

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23810
v.	:	T.C. NO. 99 CR 984
GREGORY J. GIMBRONE	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

**OPINION**

Rendered on the 11<sup>th</sup> day of February, 2011.

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GREGORY J. GIMBRONE, #381-192, P. O. Box 5500, Chillicothe, Ohio 45601  
Defendant-Appellant

FROELICH, J.

{¶ 1} Gregory J. Gimbrone appeals from a judgment of the Montgomery County Court of Common Pleas, which reclassified him as a Tier III sex offender upon resentencing him. For the following reasons, the trial court’s judgment will be reversed insofar as it reclassified Gimbrone as a Tier III sex offender and will be modified to reflect his prior

classification as a sexually oriented offender.

## I

{¶ 2} In 1999, Gimbrone pled guilty by a bill of information to one count of rape, in violation of R.C. 2907.02(A)(2), an aggravated felony of the first degree. The bill of information stated that the offense occurred between September 29, 1995, and June 30, 1996. In accordance with the sentencing statute in effect prior to July 1, 1996, the trial court sentenced Gimbrone to an indefinite term of imprisonment of eight to twenty-five years. The trial court also advised him that “bad time” may be added to his sentence by the parole board and that, following his release from prison, he “will/may serve a period of post-release control under the supervision of the parole board[.]” Gimbrone was designated a sexually oriented offender.

{¶ 3} In October 2008, Gimbrone was brought before the trial court for resentencing in order to correct the court’s imposition of post-release control. The court re-imposed the same indefinite sentence of eight to twenty-years, designated him a sexually oriented offender, and informed him about “bad time.” With regard to post-release control, the new sentencing entry stated: “Pursuant to ORC 2929.191, the defendant was brought before the court on October 21, 2008, at which time the Court notified the defendant that, as a part of this sentence, the defendant WILL be supervised by the Parole Board for a period of FIVE (5) years Post-Release Control after the defendant’s release from imprisonment.”

{¶ 4} Gimbrone appealed from his sentence, arguing that the court’s imposition of “bad time” and a mandatory period of post-release control (as opposed to parole as it existed at the time of his offense) was contrary to law and beyond the court’s authority. We agreed.

Because Gimbrone’s crimes occurred prior to July 1, 1996, the effective date of Senate Bill 2, we held that post-release control and “bad time” did not apply to him; we further noted that “bad time” has been held to be unconstitutional. *State v. Gimbrone*, Montgomery App. No. 23062, 2009-Ohio-6264. In conclusion, we stated:

{¶ 5} “The portions of the sentencing entry that informed Gimbrone that ‘bad time’ may be added to his sentence and that he is subject to post-release control will be vacated. The sentence will be modified by vacating its provisions concerning ‘bad time’ and post-release control and, as modified, the judgment will be affirmed. The case will be returned to the trial court on our special mandate to notify the Adult Parole Authority of the modified sentence.”

{¶ 6} On December 16, 2009, the trial court conducted another sentencing hearing. The court reimposed the sentence of eight to twenty-five years. It further designated Gimbrone a Tier III sex offender, as defined by R.C. 2950.01 as modified by Senate Bill 10.<sup>1</sup>

{¶ 7} Gimbrone appeals from the trial court’s judgment.

## II

{¶ 8} Gimbrone’s sole assignment of error states:

{¶ 9} “APPLYING AWA/SB10 ADDS [SIC] PROVISION OF RECLASSIFICATION FOR SEX OFFENSE COMMITTED BEFORE JANUARY 1, 2008

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<sup>1</sup>Ohio’s version of the federal Adam Walsh Child Protection and Safety Act (Senate Bill 10) was enacted in 2007. R.C. 2950.01, et seq. Among other changes, Senate Bill 10 created a three-tiered system, in which a sex offender’s classification is determined based on the offense of which the offender was convicted. Under the Act, an offender who was convicted of rape would be classified as a Tier III sex offender, whereas, under the prior law, Gimbrone was classified as a sexually-oriented offender.

WAS CONTRARY TO LAW AND BEYOND LEGISLATIVE AUTHORITY AND JURISDICTION.”

{¶ 10} Gimbrone claims that the trial court erred in designating him a Tier III sex offender under Ohio’s version of the Adam Walsh Act (Senate Bill 10). He argues that his reclassification violates the principle of separation of powers, as stated in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, that the trial court cannot apply a law that was enacted after Senate Bill 2, and that the trial court did not comply with our mandate upon remand. This area of law has indeed been “fluid,” but we agree that Gimbrone was improperly reclassified for several reasons.

