

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-6
v.	:	(C.P.C. No. 09CR-6564)
	:	
Rodney Smith, Jr.,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on February 9, 2012

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

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

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶1} This is an appeal by defendant-appellant, Rodney Smith, Jr., from a judgment of sentence and conviction entered by the Franklin County Court of Common Pleas following an order by the court denying appellant's motion to withdraw his guilty plea to one count of failure to verify his address.

{¶2} On July 29, 1983, appellant was convicted of sexual battery, in violation of R.C. 2907.03, a felony of the third degree. On November 2, 2009, appellant was indicted

on one count of failure to verify his current address, in violation of R.C. 2950.06, a felony of the third degree. The indictment alleged that appellant was subject to the registration requirements of R.C. 2950.04, based upon his conviction for sexual battery in 1983, and that he had failed to verify an address on or about September 4, 2009. On March 24, 2010, appellant entered a guilty plea to one count of failure to verify his address.

{¶3} On July 13, 2010, appellant filed a motion to withdraw his guilty plea, asserting that the provisions of R.C. 2950.04 did not apply to him. In his memorandum in support, appellant argued he had not been required to register as a sex offender until the passage of Am.Sub.S.B. No. 10 ("S.B. No. 10"), after which he received notice from the office of the Ohio Attorney General that he was now classified as a Tier III offender pursuant to R.C. 2950.031 and 2950.032.<sup>1</sup> He argued that his alleged duty to register stemmed from his 1983 conviction for sexual battery, for which he had been released from custody on March 31, 1988. Citing the Supreme Court of Ohio's decision in *State v. Champion*, 106 Ohio St.3d 120, 2005-Ohio-4098, appellant maintained that, because of the fact he was released from prison prior to July 1, 1997, he did not fit within any of the categories of R.C. 2950.04(A)(1) requiring registration under Megan's Law. Appellant further asserted he was not subject to the changes enacted under S.B. No. 10 based upon the Supreme Court's recent decision in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, in which the court held that the provisions of R.C. 2950.031 and 2950.032, requiring the attorney general to reclassify sex offenders who had already been classified

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<sup>1</sup> Under R.C. 2950.06(B)(3), a Tier III offender is required "to verify his address every 90 days for the rest of his life. Pursuant to R.C. 2950.99(A)(1)(a), the failure to verify an address is the same degree offense as the underlying sexual offense." *State v. Gingell*, 128 Ohio St.3d 444, 2011-Ohio-1481, ¶ 2.

by court order under former law were unconstitutional as violating the separation-of-powers doctrine.

{¶4} On July 19, 2010, the state filed a memorandum in opposition to appellant's motion to withdraw his guilty plea. On August 3, 2010, appellant filed a motion to dismiss the case. By decision and entry filed October 29, 2010, the trial court denied appellant's motion to withdraw his guilty plea. By judgment entry filed December 17, 2010, the trial court sentenced appellant to a two-year prison term for failure to verify his address, in violation of R.C. 2950.06, a felony of the third degree.

{¶5} On appeal, appellant sets forth the following four assignments of error for this court's review:

First Assignment of Error: The trial court failed to comply with Criminal Rule 11 in taking appellant's guilty plea.

Second Assignment of Error: The court erroneously refused to allow appellant to withdraw his guilty plea.

Third Assignment of Error: Defense counsel rendered ineffective assistance, in violation of appellant's Sixth Amendment rights and the comparable protection of Article I, Section 10 of the Ohio Constitution.

Fourth Assignment of Error: The trial court erred by not sustaining appellant's motion to dismiss the indictment.

{¶6} We will initially address appellant's second assignment of error, in which he argues that the trial court erred in denying his motion to withdraw his guilty plea following the Supreme Court's decision in *Bodyke*. Appellant notes that his motion to withdraw was made before the trial court imposed sentence and, therefore, was not subject to the heightened "manifest injustice" standard applicable to a post-sentence motion to withdraw.

{¶7} Crim.R. 32.1 provides: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." The Supreme Court has held that "a presentence motion to withdraw a guilty plea should be freely and liberally granted." *State v. Xie*, 62 Ohio St.3d 521, 527 (1992). The decision whether "to grant or deny a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court." *Id.* at paragraph two of the syllabus.

{¶8} As noted under the facts, in the motion to withdraw his guilty plea, appellant argued he was not required to register as a sex offender until the passage of S.B. No. 10, also known as Ohio's version of the Federal Adam Walsh Act ("AWA"), most of which became effective on January 1, 2008. Appellant further argued that, under the Supreme Court's holding in *Champion*,<sup>2</sup> because his sex offense and prior incarceration ended prior to July 1, 1997 (the effective date of Ohio's version of the Federal "Megan's Law"), he had no duty to register under Megan's Law.

