[Cite as *State v. Cundiff*, 2011-Ohio-4919.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-672 (C.P.C. No. 03CR-04-2804)
Timothy Cundiff,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 27, 2011

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellant.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, State of Ohio ("the State"), appeals from a judgment entered by the Franklin County Court of Common Pleas in which the court granted defendant-appellee, Timothy Cundiff's ("defendant") petition contesting his sexual offender reclassification and reinstated defendant's previous classification and his previous registration and notification orders. For the reasons that follow, we affirm.

{¶2} On May 26, 2004, in the Franklin County Court of Common Pleas, defendant pled guilty to sexual battery, a felony of the third degree. On July 23, 2004, a

sentencing hearing was held. The court imposed a three-year period of community control. In addition, a sexual predator hearing was held and defendant was classified as a sexually oriented offender under Megan's Law. This classification required defendant to comply with annual residence address registration and verification for ten years. Under Megan's Law, he was not subject to community notification.

{¶3} As a result of the implementation of the federal Adam Walsh Child Protection and Safety Act, Ohio reorganized its sexual offender registration scheme in 2007 by enacting its version of the Adam Walsh Act ("AWA"), also known as S.B. No. 10 ("S.B. 10"), which became effective on July 1, 2007 and January 1, 2008. S.B. 10 repealed the three-level scheme set forth under Megan's Law ("sexually oriented offender," "habitual sexual offender," and "sexual predator"), and replaced it with a new three tier system (Tier I, Tier II, and Tier III).

{¶4} Following the enactment of S.B. 10, defendant was reclassified by Ohio's attorney general as a Tier III sexual offender. Under this new classification, defendant was required to personally register with the local sheriff every 90 days for life and was also subject to community notification provisions. Defendant filed a petition to contest reclassification pursuant to R.C. 2950.031 and also requested a hearing as to the applicability of the new registration requirements. In his petition, defendant raised a variety of constitutional challenges to the AWA. Among those challenges was the assertion that Ohio's AWA violated the separation-of-powers doctrine. Defendant also filed a motion requesting a stay from enforcement of the community notification provisions. The motion for stay was later granted by the trial court.

{¶5} Subsequent to the filing of defendant's petition, the Supreme Court of Ohio considered the constitutionality of Ohio's AWA. On June 3, 2010, the court determined "R.C. 2950.031 and 2950.032, the reclassification provisions in the AWA, are unconstitutional because they violate the separation-of-powers doctrine." *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶2.

{¶6} After concluding that R.C. 2950.031 and 2950.032 were unconstitutional, the Supreme Court of Ohio determined the remedy was to sever those provisions. "R.C. 2950.031 and 2950.032 are severed and * * * after severance, they may not be enforced. R.C. 2950.031 and 2950.032 may not be applied to offenders previously adjudicated by judges under Megan's Law, *and the classifications and community-notification and registration orders imposed previously by judges are reinstated*." Id. at ¶66 (emphasis added).

{¶7} Following *Bodyke*, the Supreme Court of Ohio issued its decision in *Chojnacki v. Cordray*, 126 Ohio St.3d 321, 2010-Ohio-3212. In *Chojnacki*, the court concluded *Bodyke* "severed R.C. 2950.031 and 2950.032, the reclassification provisions of the Adam Walsh Act, and held that after severance, those provisions could not be enforced." Id. at ¶5.

{¶8} Based upon the decision in *Bodyke,* the trial court, without holding a hearing, filed an entry on July 6, 2010, which granted defendant's petition, vacated defendant's reclassification, and ordered the reinstatement of defendant's previously imposed classification and registration orders. The relevant portion of the judgment entry states as follows:

> [Defendant's] Petition to Contest Reclassification is GRANTED, the reclassification of [Defendant] is VACATED,

> and the classification and registration orders previously judicially imposed are REINSTATED. [Defendant] was required to register for ten years, beginning July 23, 2004, and is ORDERED to continue to register as a sexually oriented offender as originally required. The Court further ORDERS that the sex offender registries and databases no longer apply the Community Notification provision, including the databases of the Franklin County Sheriff and the Ohio Attorney General.

