

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-141 (C.P.C. No. 00CR-02-0739)
Willie A. Adams,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on January 21, 2010

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for
appellant.

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

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, state of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas determining defendant-appellee, Willie A. Adams, who was convicted in July 2000 of misdemeanor corruption of a minor in violation of R.C. 2907.04, is not subject to reclassification or a duty to register as a "sex offender" under any tier of Ohio's current sex offender registration and notification laws, as set forth in

R.C. Chapter 2950 and implemented on January 1, 2008 pursuant to the enactment of Senate Bill 10 ("S.B. 10"). The state assigns a single error:

THE TRIAL COURT ERRED IN CONCLUDING THAT AN OFFENDER CONVICTED OF A FIRST-DEGREE MISDEMEANOR OFFENSE OF CORRUPTION OF A MINOR (NOW UNLAWFUL SEXUAL CONDUCT WITH A MINOR) DID NOT COMMIT A SEXUALLY ORIENTED OFFENSE AS A MATTER OF LAW AND IS NOT SUBJECT TO ANY CLASSIFICATION UNDER THE NEW SEX-OFFENDER REGISTRATION SCHEME.

Because defendant's underlying conviction offense does not constitute a "sexually oriented offense" under Ohio's sex offender registration and notification scheme enacted pursuant to S.B. 10 ("new law"), the trial court properly concluded defendant is not subject to classification or a duty to register as a "sex offender" under Ohio's existing law.

I. Procedural History

{¶2} R.C. 2907.04 prohibits a person 18 years of age or older from engaging in sexual conduct with a minor, who is not the offender's spouse, when the offender knows the minor is 13 to 16 years of age or is reckless in that regard. At the time of defendant's offense and conviction, as well as after the statute's amendment in October 2000, the penalty provision of R.C. 2907.04 provided that the offense was a first-degree misdemeanor when "the offender is less than four years older" than the victim; it is a felony if the age difference is greater. R.C. 2907.04. In July 2000, pursuant to a guilty plea the parties negotiated, defendant was convicted of the first-degree misdemeanor offense of corruption of a minor in violation of R.C. 2907.04.

{¶3} In accordance with the parties' stipulation, the sentencing court found defendant to be a "sexually oriented offender" under the former version of R.C. Chapter

2950, a designation which required him to register annually with the sheriff for a period of ten years. See former R.C. 2950.07(B)(3). The trial court sentenced defendant to six months in jail, immediately suspended the jail term, sentenced defendant to two years probation, and ordered defendant to complete a sex offender program and to have no contact with the victim or her family. The sentencing court journalized its decision in a July 26, 2000 judgment entry.

{¶4} In response to Congress' passing the Adam Walsh Child Protection and Safety Act of 2006, Ohio's legislature enacted the new law in June 2007, creating a new sex offender registration and notification scheme in R.C. Chapter 2950, effective on January 1, 2008. For each person classified as a sex offender under former R.C. Chapter 2950 and subject to its registration requirements when the new law was enacted, R.C. 2950.031(A)(1) required the Attorney General to determine the offender's new classification as a Tier I, Tier II or Tier III sex offender under R.C. Chapter 2950 "as it will exist under the changes that will be implemented on January 1, 2008." R.C. 2950.031(A)(1). Under the new law, a Tier I sex offender must register for 15 years, a Tier II sex offender must register for 25 years, and a Tier III sex offender must register for life and is subject to community notification. See R.C. 2950.07(B).

{¶5} Following the enactment of the new law, the Ohio Attorney General made a determination pursuant to R.C. 2950.031(A)(1) that defendant should be reclassified from a "sexually oriented offender" under the former law to a "Tier I sex offender" under the new law. In response to the Attorney General's reclassification decision, defendant filed a petition and "motion for preliminary disposition" in the trial court, requesting a hearing under R.C. 2950.031(E) to contest the Attorney General's application to him of the new

registration requirements in the new R.C. Chapter 2950. Defendant contended his July 2000 conviction under R.C. 2907.04 for the misdemeanor offense of corruption of a minor, now termed unlawful sexual conduct, is not a "sexually oriented offense" under the new definition in R.C. 2950.01(A). Because a "sexually oriented offense" as defined in the new law is the necessary predicate to placing defendant in one of the tiers of the new law, defendant argued he is not subject to any classification or duty to register as a "sex offender" on and after January 1, 2008.

{¶6} In response to defendant's motion, the state contended the Attorney General properly determined defendant is a Tier I sex offender under R.C. 2950.01(A)(2) and 2950.01(E)(1)(b) because an evidentiary hearing would show that the victim, a 15-year-old minor, did not consent to defendant's sexual conduct. The state further argued defendant could be classified as a Tier II sex offender under R.C. 2950.01(A)(3) and 2950.01(F)(1)(b) because the record of defendant's conviction demonstrates he actually is more than four years older than the victim, notwithstanding his guilty plea to and conviction of the misdemeanor offense under R.C. 2907.04 that requires the offender be "less than four years older" than the victim.