{¶9} In its memorandum in opposition to appellant's motion to withdraw, the state argued in part that only those offenders who received a prior judicial classification could benefit from the separation-of-powers ruling in *Bodyke*. In its decision denying appellant's motion to withdraw, the trial court found appellant's reliance upon *Bodyke* to be misplaced, agreeing with "the State's contention that it is clear from *Bodyke* that only

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<sup>2</sup> In *Champion* at syllabus, the Supreme Court held: "A person whose prison term for a sexually oriented offense was completed before July 1, 1997, is not required to register under R.C. 2950.04(A)(1)(a) or periodically verify a current address under R.C. 2950.06(A), even if the person returns to prison on a parole violation for a term served concurrently with the sexually oriented offense."

those offenders who received a prior judicial classification can benefit from the separation-of-powers ruling in that case."

{¶10} Subsequent to the trial court's decision in this case, various decisions from this court have repeatedly rejected similar arguments by the state that relief under *Bodyke* is not available in the absence of a prior judicial classification. See, e.g., *State v. Johnson*, 10th Dist. No. 10AP-932, 2011-Ohio-2009, ¶ 15 ("even if appellee's classification as a sexually oriented offender did not arise from a specific judicial determination to which *Bodyke* would apply, we have nevertheless recognized that offenders whose pre-Adam Walsh Act classification arose purely as a matter of law still must receive the benefit of the *Bodyke* remedy returning those offenders to their pre-Adam Walsh Act classifications because of *Bodyke's* complete severance of the statutory provisions governing reclassification by the attorney general"); *State v. Gardner*, 10th Dist. No. 09AP-1192, 2011-Ohio-4360, ¶ 10 (rejecting state's argument that appellant was not entitled to relief under *Bodyke* because his original classification attached as a matter of law, and not as a result of a judicial classification); *State v. Hazlett*, 191 Ohio App.3d 105, 2010-Ohio-6119, ¶ 11 (10th Dist.), discretionary appeal not allowed, *State v. Hazlett*, 129 Ohio St.3d 1477, 2011-Ohio-4751 (the severance under *Bodyke* "makes no distinction between those classified judicially and those classified by operation of law"); *Core v. Ohio*, 191 Ohio App.3d 651, 2010-Ohio-6292, ¶ 28 (10th Dist.), discretionary appeal allowed by *Core v. State*, 128 Ohio St.3d 1556, 2011-Ohio-2905, appeal dismissed by *In re Cases Held for the Decision in State v. Williams*, 130 Ohio St.3d 254, 2011-Ohio-5348 (applying *Bodyke* relief to case where the defendant's conviction arose

in California and defendant had never been determined to be a sexually oriented offender by a judge of an Ohio common pleas court).

{¶11} Further, shortly before briefing was due in this appeal, the Supreme Court released its decision in *State v. Gingell*, 128 Ohio St.3d 444, 2011-Ohio-1481, a case involving a defendant's prosecution for failure to verify. Under the facts of that case, Gingell was convicted of three counts of rape in 1981. Following the enactment of S.B. No. 10, Gingell was reclassified from a sexually oriented offender to a Tier III offender. In 2008, Gingell, who had never challenged his reclassification by way of petition, was charged with failing to verify his address under the 90-day reporting requirement of S.B. No. 10, and he entered a plea of guilty. After sentencing, he appealed to the First District Court of Appeals, arguing that the trial court should have applied the law in place at the time of his original classification. The appellate court held that there was no retroactive application of the statute because Gingell's failure to register occurred after the statute's effective date (January 1, 2008).

{¶12} Gingell appealed to the Supreme Court, and while his appeal was pending the Supreme Court released its decision in *Bodyke*. In *Gingell*, the Supreme Court reversed, holding that, "pursuant to *Bodyke*, Gingell's original classification under Megan's Law and the associated community-notification and registration order were reinstated. Therefore, the current version of R.C. 2950.06, which requires Tier III sexual offenders to register every 90 days, does not apply to Gingell." *Gingell* at ¶ 8. The Supreme Court further noted that, "[s]ince Gingell was charged after his reclassification and before *Bodyke*, there is no doubt that he was indicted for a first-degree felony for a violation of the reporting requirements under the AWA [S.B. No. 10]." *Id.* Thus,

"[b]ecause the application of the AWA was based upon an unlawful reclassification," the court reversed the judgment of the court of appeals and vacated Gingell's conviction for a violation of the 90-day address verification requirement of R.C. 2950.06. *Id.*

{¶13} Subsequent to the time for filing briefs in the instant appeal, the Supreme Court released *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374. In *Williams*, the court held that "imposing the current registration requirements on a sex offender whose crime was committed prior to the enactment of S.B. No. 10 is punitive," and the court thus concluded that "S.B. 10, as applied to defendants who committed sex offenses prior to its enactment, violates Section 28, Article II of the Ohio Constitution, which prohibits the General Assembly from passing retroactive laws." *Id.* at ¶ 21.

