

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-07-024
 :
 - vs - : OPINION
 : 6/1/2010
 :
 ROBERT E. MEADE, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 2006-2061

Jessica A. Little, Brown County Prosecuting Attorney, Mary McMullen, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

R. Aaron Maus, 302 East Main Street, Batavia, Ohio 45103, for Andrea Meade

HENDRICKSON, J.

{¶1} Andrea Meade, the personal representative of the late Robert Meade, appeals a decision of the Brown County Court of Common Pleas classifying the decedent as a Tier I sex offender. For the reasons outlined below, we reverse the decision of the trial court and remand.

{¶2} In March 2006, the decedent was indicted on one count of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A), a fourth-degree felony. The decedent entered a plea of guilty to an amended charge in July 2009. Pursuant to the

plea agreement, the level of the offense was reduced from a fourth-degree felony to a first-degree misdemeanor. The decedent was sentenced to a 180-day jail term and classified as a Tier I sex offender.

{¶13} At the plea hearing, the decedent objected to the sex offender classification. Although guilty pleas typically waive such challenges, the trial court allowed the decedent to preserve the objection for appeal before accepting his guilty plea. The decedent passed away while his appeal was pending, whereupon his mother Andrea (hereinafter "appellant") was substituted as a party pursuant to App.R. 29(A). See *State v. McGettrick* (1987), 31 Ohio St.3d 138, 141-42. The appeal presents three assignments of error for our review.

{¶14} Assignment of Error No. 1:

{¶15} "APPLICABILITY OF R.C. 2950.01(A)(2), (A)(3), TO THE MISDEMEANOR OFFENSE OF R.C. 2907.04." [SIC]

{¶16} Assignment of Error No. 2:

{¶17} "APPLICABILITY TO R.C. 2950.01(B)(1), (B)(2) TO THE MISDEMEANOR OFFENSE OF [R.C.] 2907.04." [SIC]

{¶18} Assignment of Error No. 3:

{¶19} "THE TRIAL COURT ERRED INTERPRETING AND FINDING APPELLANT SUBJECT TO CLASSIFICATION AND REGISTRATION AS A SEX OFFENDER AS THE OFFENSE INVOLVING A CHILD VICTIM." [SIC]

{¶10} Because the three assignments of error pertain to the propriety of the decedent's sex offender classification, we shall address them together. In essence, appellant argues that the decedent should not have been classified as a sex offender. Appellant generally asserts that the misdemeanor-level offense of unlawful sexual conduct with a minor *cannot* qualify as a "sexually oriented offense" within the meaning

of R.C. 2950.01(A)(2). Even if the misdemeanor offense can be characterized as a "sexually oriented offense," appellant maintains that the decedent would be exempt from classification as a "sex offender" by operation of the exception contained in R.C. 2950.01(B)(2)(b).

{¶11} First, we must examine the text of the statutes relevant to this appeal in order to appropriately address appellant's assignments of error. The decedent was convicted of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A), which reads:

{¶12} "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."

{¶13} R.C. 2907.04(B) dictates the level of the offense when a perpetrator engages in unlawful sexual conduct with a minor. Relevant to the present matter, subsection (2) states:

{¶14} "[Unless the offender previously has been convicted of or pleaded guilty to a predicate offense], if the offender is less than four years older than the other person, unlawful sexual conduct with a minor is a misdemeanor of the first degree."

{¶15} At the plea hearing, the state stipulated that the decedent was less than four years older than the victim, G.J. The state did not allege that the decedent had been previously convicted of a predicate offense. Accordingly, the decedent pled guilty to and was convicted of first-degree misdemeanor unlawful sexual conduct with a minor.

{¶16} R.C. 2950.01 defines numerous key terms used in Ohio's Adam Walsh Act. As stated, appellant maintains that the misdemeanor-level offense of unlawful sexual conduct with a minor *cannot* qualify as a "sexually oriented offense." R.C.

2950.01(A)(2) defines "sexually oriented offense" to *include*:

{¶117} "A violation of section 2907.04 of the Revised Code [(unlawful sexual conduct with a minor)] 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 predicate offense.]" (Emphasis added.)

{¶118} The phrase "sex offender" contemplates "a person who is convicted of, pleads guilty to, has been convicted of, [or] has pleaded guilty to * * * any sexually oriented offense." R.C. 2950.01(B)(1). Certain offenders may be excluded from this definition. R.C. 2950.01(B)(2) *excludes* the following from the definition of "sex offender:"

{¶119} "[A] person who is convicted of [or] pleads guilty to * * * a sexually oriented offense *if the offense involves consensual sexual conduct or consensual sexual contact* and either of the following applies:

{¶120} "(a) The victim of the sexually oriented offense was eighteen years of age or older * * *.

{¶121} "(b) The victim of the offense was thirteen years of age or older, and the person who is convicted of [or] pleads guilty to* * * the sexually oriented offense is not more than four years older than the victim." (Emphasis added.)

{¶122} Finally, R.C. 2950.01(E)(1)(b) defines "Tier I sex offender" to *include* a sex offender who has pled guilty to:

{¶123} "A violation of section 2907.04 of the Revised Code [(unlawful sexual conduct with a minor)] 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 predicate offense]." (Emphasis added.)

