

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 12AP-53
v.	:	(C.P.C. No. 11CR-2376)
	:	
Mark D. Lawson,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on November 13, 2012

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

Yeura R. Venters, Public Defender, and *Allen Adair*, 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 imposing a 30-month sentence upon defendant-appellee, Mark D. Lawson, following defendant's plea of guilty to the crime of failure to register, a third degree felony. The state assigns a single error:

THE COMMON PLEAS COURT ERRED WHEN IT FAILED TO IMPOSE THE MANDATORY THREE-YEAR SENTENCE FOR DEFENDANT'S FAILURE-TO-REGISTER OFFENSE.

Because the trial court erred in failing to impose the mandatory three-year prison term following defendant's guilty plea to failure to register, we reverse.

I. Facts and Procedural History

{¶2} On July 9, 2007, defendant pleaded guilty to gross sexual imposition, a fourth degree felony and, on August 3, 2007, was classified as a sexual predator pursuant to former R.C. Chapter 2950 ("Megan's Law"). See 1996 Am.Sub.H.B. No. 180, amended by 2003 Am.Sub.S.B. No. 5. Although defendant was subsequently reclassified under 2007 Am.Sub.S.B. No. 10 ("S.B. 10") as a Tier III sex offender, he eventually reverted to his original classification as a sexual predator under Megan's Law pursuant to the Supreme Court of Ohio's holdings in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, and *State v. Gingell*, 128 Ohio St.3d 444, 2011-Ohio-1481.

{¶3} On both May 21, and on November 25, 2009, defendant was convicted of fourth degree felonies of failure to properly register, including failure to provide notice of change of address. By indictment filed May 4, 2011, defendant again was charged with failure to register, a violation of R.C. 2950.04 and a third degree felony. The indictment charged that, after he came to Franklin County between March 22, and April 20, 2011 to reside, defendant failed to register within five days. On November 3, 2011, defendant entered a plea of guilty to the charge of failure to register, and the trial court sentenced defendant on December 21, 2011.

{¶4} At the sentencing hearing, the state noted defendant was adjudicated a sexual predator following his conviction for gross sexual imposition, requiring him under Megan's Law to register for life. The state further pointed out that defendant previously was convicted of felony registration violations. The state therefore argued the court was required to impose a three-year term of incarceration under R.C. 2950.99 as amended by 2007 Am.Sub.S.B. No. 97 ("S.B. 97"), effective prior to the date of defendant's offense. Although defendant conceded he previously was adjudicated a sexual predator, he argued the mandatory sentencing requirements imposed through S.B. 97 did not apply to him as a result of the Supreme Court of Ohio's decisions in *Bodyke* and subsequent cases.

{¶5} In a judgment entry dated December 21, 2011, the trial court failed to impose 3-year prison term the state requested, but instead sentenced defendant to a prison term of 30 months.

II. Assignment of Error

{¶6} The state's single assignment of error contends that since defendant's offense for failing to register occurred after the effective date of S.B. 97, the trial court deviated from a statutory command by failing to impose the mandatory three-year sentence. Defendant responds that the trial court could not constitutionally apply the penalties in S.B. 97 to him since his registration duties arise out of his conviction under Megan's Law. The parties essentially debate whether sentencing defendant under R.C. 2950.99 would impermissibly apply the statute retroactively to him. *See* Ohio Constitution, Article II, Section 28 (providing that the General Assembly "shall have no power to pass retroactive laws"). Because construction of a statute, as well as the issue of retroactive application, is a question of law, our review is *de novo*. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, ¶ 8, citing *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 466 (1994).

{¶7} The Supreme Court of Ohio established a two-part test for determining unconstitutional retroactivity. *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, ¶ 14, citing *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100 (1988), paragraphs one and two of the syllabus. The first part requires the court to determine whether the General Assembly expressly intended that the statute apply retroactively. *LaSalle* at ¶ 14. If so, then the second part asks whether the statute is "substantive, rendering it *unconstitutionally* retroactive, as opposed to merely remedial." (Emphasis sic.) *Bielat v. Bielat*, 87 Ohio St.3d 350, 353 (2000), citing *State v. Cook*, 83 Ohio St.3d 404, 410-11 (1998).

{¶8} "Because R.C. 1.48 establishes a presumption that statutes operate prospectively only, '[t]he issue of whether a statute may constitutionally be applied retrospectively does not arise unless there has been a prior determination that the General Assembly specified that the statute so apply.'" *Cosby v. Franklin Cty. Dept. of Job and Family Servs.*, 10th Dist. No. 07AP-41, 2007-Ohio-6641, ¶ 16, quoting *Van Fossen* at paragraph one of the syllabus; *see Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, ¶ 9. Statutes must be construed as applying prospectively only unless there is a "clear pronouncement by the General Assembly" that the statute applies retroactively. *LaSalle* at

¶ 14. A mere suggestion that a statute applies retroactively is insufficient to overcome the presumption of prospective application. *Hyle* at ¶ 13.