{¶9} The State has filed a timely appeal and now raises four assignments of error for our review:

> FIRST ASSIGNMENT OF ERROR
>
> The trial court erred in granting the petition when it was based in major part on R.C. 2950.031(E), which is part of a statute that has been severed in its entirety.
>
> SECOND ASSIGNMENT OF ERROR
>
> The trial court erred in failing to conduct the hearing required by R.C. 2950.031 before granting defendant's petition.
>
> THIRD ASSIGNMENT OF ERROR
>
> The trial court erred in addressing when defendant's ten-year registration period commenced without taking into account the operation of the statutory tolling provision that applies to defendant under R.C. 2950.07(D).
>
> FOURTH ASSIGNMENT OF ERROR
>
> The trial court erred in ordering that "the sex offender registries and databases no longer apply the Community Notification provision, including the databases of the Franklin County Sheriff and the Ohio Attorney General."

{¶10} In its first assignment of error, the State argues the trial court erred in granting defendant's petition and affording the requested relief pursuant to R.C. 2950.031, due to the Supreme Court of Ohio's decisions in *Bodyke* and *Chojnacki*. Reading the two cases together, the State of Ohio submits the petition contest

procedures created under R.C. 2950.031 and 2950.032 have been severed, thereby leaving the trial court without authority to rule on the reclassification, and thus making dismissal of the petition the proper result.

{¶11} However, we have repeatedly rejected this argument and have instead recognized that, as a result of *Bodyke*, reclassifications made under the severed statutes must be vacated and the prior judicial classifications must be reinstated. See *State v. Lawson*, 10th Dist. No. 09AP-672, 2011-Ohio-1255; *State v. Miliner*, 10th Dist. No. 09AP-643, 2010-Ohio-6117; and *State v. Hickman*, 10th Dist. No. 09AP-617, 2010-Ohio-5548. See also *Cook v. State of Ohio*, 10th Dist. No. 10AP-641, 2011-Ohio-906 (case remanded to reinstate prior classification; individuals who filed their petitions prior to the ruling in *Bodyke* are entitled to the same relief granted in *Bodyke*); *Powell v. State of Ohio*, 10th Dist. No. 10AP-640, 2011-Ohio-1382, ¶2 ("because the Supreme Court of Ohio did not dismiss the many cases pending before it at the time it decided [*Bodyke*], the Supreme Court did not intend to nullify the petition process as to cases pending when *Bodyke* was decided"); *State v. Ogden*, 10th Dist. No. 09AP-640, 2011-Ohio-1589 (reclassification made under the severed statutes must be vacated; prior judicial classification was ordered to be reinstated); *Edwards v. State of Ohio*, 10th Dist. No. 10AP-645, 2011-Ohio-1492 (sua sponte dismissal of petition as moot was error because appellant was not provided with the relief requested); and *State v. Johnson*, 10th Dist. No. 10AP-932, 2011-Ohio-2009, ¶8, quoting *State v. Hosom*, 10th Dist. No. 10AP-671, 2011-Ohio-1494, ¶8 (" '[w]e have consistently recognized that, notwithstanding the severance of the statutory provisions under which the reclassification petitions were filed, petitioners

such as appellee are entitled to orders directing their return to those previous classifications.' ").

{¶12} Moreover, approximately two months after the issuance of its decision in *Bodyke*, the Supreme Court of Ohio reversed and remanded numerous cases to various trial courts after several courts of appeals had rejected constitutional challenges to the AWA based on separation-of-powers grounds. See *In re Sexual Offender Reclassification Cases*, 126 Ohio St.3d 322, 2010-Ohio-3753. Notably, the Supreme Court of Ohio did not dismiss these petitions, but rather remanded the cases for further proceedings, if any, as necessitated by *Bodyke*. In several cases, the court specifically remanded to the trial courts with instructions to reinstate the original classification, registration and reporting requirements.

{¶13} Based upon the foregoing, we overrule the State's first assignment of error.

{¶14} In its second assignment of error, the State asserts the trial court erred by granting defendant's petition without first holding a hearing on the petition, as required by R.C. 2950.031(E). The State submits the trial court's failure to hold a hearing deprived the State of due process and of the right to be heard.

{¶15} Under R.C. 2950.031(E), a petitioner is entitled, as a matter of right, to a court hearing to contest the application of the new classification as well as its registration requirements. Thus, under this statute, a court could not *deny* a petition without holding a hearing. *Hosom* at ¶10. However, like in *Hosom*, the State here seems to be making an inverse argument—that the court is also required to hold a hearing prior to the *granting* of a petition and thus the State is also entitled to a hearing under the statute. However, to the extent the State of Ohio contends it too is entitled to a statutorily-mandated hearing to

present various arguments, we disagree. See id. at ¶11 ("[b]ecause the petition process set forth in R.C. 2950.031 and 2950.032 was severed, any issues relating to that petition process, including whether the statute provides the state with the same right to a hearing as a petitioner, no longer constitute any justiciable controversy and are therefore moot."). See also *Jackson v. State*, 10th Dist. No. 10AP-644, 2011-Ohio-2047, ¶14.