{¶14} Several appellate cases have addressed trial court rulings on motions to withdraw guilty pleas brought by defendants charged with violating the provisions of R.C. 2950.06 of the AWA (i.e., failure to verify an address), and who had entered their pleas prior to the release of the Supreme Court's decision in *Bodyke*. In *State v. Caldero*, 8th Dist. No. 96719, 2012-Ohio-11, the defendant entered a guilty plea to sexual battery in 2003, and he was classified as a sexually oriented offender under Megan's Law. The defendant was later reclassified by the Ohio Attorney General as a Tier III sex offender under the AWA. After failing to register, he was charged with violating the AWA under R.C. 2950.06(F), and he entered a guilty plea. Following the Supreme Court's decision in *Bodyke*, the defendant filed a motion to withdraw his guilty plea under Crim.R. 32.1. The trial court granted the motion, and the state appealed. Part of the state's argument on appeal was that the defendant was not prosecuted under the AWA, and that his conviction was therefore proper under Megan's Law.

{¶15} On appeal, the court in *Caldero* rejected the state's argument, noting that, under *Gingell*, "a defendant 'charged [with failing to register] after his reclassification and before *Bodyke*' was prosecuted under the AWA." *Caldero* at ¶ 10, quoting *Gingell* at ¶ 8. As further support, the court noted that "the penalty Caldero faced further evidences that he was charged with violating the AWA and not Megan's Law." *Id.* at ¶ 12. Specifically, the defendant in *Caldero* had entered a guilty plea to a third-degree felony, and the court noted that, while a failure to verify under the AWA is a felony of the third degree, the failure to verify under Megan's Law constituted a felony of the fifth degree. Finding that the basis of the prosecution was the AWA, the court affirmed the trial court's decision granting defendant's motion to withdraw his guilty plea.

{¶16} In *State v. Mestre*, 8th Dist. No. 96820, 2011-Ohio-5677, the defendant was convicted in 1988 of a sex offense in Pennsylvania. In 2010, he was charged in Ohio with failing to verify his address under the AWA, and he entered a guilty plea in May 2010. On March 29, 2011, the defendant moved to withdraw his guilty plea pursuant to Crim.R. 32.1 based upon the authority of *Bodyke*. The state opposed the motion, and the trial court denied the defendant's motion to withdraw. On appeal, the court reversed, citing one of its earlier decisions holding that "an unlawful reclassification under Ohio's AWA cannot serve as the predicate for the crime of failure to verify." *Mestre* at ¶ 6, fn. 2, citing *State v. Ortega-Martinez*, 8th Dist. No. 95656, 2011-Ohio-2540, ¶ 17, citing *State v. Smith*, 8th Dist. No. 92550, 2010-Ohio-2880, ¶ 29.

{¶17} Similarly, in *State v. Beasley*, 8th Dist. No. 96806, 2011-Ohio-6650, the appellate court reversed the trial court's denial of the defendant's motion to withdraw his guilty plea to one count of failure to verify. The court in *Beasley* held that, pursuant to the

Supreme Court's holdings in *Bodyke* and *Gingell*, the defendant's indictment for a reporting violation based on a reclassification deemed unconstitutional "cannot serve as the predicate for the violations charged in the indictment," and thus the defendant was "permitted to withdraw his plea in order to correct a manifest injustice." *Id.* at ¶ 11.

{¶18} In the present case, as noted under the facts, the indictment charging appellant with failure to verify his address was predicated upon a 1983 conviction for sexual battery. As also noted, the trial court denied appellant's motion to withdraw on the basis that "only those offenders who received a prior judicial classification can benefit from the separation-of-powers ruling in [*Bodyke*]." We recognize that the trial court did not, at the time of the proceedings on the motion to withdraw, have the benefit of this court's later decisions construing the holding in *Bodyke*. Nevertheless, the trial court's interpretation of *Bodyke*, serving as the basis for its denial of the motion to withdraw, was erroneous. Further, appellant was charged with failure to verify, a felony of the third degree, based upon the provisions of the AWA. See *Caldero*, citing *Gingell*. Based upon the holdings in *Bodyke*, *Gingell* and, significantly, the Supreme Court's more recent decision in *Williams* (holding that the application of S.B. No. 10 to defendants who committed a sex offense prior to its enactment violates the constitutional prohibition against retroactive laws), we conclude that the trial court's denial of appellant's motion to withdraw his guilty plea to a charge of failure to verify, predicated upon the reporting requirements of S.B. No. 10, constitutes an abuse of discretion.

{¶19} Accordingly, we sustain appellant's second assignment of error. Based upon our disposition of the second assignment of error, we find the issues raised under the remaining assignments of error to be moot.

{¶20} Based upon the foregoing, appellant's second assignment of error is sustained, the first, third, and fourth assignments of error are rendered moot, the judgment of the Franklin County Court of Common Pleas is reversed, and this matter is remanded to the trial court for further proceedings in accordance with law and consistent with this decision.

*Judgment reversed; cause remanded.*

SADLER and DORRIAN, JJ., concur.

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