degree; however, as in this case, unlawful sexual conduct with a minor is a misdemeanor of the first degree "[i]f the offender is less than four years older than the other person." R.C. 2907.04(B)(2).

{¶9} At the outset, we note that Ohio's classification of sexual offenders was altered by the passage of Senate Bill 10, Ohio's Adam Walsh Act. With the passage of Senate Bill 10, the General Assembly enacted a new classification and registration scheme introducing a tier structure. As such, an individual may be labeled as a Tier I, II, or III offender. An individual's registration and classification obligations under Senate Bill 10 depend on his or her crime, not upon his or her threat to the community.

{¶10} According to R.C. 2950.01(E)(1), a "Tier I sex offender" is a "[a] sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any of the following sexually oriented offenses:

{¶11} "***

{¶12} "(b) A violation of section 2907.04 of the Revised Code when the offender is less than four years older than the other person with whom the offender engaged in sexual conduct, *the other person did not consent to the sexual conduct*, and the offender previously has not been convicted of or pleaded guilty to a violation of section 2907.02, 2907.03, or 2907.04 of the Revised Code or a violation of former section 2907.12 of the Revised Code." (Emphasis added.)

{¶13} As evidenced by the plain language of R.C. 2950.01(E)(1)(b), a violation of R.C. 2907.04 requires Tier I sex offender classification if "*the other person did not consent to the sexual conduct*." R.C. 2950.01, however, is silent as to whether a trial court must conduct a hearing to resolve the presence or lack of consent.

{¶14} In this case, appellee pled guilty to a violation of R.C. 2907.04, yet there was no hearing on the issue of consent nor did the trial court make a finding as to consent. In his brief, appellee argues that lack of consent is not an element of the offense to which he pled guilty and, therefore, he is not subject to the registration requirements under the law.

{¶15} At the sentencing hearing, the trial court made it clear that it *was not making* a finding of fact on the issue of consent. This is demonstrated by the following exchange between the trial court and appellee's counsel:

{¶16} "[Appellee's counsel]: Your Honor, I would – well, your Honor, I would like the – the record to reflect that the presentence investigation indicated that the – that my client does not qualify as a Tier I sexual offender or that – that he shouldn't fall into the class – whatever that last sentence is.

{¶17} "THE COURT: That's noted. That will be noted. It says right here in the P.S.I., 'It does not appear the defendant qualifies as a Tier I or Tier 2 Sex Offender Status according to the Ohio Revised Code.'

{¶18} "***

{¶19} "THE COURT: It indicates the offense was consensual and no prior convictions of 2907.02, 03, 04 or former 2907.12.

{¶20} "[Appellee's counsel]: That's sufficient, your Honor.

{¶21} "THE COURT: I mean, that's not a finding. I'm not making that finding by the court. We didn't have a hearing on that. I said we weren't going to have a hearing on that.

{¶22} "[Appellee's counsel]: I understand.

{¶23} "THE COURT: If the Court of Appeals tells me to have a hearing, we'll have a hearing and then I'll make that finding."

{¶24} The above exchange illustrates that the trial court had no intent to make a factual finding on the issue of consent. Nevertheless, such a finding is necessary to determine whether appellee is to be classified under R.C. 2907.04 as a Tier I sex offender. Once appellee pled guilty, the trial court had an obligation to make a determination as to consent. Although lack of consent is not an element of the crime to which appellee pled guilty, R.C. 2950.01(E)(1)(b) exempts only those individuals that, inter alia, engaged in consensual sexual conduct. See, e.g., *Miller v. Florida* (Fla.App.2009), 17 So.3d 778, 781-782 (finding that although the appellant entered a plea to a crime that did not contain an element addressing the issue of consent, the Adam Walsh Act "makes clear that only persons who have engaged in consensual conduct can be exempt from registering as sexual offenders," and, therefore, the trial court did not err in concluding that removal from the sex offender registry would conflict with federal law).

{¶25} Further, requiring a factual finding on the issue of consent is consistent with the holdings of the Ninth and Twelfth Appellate Districts. In *State v. Battistelli*, 9th Dist. No. 09CA009536, 2009-Ohio-4796, at ¶16, the Ninth Appellate District held that a hearing was necessary on the issue of consent. In *Battistelli*, the defendant pled no

contest to two counts of unlawful sexual conduct with a minor. Id. at ¶3. At the trial court level, the state motioned for a hearing to determine whether the individual had provided her consent to engage in sexual conduct with the defendant. Id. The trial court concluded that such a determination was not needed because consent was not an element of the crime. Id. The *Battistelli* court determined that requiring a factual finding on the issue of consent was not a violation of the defendant's due process rights since he would have the opportunity to be present at the hearing. Id.

{¶26} In *State v. Meade*, the Twelfth Appellate District followed the decision in *Battistelli*, supra. *State v. Meade*, 12th Dist. No. CA2009-07-024, 2010-Ohio-2435, at ¶28. In *Meade*, the defendant pled guilty to unlawful sexual conduct with a minor. Id. at ¶2. The trial court acknowledged that Senate Bill 10 "[r]equired a finding of nonconsent as a prerequisite to requiring a defendant convicted of misdemeanor unlawful sexual conduct to register as a sex offender." Id. at ¶29. Yet, the trial court refused to have such a hearing. Id. The *Meade* court reversed, holding that the trial court was required to make a finding on the issue of consent to fulfill "[i]ts statutory obligation to notify the defendant if he had a duty to register." Id. at ¶30.

{¶27} Like *Meade* and *Battistelli*, the trial court in this case made no finding on the issue of consent. The issue of consent was not resolved on the record by either a hearing or by stipulation. Without resolving whether B.L. consented to the sexual conduct perpetrated by appellee, the trial court is unable to fulfill its obligation under the statute. Specifically, if there was no consent, the statute requires the classification of Tier 1 to be made. If there was consent, appellee would be exempt from registering

under R.C. 2950.01(B)(2)(b). For this reason, the trial court must make a finding on the issue of consent.

{¶28} We find merit in appellant's assignment of error. Based on the opinion of this court, this matter is reversed and remanded to the Portage County Municipal Court, Ravenna Division, for further proceedings consistent with this opinion.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.