{¶7} Following a hearing on the matter pursuant to R.C. 2950.031(E), the trial court concluded the state's negotiated agreement and the elements of the conviction offense bind the state, so the state may not "introduce facts outside the record of conviction in order to demonstrate specific elements described in R.C. 2950.01(A)(2) or (3)." Concluding defendant "has *not* committed a 'sexually oriented offense,' as defined by R.C. 2950.01(A), and thus is not subject to classification as a sex offender under any tier," the court ordered that defendant "shall no longer be subject to classification as a sex

offender" and "shall no longer be subject to any duty, based upon his 2000 conviction, to register, record a change of address, or otherwise comply with provisions of Chapter 2950." (Emphasis sic.) (Jan. 13, 2009 Decision and Entry.)

II. Assignment of Error

{¶8} In its appeal to this court, the state contends the trial court erred in ruling the plea agreement binds the state. The state argues that R.C. 2950.031(A)(1) of the new law expressly authorizes the Attorney General to initially "determine" the offender's classification, which necessarily includes the "lack of consent" and age-difference issues addressed in R.C. 2950.01(A)(2) and (3). The state similarly argues the sex offender classification issues require the trial court to go beyond the four corners of a conviction under R.C. 2907.04 to ultimately determine whether (1) consent was absent for purposes of R.C. 2950.01(A)(2), or (2) the offender was more than four years older than the victim for purposes of R.C. 2950.01(A)(3). Accordingly, the state asserts, the trial court should have held an evidentiary hearing on the "consent" and "real age gap" issues.

{¶9} Ohio's sex offender registration and notification scheme in effect at the time of defendant's offense and conviction provided that any violation of R.C. 2907.04, including a first-degree misdemeanor violation of the statute, was a "sexually oriented offense." See former R.C. 2950.01(D)(2)(a). By contrast, under Ohio's new law implemented on January 1, 2008, not all persons who were convicted of or pleaded guilty to offenses of a sexual nature are subject to reclassification and registration as a sex offender. Rather, only those persons who were convicted of or pleaded guilty to a "sexually oriented offense" as defined in R.C. 2950.01(A) under the new law are subject to reclassification and registration as a "sex offender." See R.C. 2950.01(B); R.C.

2950.031; R.C. 2950.032. Then, largely depending on which "sexually oriented offense" an offender was convicted of or pleaded guilty to, the offender is classified as a Tier I, Tier II, or Tier III sex offender under the new law's sex offender registration scheme. See R.C. 2950.01(E), (F), and (G).

{¶10} Under the new law, a first-degree misdemeanor violation of R.C. 2907.04, in which the offender is less than four years older than the victim, is not a "sexually oriented offense" unless the victim "did not consent to the sexual conduct." R.C. 2950.01(A)(2). Lack of consent means the offender could be classified as a Tier I sex offender under R.C. 2950.01(E)(1)(b). An offender commits a "sexually oriented offense" under R.C. 2950.01(A)(3) and can be classified as a Tier II sex offender under R.C. 2950.01(F)(1)(b) if the offender is at least four years older than the victim.

A. Consent

{¶11} To classify defendant as a Tier I sex offender, the Attorney General necessarily must have determined defendant acted without the victim's consent. The Attorney General, however, had no basis on which to determine whether the victim consented: lack of consent was not an element of the offense to which defendant entered a guilty plea. Moreover, nothing in the language of R.C. 2950.01 or 2950.031(E) allows the Attorney General to request and receive evidence to prove facts beyond the record of conviction in determining defendant's classification.

{¶12} The Department of Justice prepared final guidelines for interpreting and implementing Title I of the Adam Walsh Child Protection and Safety Act which state that "information about underlying offense conduct or circumstances does not have to be sought beyond that appearing in available criminal history information." 73 FR 38030-01

(July 2, 2008), "National Guidelines for Sex Offender Registration and Notification." Accordingly, "jurisdictions are not required * * * to look beyond the elements of the offense of conviction in determining registration requirements." *Id.*

{¶13} Consistent with those guidelines, the new law classifies adult offenders solely on the basis of their convictions. See, e.g., *State v. Johnson*, 11th Dist. No. 2008-L-015, 2008-Ohio-4666, ¶10 (stating "Senate Bill 10 replaced R.C. Chapter 2950, now requiring classification based solely on the offense for which an offender is convicted"); *State v. Omiecinski*, 8th Dist. No. 90510, 2009-Ohio-1066, ¶29 (stating "[t]he new provisions leave little, if any, discretion to the trial court in classifying an offender," and instead the law "requires the trial court to classify an offender based solely on his or her conviction"), appeal allowed in part by *State v. Omiecinski*, 123 Ohio St.3d 1405, 2009-Ohio-5031; *In re Antwon C.*, 1st Dist. No. C-080847, 2009-Ohio-2567, ¶12 (explaining R.C. 2950.01 creates three classification tiers for sex offenders, and "[f]or adult offenders, classification is automatic and based solely on the underlying offense"), appeal not allowed by *In re Antwon C.*, 123 Ohio St.3d 1425, 2009-Ohio-5340.

