[Cite as *State v. Downing*, 2009-Ohio-6482.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 09AP-420
v.	:	(C.P.C. No. 04CR-08-5691)
James E. Downing,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 10, 2009

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellant.

Shaw and Miller, and *Mark J. Miller*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, P.J.

I. Introduction

{¶1} This appeal presents the question whether R.C. 2950.11(F)(2) requires a trial court to hold a hearing and consider statutory factors before exempting a Tier III sex offender from community notification requirements. The offender at issue was convicted of rape and gross sexual imposition ("GSI") in 2005. By joint

recommendation and without a hearing as to his designation, he was classified under prior law as a sexually oriented offender, a designation that did not subject him to community notification requirements. Under current law, however, he is subject to community notification, unless a court exempts him. On these facts, we conclude that the trial court erred by exempting the offender from community notification without holding a hearing and considering the factors described in R.C. 2950.11(F)(2).

II. Background

{¶2} In June 2005, appellee, James Downing, pleaded guilty to one count of rape (without force) and one count of GSI. The prosecution and defense jointly recommended that the trial court impose an eight-year prison term, which included a five-year term on the rape count and a consecutive three-year term on the GSI count. The parties also recommended that Downing be found a sexually oriented offender.

{¶3} The law existing at that time gave trial courts some discretion, depending on the crime committed and the court's findings, to designate a sex offender as a sexually oriented offender, habitual sex offender or sexual predator, for purposes of imposing graduated registration and community notification requirements. An offender could only be labeled as a sexual predator, and be subjected to community notification requirements, if the trial court held a hearing at which the offender could testify, present evidence, and call witnesses, and after which the trial court made certain findings. See *State v. McClellan*, 10th Dist. No. 01AP-1462, 2002-Ohio-5164, ¶18-19, construing former R.C. 2950.09(B)(1). See also former R.C. 2950.09(E)(2) (allowing a trial court to subject a habitual sex offender to community notification). A trial court could designate

an offender as a sexually oriented offender without holding a hearing, however. *McClellan* at ¶19. Here, without holding a hearing to determine whether Downing was a sexual predator or a habitual sex offender, the trial court followed the parties' joint recommendation, found Downing to be a sexually oriented offender, and imposed an eight-year prison term.

{¶4} In 2007, the Ohio General Assembly passed Senate Bill 10 ("S.B. 10") in response to the federal Adam Walsh Act. S.B. 10 created a new scheme for classifying a sex offender based on the crime committed and uses three tiers for purposes of imposing registration and community notification requirements. A Tier I offender must register for 15 years and verify his address annually. A Tier II offender must register for 25 years and verify his address every 180 days. A Tier III offender must register for life and verify his address every 90 days. See R.C. 2950.05, 2950.06. A Tier III offender is also subject to community notification by the sheriff. R.C. 2950.11. By virtue of his conviction for rape, Downing was reclassified as a Tier III offender under the new law.

{¶5} As a Tier III offender, Downing is subject to post-release community notification requirements. R.C. 2950.11 allows a Tier III offender to avoid notification requirements "if a court finds at a hearing after considering the factors described" in that section that the person would not have been subject to community notification requirements under prior law. See R.C. 2950.11(F)(2). In essence, the new law requires the court to consider the same factors the court would have considered in determining whether the offender was a sexual predator or habitual sex offender under prior law.

{¶6} On January 21, 2009, Downing filed a petition to contest application of S.B. 10. In that petition, he raised constitutional and other challenges to his Tier III classification. He also filed a motion for immediate relief from community notification requirements under R.C. 2950.11(F)(2). Appellant, state of Ohio ("the State"), responded to the petition and motion.

{¶7} On March 27, 2009, without holding a hearing, the trial court issued a decision and entry granting Downing's motion to exempt him from community notification requirements. In its decision, the trial court adopted a prior decision of the Franklin County Court of Common Pleas in *State v. Toles* (Sept. 9, 2008), Franklin C.P. No. 00CR-02-875, in which the court held that, if prior to the effective date of S.B. 10, "a party had not been subject to community notification, that party is still not subject to community notification" under S.B. 10. Adopting *Toles*, the trial court concluded that, because Downing had been classified as a sexually oriented offender under prior law, and therefore was not subject to community notification, Downing "is not subject to community notification now."

III. Question Presented

{¶8} The State filed a timely appeal and raises the following assignment of error:

> THE COMMON PLEAS COURT ERRED IN DETERMINING THAT RELIEF FROM COMMUNITY NOTIFICATION UNDER R.C. 2950.11(F)(2) IS DETERMINED SOLELY BY THE SEX OFFENDER'S CLASSIFICATION UNDER PRIOR LAW.

IV. Analysis

{¶9} In its assignment of error, the State contends that the trial court erred by determining, without a hearing and consideration of statutory factors, that Downing is exempt from community notification requirements. Because this presents a question of law, we review the trial court's decision de novo.

{¶10} As we noted, S.B. 10 imposes community notification requirements on Tier III offenders. Pursuant to R.C. 2950.11(F)(2), however, community notification requirements do not apply "if a court finds at a hearing after considering the factors described in this division that the person would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment." In determining whether an offender would have been subject to the notification requirements under prior law, the court must consider the following factors: (1) the offender's age; (2) the offender's prior criminal record regarding all offenses; (3) the victim's age; (4) whether there were multiple victims; (5) whether the offender used drugs or alcohol to impair the victim or to prevent the victim from resisting; (6) if previously convicted, whether the offender had completed a sentence for a sexual offense and whether the offender participated in available programs for sexual offenders; (7) any mental illness or mental disability; (8) the nature of the sexual conduct and whether the conduct was part of a demonstrated pattern of abuse; (9) whether the offender displayed cruelty during the offense; (10) whether the offender would have been a habitual sex offender under prior law; and (11) any

additional behavioral characteristics that contribute to the offender's conduct. R.C. 2950.11(F)(2)(a) through (k).