{¶16} Thus, we overrule the State's second assignment of error.

{¶17} In its third assignment of error, the State argues the language used in the entry implies that defendant's ten-year duty to register will run without interruption beginning on July 23, 2004, and also fails to take into account the statutory tolling provision set forth in R.C. 2950.07(D). The State further argues the trial court's language is overbroad and is based upon a fundamental misunderstanding of the statutory registration provisions. We disagree.

{¶18} We begin by noting that the State has not argued that the date of commencement of the ten-year registration period (July 23, 2004) is an incorrect date. In fact, the record reflects that a sentencing hearing was held on July 23, 2004, at which time defendant was placed on community control. The trial court further determined, following a hearing, that defendant was a sexually oriented offender. There is nothing in the record to contradict the evidence supporting the commencement date of defendant's registration period as July 23, 2004. The crux of the State's argument, rather, seems to be that the manner in which the court addressed the issue of defendant's registration period is overbroad, in that it does not specifically take into account the statutory tolling provision that applies pursuant to R.C. 2950.07(D).

{¶19} The pertinent language of the judgment entry reads as follows: "[Defendant] was required to register for ten years, beginning July 23, 2004, and is ORDERED to continue to register as a sexually oriented offender as originally required."

{¶20} Yet, "as originally required" in 2004, defendant's duty to register for ten years was always subject to the tolling provisions of R.C. 2950.07(D). That portion of the statute reads, in relevant part, as follows:

> The duty of an offender * * * to register under this chapter is tolled for any period during which the offender * * * is returned to confinement * * * when the confinement * * * occurs subsequent to the date determined pursuant to division (A) of this section. The offender's * * * duty to register under this chapter resumes upon the offender's * * * release from confinement in a secure facility or imprisonment.

{¶21} From the moment defendant was classified as a sexually oriented offender, defendant was subject to the tolling provisions of R.C. 2950.07(D) in the event that he was returned to confinement. He continues to be subject to that same tolling provision now, just as he was when it was "originally required" at his initial classification hearing.

{¶22} The record reflects defendant was returned to confinement for a period of time. Thus, there was a period of time that was tolled, and therefore, it logically follows that his ten-year registration period does not run uninterrupted and will not end ten years from the date it began. However, the entry does not definitively provide a date on which his ten-year registration duties expire (i.e., it does not state his duties expire on July 23, 2014, exactly ten years after his duties commenced); rather, it simply sets forth the date on which his duties to register commenced.

{¶23} Admittedly, the entry does not include language calculating the period of time that his registration duties will be extended beyond an uninterrupted ten-year period,

and it does not include language stating that he is subject to the tolling provisions of R.C. 2950.07(D). Nevertheless, the fact that the entry does not specifically account for the application of a tolling period for the period of time when defendant's community control was revoked is not error. Such information is not required to be specifically included in the entry here, but the tolling provision of R.C. 2950.07(D) is still applicable. Furthermore, should defendant again be subject to confinement, the date of the expiration of his registration duties would again be subject to change.

{¶24} While the entry is somewhat open-ended, there is nothing in this portion of the entry that is incorrect and we disagree with the State's contention that it is potentially misleading or open to an interpretation that leads to the conclusion that his registration period ends on July 23, 2014, without consideration of the application of R.C. 2950.07(D). The entry simply does not explicitly or implicitly address when the registration period ends.

{¶25} Accordingly, we overrule the State's third assignment of error.

{¶26} In its fourth assignment of error, the State argues the trial court was without statutory authority to issue an order instructing that the databases and registries maintained by the Franklin County Sheriff and the Ohio Attorney General shall not apply the community notification provision. The State further contends the court's judgment entry reflects a misunderstanding of the community notification procedures.

{¶27} The State asserts that, pursuant to R.C. 2950.031 and 2950.032, the court's authority on this issue is limited to determining how the registration requirements under Chapter 2950 apply to the offender. In addition, the State submits that the phrase "registration requirements" does not include other matters performed by the sheriff, such

as community notification. According to the State, if the court determines the requirements do not apply at all, the court's power is limited to issuing "an order that specifies that the new registration requirements do not apply to the offender" and to serving a copy of said order upon the sheriff with whom the offender most recently registered and upon the bureau of criminal identification and investigation. See R.C. 2950.031(E).