{¶ 11} First, our remand in Gimbrone’s prior appeal did not require the trial court to conduct a new sentencing hearing. Indeed, no action was required of the trial court other than to notify the Adult Parole Authority that Gimbrone was not subject to post-release control. Accordingly, the trial court exceeded our limited mandate when it held a new sentencing hearing and reclassified Gimbrone as a Tier III sex offender.

{¶ 12} Second, where resentencing is required due to an error in the imposition of post-release control, the trial court is not authorized to address a defendant’s previously-imposed sex offender classification. *State v. Gibson*, Champaign App. No. 2009 CA 47, 2010-Ohio-3447. In *Gibson*, the defendant was sentenced for rape in 2001, prior to the enactment of the Adam Walsh Act, but he challenged the validity of his sentence to post-release control after the Act was in effect. We held that, although a defendant is informed of his sex offender classification at sentencing and it is included in the trial court’s judgment entry, his classification “is a separate and distinct proceeding, which is not affected

by the validity of his sentencing.” *Id.* at ¶22. Thus, we concluded that the validity of a sentence, including whether the sentence was void because post-release control had not been properly imposed, “would not affect the validity of [a defendant’s] classification as a sexual predator.” *Id.* at ¶28. See, also, *State v. Williams*, 177 Ohio App.3d 865, 2008-Ohio-3586, ¶11-12; *State v. Hudson*, Montgomery App. No. 23776, 2010-Ohio-5386; *State v. Poissant*, Fairfield App. No. 08 CA7, 2009-Ohio-4235, ¶45. Gimbrone’s classification as a sexually oriented offender was likewise unaffected by the error that rendered the post-release control portion of his sentence void. See *State v. Pearson*, Montgomery App. No. 23974, 2011-Ohio-245.

{¶ 13} At the trial court’s first resentencing hearing in October 2008, which addressed the error in the imposition of post-release control, the court correctly left Gimbrone’s classification as a sexually oriented offender unchanged. Upon remand following the appeal from that judgment, the trial court should not have reconsidered Gimbrone’s sex offender classification.

{¶ 14} Our conclusion is supported by the Supreme Court of Ohio’s recent decision in *State v. Fischer*, \_\_\_\_\_ Ohio St.3d \_\_\_\_\_, 2010-Ohio-6238, which narrowed the scope of resentencing required to correct an improperly-imposed term of post-release control. As we stated in *Pearson*, in which we held that the trial court improperly reclassified the defendant as a Tier III sex offender during a resentencing hearing held for the purpose of properly imposing post-release control:

{¶ 15} “In *Fischer*, the Supreme Court concluded that the required resentencing when a term of post-release control was not properly imposed ‘does not permit

reexamination of all perceived errors at trial or in other proceedings prior to sentencing.’  
Id. at ¶25. ‘[W]hen a judge fails to impose a statutorily mandated postrelease control as part of a defendant’s sentence, that *part* of the sentence is void and must be set aside. Neither the Constitution nor common sense commands anything more.’ (Emphasis sic.)  
Id. at ¶26. In other words, the Supreme Court has modified its view that a full, de novo sentencing hearing is required in such a situation; only the portion of the sentence related to post-release control is void, and only that portion ‘may be vacated or otherwise amended.’  
Id. at ¶28. Pursuant to *Fischer*, it is now apparent that the trial court’s re-sentencing should have been confined to the imposition of a proper term of post-release control.” *Pearson* at ¶11.

{¶ 16} In summary, the trial court erred when, upon remand, it reclassified Gimbrone as a Tier III sex offender under the Adam Walsh Act. Gimbrone’s prior classification as a sexually oriented offender must be reinstated.

{¶ 17} The assignment of error is sustained.

### III

{¶ 18} The trial court’s judgment will be reversed insofar as it reclassified Gimbrone as a Tier III sex offender and will be modified to reflect his prior classification as a sexually oriented offender. The trial court need not conduct another hearing to effectuate this holding; however, the trial court shall file an appropriate entry notifying the necessary authorities of this court’s decision reinstating Gimbrone’s classification as a sexually oriented offender.

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FAIN, J. and DONOVAN, J., concur.

Copies mailed to:

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Hon. Frances E. McGee