{¶11} Here, it is undisputed that the trial court did not exempt Downing from community notification requirements "at a hearing after considering the factors" described in R.C. 2950.11(F)(2). Rather, the court held that, as a matter of law, because Downing was not subject to community notification under prior law, he is not subject to community notification now.

{¶12} In reaching this decision, as we noted, the trial court adopted a prior decision of the Franklin County Court of Common Pleas in *Toles*, which is pending on appeal before this court. Important for our purposes here, the *Toles* court considered the circumstances under which the community notification requirements apply. The *Toles* court acknowledged three groups of offenders.

{¶13} First, the court considered those offenders who had had the benefit of a hearing, pursuant to former R.C. 2950.09, and had been found to be a sexual predator. For those offenders, the *Toles* court held, the community notification requirements applied unless they were suspended after a hearing held pursuant to R.C. 2950.11(H). As detailed in *Toles*, R.C. 2950.11(H) allows an offender, prosecuting attorney or sentencing judge to file a motion to suspend the requirements and sets out detailed requirements for the proceedings.

{¶14} Second, the court considered those offenders, like Toles, who had had the benefit of a hearing under former R.C. 2950.09 and had been found by a court not to be a sexual predator. The court concluded that, as a matter of law, community notification

requirements did not apply to those offenders because a court had already made the determination required by R.C. 2950.11(F)(2). No further hearing was required.

{¶15} Finally, the court considered those offenders, like Downing, who had not been subject to a hearing to determine whether the offender was a sexual predator. Instead, as here, "the State and defense counsel simply waived any further need for a hearing by stipulating to the defendant's status as a sexually oriented offender. In these situations the State sought only the minimum classification that would attach by law without the need to have a hearing." For these offenders, the *Toles* court concluded that "consistency dictates that those for whom the State did not even seek a sexual-predator determination should likewise not be subject to the community-notification requirements." Therefore, where, as here, the parties at the original sentencing waived any hearing requirement and simply recommended that a defendant be found to be a sexually oriented offender, *Toles* holds that no hearing is required under R.C. 2950.11(F)(2) before a trial court may exempt the offender from community notification requirements under current law.

{¶16} The Eighth District Court of Appeals has reached a similar conclusion. See *Gildersleeve v. State*, 8th Dist. No. 91515, 2009-Ohio-2031, ¶77 (holding that Tier III offenders who were not subject to community notification under former law are exempt from community notification under S.B. 10, and, in those situations, a trial "court need not hold an evidentiary hearing or consider the R.C. 2950.11(F)(2) factors"). Accord *In re J.M.*, 8th Dist. No. 91800, 2009-Ohio-2880, ¶18-19.

{¶17} Our analysis begins with the principle that we must apply, not interpret, an unambiguous statute. *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph five of the syllabus. Unless the General Assembly defines words or expresses a contrary intent, we must apply a plain and ordinary meaning to words contained in a statute. *Cincinnati Metro. Hous. Auth. v. Morgan*, 104 Ohio St.3d 445, 2004-Ohio-6554, ¶6, citing *Coventry Towers, Inc. v. Strongsville* (1985), 18 Ohio St.3d 120, 122, and *Youngstown Club v. Porterfield* (1970), 21 Ohio St.2d 83, 86.

{¶18} Here, R.C. 2950.11(F)(2) requires a trial court to make a finding about whether to exempt an offender from community notification requirements "at a hearing after considering the factors" described in the statute. Applying the plain meaning of the words contained in the statute, we may only conclude that the trial court erred by exempting Downing from community notification without first holding a hearing and considering the statutory factors.

{¶19} We acknowledge that, in some cases, such a hearing might provide little benefit. Where, for example, a sentencing court has already, and perhaps recently, held a hearing to determine whether an individual is a sexual predator, it may not be particularly useful to hold another hearing to consider the same factors. Application of R.C. 2950.11(F)(2) to such facts, however, is beyond the scope of this decision. In this case, no hearing has ever been held. At sentencing in 2005, the parties stipulated to Downing's designation as a sexually oriented offender, and the trial court imposed the designation without a hearing on the designation and without consideration of the

statutory factors. It would not, as Downing contends, be nonsensical to require a hearing and consideration of statutory factors under these circumstances.

{¶20} In any event, we need not consider the wisdom of S.B. 10 as applied to Downing or any other offender. See *Bernardini v. Bd. of Edn. of the Conneaut Area City School Dist.* (1979), 58 Ohio St.2d 1, 4 ("whether an act is wise or unwise is a question for the General Assembly and not this court"). R.C. 2950.11(F)(2) requires that a hearing be held and that statutory factors be considered before an offender may be exempted from community notification. Because neither the trial court nor any other court held a hearing to consider the statutory factors, the trial court erred by exempting Downing from community notification without doing so. Accordingly, we sustain the State's assignment of error.

V. Conclusion

{¶21} In conclusion, we hold that, where no hearing was held before an offender was designated as a sexually oriented offender under prior law, R.C. 2950.11(F)(2) requires a trial court to hold a hearing and consider statutory factors before exempting the offender from community notification requirements. We sustain the State's assignment of error, reverse the judgment of the Franklin County Court of Common Pleas, and remand this matter to the trial court for further proceedings consistent with this decision and applicable law.

Judgment reversed and cause remanded.

BRYANT and KLATT, JJ., concur.