{¶14} Here, the entirety of defendant's conviction record consists of his written plea agreement and the transcript of his combined plea and sentencing hearing pertaining to his guilty plea, and it does not mention the victim's consent or lack of it. Even though the record of defendant's conviction lacked such evidence, the Attorney General nonetheless necessarily determined the victim did not consent: without that element, the Attorney General could not determine defendant to be both a "sexually oriented offender" under the new law and subject to the duties of a Tier I offender.

{¶15} In response, defendant filed a petition requesting a hearing pursuant to R.C. 2950.031. Although the new law requires a hearing on the proposed classification when the offender timely files a petition with the appropriate court, the burden rests with the defendant to prove by clear and convincing evidence "that the new registration requirements do not apply" to him. R.C. 2950.031(E). The hearing is limited in scope and affords defendant an opportunity to convince the court the requisite elements of his classification have not been met.

{¶16} Defendant met his burden: he demonstrated the record of his conviction contained no evidence that the victim did not consent. Because consent was not an element of the crime to which defendant entered a guilty plea, the state was not required to prove, and did not present evidence of, the victim's lack of consent in order to prove defendant's commission of an offense under R.C. 2907.04. Indeed, had defendant pursued a trial of the charge against him, he arguably would not have been permitted to present evidence of the victim's consent as an affirmative defense. See, e.g., *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶14; *State v. Hardy*, 12th Dist. No. CA2002-06-141, 2003-Ohio-4745. Neither the Attorney General nor the court may presume "lack of consent." See, e.g., R.C. 2901.04(A); *State v. Williams*, 114 Ohio St.3d 103, 2007-Ohio-3268, ¶10 (applying the rule of lenity, which requires statutes defining an offense or penalty to be strictly construed against the state and liberally in favor of the defendant, to R.C. Chapter 2950). Because the Attorney General lacked an evidentiary basis to classify defendant as a sexually oriented offender, the trial court properly concluded defendant is not subject to the duties of a Tier I offender since he is not a sexually oriented offender.

{¶17} Despite the Department of Justice's guidelines and the language of the Ohio statutes at issue, the state argues the trial court's power to determine classification under the statute necessarily carried with it the power to consider facts regarding consent. In support, the state relies on *State v. Battistelli*, 9th Dist. No. 09CA009536, 2009-Ohio-4796, where the court determined that although "Ohio's Adam Walsh Act does not provide for hearings to determine whether a particular defendant convicted of violating Section 2907.04 must register as a Tier I sex offender," the trial court nonetheless had a duty, after convicting defendant there of violating Section 2907.04, to "hold a hearing to determine the issue of consent." *Id.* at ¶13, 16.

{¶18} *Battistelli* does not apply here. *Battistelli* involved a defendant convicted of violating R.C. 2907.04 after the new law went into effect. The issue of consent thus would have been addressed at the time the defendant in *Battistelli* entered a no contest plea. Here, defendant's conviction for violating R.C. 2907.04 occurred in 2000, well before Ohio's new law went into effect. As a result, the trial court did not have either the opportunity or a reason to explore the issue of consent because it was not an element of the crime.

{¶19} The state nonetheless responds that the hearing under R.C. 2950.031 necessarily requires the trial court to examine evidence outside the record of defendant's conviction, since consent is not an element of the offense but nonetheless is a statutory consideration in determining whether defendant is a sexually oriented offender. The state contends that, in challenging the Attorney General's classification, defendant must demonstrate not that the Attorney General had no evidence on which to conclude the victim did not consent but that the victim actually consented. The state's argument

ignores the statutory language supporting defendant's contention that he met his burden in the hearing before the trial court by demonstrating the Attorney General lacked any basis to conclude the victim did not consent. It also raises serious due process concerns.

{¶20} Due process "expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty." *Lassiter v. Dept. of Soc. Servs. of Durham Cty., N. Carolina* (1981), 452 U.S. 18, 24, 101 S.Ct. 2153, 2158, rehearing denied, 453 U.S. 927, 102 S.Ct. 889. Proceedings arguably lack fundamental fairness when a defendant may be classified as a sexually oriented offender despite the lack of evidence to support the classification. To then require the defendant to do more than demonstrate the Attorney General was in error for lack of a basis to classify defendant as a sexually oriented offender and a Tier I offender, and instead prove actual consent, raises additional questions.