{¶28} Because we reject the contention that the trial court's authority is limited to addressing registration requirements as set forth under R.C. 2950.031(E), we reject the State's argument that the order exceeded its authority. As an appellate court, we are required to follow the directives from the Supreme Court of Ohio, which has declared that the entire petition process has been severed, and thus R.C. 2950.031 and 2950.032 are not enforceable. Under *Bodyke* and *Chojnacki*, those statutes and the petition process can no longer be enforced, and thus, the trial court is not confined to only the procedures set forth in those now severed statutes.

{¶29} The State further argues that, even if R.C. 2950.031 had not been severed by *Bodyke* and *Chojnacki*, there is still no statutory authority to support the trial court's order as it applies to the county sheriff and the attorney general. Nevertheless, while there may not be statutory authority which specifically supports the trial court's order, based upon the authority of *Bodyke* and its progeny, we believe the trial court was within its authority to address the issue of community notification. The mandates set forth in *Bodyke* dictate a reclassified offender such as defendant must be restored to his previously imposed classification *and* to his previously imposed community-notification and registration orders pursuant to Megan's Law, whether or not there exists the statutory

authority to support such action. See *Bodyke* at ¶66. And, as a sexually oriented offender under Megan's Law, defendant was not subject to community notification. See former R.C. Chapter 2950.

{¶30} Furthermore, in *State v. Young*, 10th Dist. No. 10AP-911, 2011-Ohio-2374, we cited to *State v. Gingell*, 128 Ohio St.3d 444, 2011-Ohio-1481, ¶8 and concluded that "when a sex offender's original classification under prior law is reinstated, the orders associated with that prior law are also reinstated." *Young* at ¶11. As a result, we found that, based on *Gingell*, "none of the provisions in S.B. 10 apply to a sex offender whose classification under prior law has been reinstated." Id. As applied to the case sub judice, because defendant's classification from prior law is reinstated, he is not bound by any of the other provisions in S.B. 10, such as community notification. See id.

{¶31} Finally, we do not construe the trial court's order to be in the broad context in which the State purportedly perceives it. While we concede that the judgment entry at issue was unartfully worded, and we further note that the language used in the entry appears to demonstrate some confusion between the concept of "community notification," which requires the sheriff to distribute written notice of the offender's residence to the individuals and entities listed in R.C. 2950.11 within a particular geographic area, and the designation used in sexual offender registries and databases (e.g., "Tier III Sex Offender with Notification"[1]) to reflect whether or not an offender's particular classification subjects him to the community notification requirements set forth in R.C. Chapter 2950, the overall intent behind the entry is clear.

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[1] See the sex offender registries of the Ohio Attorney General and the Franklin County Sheriff at http://www.esorn.ag.state.oh.us/Secured/p21_2.aspx?from=nav and http://www.icrimewatch.net/index.php?AgencyID=53924 respectively, to observe the use of these designations for various registered Tier III sexual offenders (last visited August 30, 2011).

{¶32} It is apparent the entry was intended to reflect that defendant was not subject to the community notification requirements set forth in S.B. 10 for Tier III offenders[2] because defendant was being reinstated to his previous classification as a sexually oriented offender under Megan's Law, and such classification is not subject to community notification pursuant to the provisions of former R.C. Chapter 2950. Furthermore, it appears the intent of the entry was to convey to those entities served with the entry (e.g., the Franklin County Sheriff's Office and the Ohio Attorney General via the bureau of criminal identification and investigation) who are responsible for carrying out the court's order, of the fact that, because defendant was no longer subject to community notification, the applicable registries and databases should no longer reflect defendant was a "Tier III Sex Offender with Notification."

{¶33} This is simply an elaboration upon the trial court's conclusion that the provisions of S.B. 10 are not applicable to defendant and which logically follows its determination that defendant's previous classification and previous registration and notification orders must be reinstated. See also *Martin v. State*, 10th Dist. No. 10AP-613, 2011-Ohio-3307, ¶15-16, in which we rejected a similar argument raised by the State of Ohio in the context of the trial court's order as it applied to the county sheriff's office and its sex offender database. Although a more precise and more narrowly tailored order would have been the better approach to utilize here, we do not find the trial court's order to be in error.

{¶34} Thus, we overrule the State's fourth assignment of error.

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[2] Under S.B. 10, the only classification which is subject to community notification is the classification for Tier III offenders. See R.C. 2950.11(F); see also *Bodyke* at ¶25 (community notification is limited to Tier III offenders).

{¶35} In conclusion, we overrule the State's first, second, third, and fourth assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and TYACK, JJ., concur.

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