{¶24} The plain wording of these statutes contravenes appellant's initial argument. Nowhere in the above-quoted definition of "sexually oriented offense" is there an exemption for a misdemeanor-level violation of R.C. 2907.04. Rather, the crucial factor in determining whether a misdemeanor violation of R.C. 2907.04 falls within the definition of a "sexually oriented offense" is whether the victim consented to the sexual conduct or contact. R.C. 2950.01(A)(2), (B)(2), (E)(1)(b). See, also, *State v. Battistelli*, Lorain App. No. 09CA009536, 2009-Ohio-4796, ¶2. If the sexual conduct or contact was nonconsensual, the offender must register as a Tier I sex offender. R.C. 2950.01(E)(1)(b). See, also, *Battistelli* at ¶2.

{¶25} The facts of the present case indicate that R.C. 2950.01(B)(2)(b) may have applied to exempt the decedent from sex offender registration. At 14 years old, G.J. was "thirteen years of age or older" at the time of the offense, and the state stipulated that the decedent was "not more than four years older than [G.J.]" at the time of the offense. See R.C. 2950.01(B)(2)(b). As the text of the exception specifies, however, the sexual conduct or contact must have been consensual in order for the exception to apply. The record does not contain *any* findings regarding whether G.J. consented to the sexual conduct or contact perpetrated by the decedent. This omission prevents us from deciphering whether the decedent would have been exempt from sex offender registration requirements by operation of R.C. 2950.01(B)(2)(b). Consent thus remains an open issue requiring resolution by the trial court.

{¶26} The state urges us to find that the decedent committed a "sexually oriented offense" within the meaning of R.C. 2950.01(A)(2) because G.J. could not legally consent to sexual conduct or contact at age 14. The state argues that G.J. was incapable of consenting because the legal age of consent in Ohio for purposes of sexual

conduct or contact is 16 years old. Consequently, the state concludes, the sexual conduct was nonconsensual and the decedent was obligated to register as a sex offender.

{¶27} Were we willing to accept the state's argument, the wording employed by the legislature in R.C. 2950.01(B)(2)(b) would be rendered nonsensical. The legislature specifically referred to the victim age of 13 in crafting this exception to the "sex offender" definition. The exception applies where there is consent, the victim is 13 years of age or older, and there is less than a four-year age difference between the victim and the offender. Had the legislature intended to limit victim consent to age 16, R.C. 2950.01(B)(2)(b) presumably would have been crafted to reflect such a limitation. We are thus unpersuaded by the state's argument.

{¶28} We find direction in resolving this appeal from a decision rendered by the Ninth District Court of Appeals. In *State v. Battistelli*, 2009-Ohio-4796, the defendant entered into a plea agreement wherein he pled no contest to two counts of misdemeanor unlawful sexual conduct with a minor. The victim was between 13 and 15 years of age at the time of the offense and Battistelli was less than four years older than the victim. Following Battistelli's conviction, the state filed a motion requesting that the trial court notify him of his duty to register as a sex offender. The state's motion also requested that the court hold a hearing to determine whether the victim consented to the sexual conduct.

{¶29} The trial court acknowledged that Ohio's Adam Walsh Act required a finding of nonconsent as a prerequisite to requiring a defendant convicted of misdemeanor unlawful sexual conduct to register as a sex offender. However, the court refused to conduct a hearing on the consent issue. The court found that the Adam Walsh Act did not include "any directive as to how and when a determination is to be

made regarding the issue of consent." Id. at ¶3. The trial court concluded that Battistelli was not subject to registration under the law as written since lack of consent was not an element of his offense.

{¶30} On appeal, the Ninth District reversed. Citing R.C. 2950.03(A)(2), the appellate court noted that trial courts have a statutory obligation to notify defendants sentenced after the effective date of the Adam Walsh Act regarding their duty to register as sex offenders.¹ In order to decipher whether Battistelli had a duty to register, the trial court necessarily had to determine whether the victim consented to the sexual conduct. Citing the inherent powers doctrine, the appellate court reasoned that the legislature implicitly authorized the trial court to conduct a hearing on the consent issue to permit the court to carry out its statutory obligation to notify the defendant if he had a duty to register. *Battistelli* at ¶13-14. The Ninth District ordered the trial court to provide notice and hold a hearing on the issue of consent in order to carry out its obligation to Battistelli. Id. at ¶16.

{¶31} We adopt the rationale and approach espoused by the *Battistelli* court. The record in the case at bar indicates that the decedent's classification as a sex offender may have been improper. Due to the unresolved issue of victim consent, it is unclear whether the decedent committed a "sexually oriented offense" as contemplated by R.C. 2950.01(A)(2) or whether he would have been exempt from sex offender registration requirements pursuant to R.C. 2950.01(B)(2)(b). *Battistelli* at ¶11. Accordingly, this case must be remanded for a resolution of the consent issue. See id. at ¶4, 16.

1. R.C. 2950.03(A)(2) provides, in pertinent part: "Each person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense or a child-victim oriented offense and who has a duty to register * * * shall be provided notice in accordance with this section of the offender's [registration] duties * * *. * * * Regardless of when the person committed the sexually oriented offense or child-victim oriented offense, if the person is an offender who is sentenced on or after January 1, 2008 for

{¶32} Appellant's first, second, and third assignments of error are sustained.

{¶33} The portion of the trial court's decision classifying the decedent as a Tier I sex offender is reversed. The matter is remanded for the limited purpose of conducting an evidentiary hearing to ascertain whether the sexual conduct or contact between the decedent and G.J. was consensual. The answer to that question will dictate whether the decedent's misdemeanor violation of R.C. 2907.04 qualified as a "sexually oriented offense" requiring him to register as a Tier I sex offender. We do not disturb the decedent's conviction or the remainder of his sentence.

{¶34} Reversed and remanded.

YOUNG, P.J., and BRESSLER, J., concur.