{¶21} "To go beyond the record of conviction subjects the accused to a re-trial of his prior offense, raising serious concerns of * * * fairness." *State v. Roy* (June 21, 1991), 2d Dist. No. 12525 (stating trial courts must not go beyond the record of conviction in determining whether a prior conviction constituted a prior offense of violence). In the same way, requiring a defendant to prove consent also presents substantial issues of fairness, especially with a recalcitrant or absent victim. See, e.g., *State v. Hawn* (2000), 138 Ohio App.3d 449, 464 (explaining certain offenses, like domestic violence, present significant problems of proof, but the constitutional right to due process mandates "the fundamental rules of evidence and procedure that limit the power of government to convict and punish an individual cannot be stretched beyond their purpose").

{¶22} Here, the trial court ordered defendant, as part of his conviction, to have no contact with the victim or her family. To require defendant, under such circumstances, to affirmatively prove nearly ten years later that the victim consented to the conduct, when the state presented no evidence of lack of consent in order to obtain the conviction, raises significant problems in terms of both proof and fairness, running up against the guarantees of due process. See, e.g., *Mullaney v. Wilbur* (1975), 421 U.S. 684, 704, 95 S.Ct. 1881, 1892 (holding the Due Process Clause requires that the *state* has the burden of proving every element of the crime beyond a reasonable doubt).

{¶23} Here, defendant had the burden to convince the court by clear and convincing evidence that his classification as a Tier I sex offender was in error. The defendant satisfied that burden by correctly indicating the record of his conviction contained no evidence of the victim's lack of consent. The Attorney General has no statutory basis to presume lack of consent, and the trial court has no statutory basis to accept evidence outside the record of conviction concerning lack of consent. Because the record of defendant's conviction presents no factual or legal basis upon which the Attorney General could determine the victim did not consent, defendant's conviction, a first-degree misdemeanor unlawful sexual conduct, in violation of R.C. 2907.04, does not qualify as a sexually oriented offense under R.C. 2950.01(A)(2), and trial court correctly concluded the Attorney General could not properly classify defendant as a Tier I sex offender under R.C. 2950.01(E)(1)(b).

B. Age Difference

{¶24} The state further argues that even if defendant's conviction offense does not qualify as a sexually oriented offense under R.C. 2950.01(A)(2) due to the victim's

alleged lack of consent, the offense nonetheless qualifies as a sexually oriented offense under R.C. 2950.01(A)(3), subjecting defendant to classification as a Tier II sex offender under R.C. 2950.01(F)(1)(b) because defendant is actually more than four years older than the minor victim.

{¶25} Defendant's conviction offense under R.C. 2907.04 arose pursuant to a plea agreement. The state's plea agreement with a criminal defendant is binding regarding the elements of the offense. "Once a defendant offers to enter a guilty plea to the charges contained in an indictment, and the state accepts, the state is bound under contract principles to do as it promised." *State v. Lezatte*, 9th Dist. No. 02CA008131, 2003-Ohio-1472, ¶10, citing *State v. Kidd*, 12th Dist. No. CA2001-11-021, 2002-Ohio-6394, ¶31. The doctrine of issue preclusion, a component of res judicata, "provides that an issue of fact that was fairly, fully, and necessarily litigated and determined in a prior action may not be drawn into question in a subsequent action between the same parties or their privies." *Swihart v. Ohio Adult Parole Auth.*, 10th Dist. No. 08AP-222, 2008-Ohio-6420, ¶18, citing *State ex rel. Stacy v. Batavia Local Sch. Dist. Bd. of Edn.*, 97 Ohio St.3d 269, 2002-Ohio-6322, ¶16; *State v. Szefcyk* (1996), 77 Ohio St.3d 93; *State v. Dick*, 137 Ohio App.3d 260, 2000-Ohio-1685.

{¶26} Here, the state entered into a binding plea agreement with defendant that included a provision specifying defendant was not more than four years older than the victim. Although the state's argument so suggests, the state points to no law indicating a plea agreement is binding for some circumstances but not for others. In the final analysis, the state agreed defendant was not more than four years older than the victim, defendant was convicted of an offense based on that stipulation, and the conviction arising from the

stipulation is the premise for any tier classification under the new law. Since the state agreed defendant was not more than four years older than the victim, the stipulation binds the state and precludes the state from going outside the agreement to classify defendant under the new law based on an age gap of more than four years.

{¶27} Because the trial court properly concluded defendant is not a sexually oriented offender under the new law either by virtue of the consent issue or the difference in age between defendant and the victim, we overrule the state's single assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

TYACK, P.J., and CONNOR, J., concur.