{¶9} The parties do not dispute the general law surrounding unconstitutional retroactivity. Nor do they dispute that R.C. 2950.99, as S.B. 97 amends it, contains no clear indicia of retroactivity. Accordingly, S.B. 97 can apply, as pertinent here, only to those offenses arising after its enactment date. The state points out that defendant's failure to register charge arose after that date.

{¶10} Defendant, however, notes that even when the language of a statute indicates only prospective operation, the statute nonetheless may affect pre-existing rights and thus effectively operate retroactively. *See State v. Adkins*, 129 Ohio St.3d 287, 2011-Ohio-3141, ¶ 14, citing *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, ¶ 14. In such instances, "[t]he retroactivity clause nullifies those new laws that 'reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time [the statute becomes effective].'" *Bielat* at 352-53, quoting *Miller v. Hixson*, 64 Ohio St. 39, 51 (1901). "A statute is retroactive if it penalizes conduct that occurred before its enactment." *State v. Williams*, 103 Ohio St.3d 112, 2004-Ohio-4747, ¶ 7.

{¶11} R.C. 2950.99 does not levy additional penalties upon defendant's prior adjudication for gross sexual imposition; rather it penalizes defendant's post-S.B. 97 failure to register as his sexual predator classification required. *Personal Service Ins. Co. v. Mamone*, 22 Ohio St.3d 107, 109 (1986) (stating "the prohibition against retroactive laws does not apply to a sanction levied for a present violation of an existing law"), citing *In re Allen*, 91 Ohio St. 315 (1915); and *Blackburn v. State*, 50 Ohio St. 428 (1893). The penalties in R.C. 2950.99 thus "flow[] from a failure to register, a new violation of the statute, not from a past sex offense. In other words, the punishment is not applied retroactively for an act that was committed previously, but for a violation of law committed subsequent to the enactment of the law." *Cook* at 421. Because R.C. 2950.99 has no effect until a new, post-statutory enactment registration violation is committed, it is not unconstitutionally retroactive as applied to defendant. *See Adkins* at ¶ 13.

{¶12} S.B. 97's amendment to R.C. 2950.99 to include a three-year mandatory sentence for repeat violations of registration requirements does not change the analysis of

the retroactivity of the statute. " 'When a defendant is given a higher sentence under a recidivism statute—or for that matter, when a sentencing judge, under a guidelines regime or a discretionary sentencing system, increases a sentence based on the defendant's criminal history—100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's "status as a recidivist." The sentence "is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one." ' " *Adkins* at ¶ 15, quoting *United States v. Rodriguez*, 553 U.S. 377, 386 (2008), quoting *Gryger v. Burke*, 334 U.S. 728, 732 (1948). Similarly here, imposing a mandatory three-year sentence on defendant does not punish defendant for his prior gross sexual imposition conviction, but instead punishes his recidivist behavior occurring after S.B. 97 was effective.

{¶13} Contrary to defendant's assertions, the Supreme Court of Ohio's holdings in *Bodyke* and *Gingell* do not alter our analysis. In *Bodyke*, the court addressed the provisions of S.B. 10 that directed the attorney general to reclassify offenders who were already classified under Megan's Law. *Id.* at ¶ 1-2. The court concluded the reclassification provisions of S.B. 10 violated the separation of powers doctrine by requiring final judgments to be reopened and by impermissibly vesting judicial authority in the executive branch. *Id.* at ¶ 55. Concluding severance was the proper remedy for the reclassification provisions, the court severed R.C. 2950.031 and 2950.032 and declared them unenforceable, effectively reinstating the Megan's Law classifications and orders on previously adjudicated offenders. *Id.* at ¶ 66.

{¶14} Less than one year later, in *Gingell*, the court examined whether an offender who was reclassified under S.B. 10 could be convicted for violating the reporting requirements imposed as a result of the reclassification. *Id.* at ¶ 1-3. While the appeal raised the question of whether R.C. 2950.99 was retroactively applied, the court explicitly did not reach the issue since the offender's conviction was based on an unlawful reclassification. *Id.* at ¶ 4, 8. The court concluded that unconstitutionally reclassified offenders could not be prosecuted for violating the reporting requirements under S.B. 10. *Id.* at ¶ 8.

{¶15} Although defendant was at one point reclassified as a Tier III offender, the record indicates he reverted to his status as a sexual predator under Megan's Law in

accordance with *Bodyke* and *Gingell*. Because defendant's conviction for failing to register was not based on an unlawful reclassification, the holdings of *Bodyke* and *Gingell* do not apply here.

{¶16} Defendant additionally contends that as a result of the Supreme Court of Ohio's ruling in *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, he is exempt from the penalties in R.C. 2950.99 as amended by S.B. 97. In *Williams*, the court revisited its earlier decisions that held a prior version of R.C. Chapter 2950 was not unconstitutionally retroactive since the purpose of the statute was solely remedial. *Id.* at ¶ 10. The court detailed the "more complicated and restrictive" classification, registration, and community notification aspects of S.B. 10 and determined the provisions of S.B. 10 transformed R.C. Chapter 2950 into a punitive statute. *Id.* at ¶ 14, quoting *State v. Ferguson*, 120 Ohio St. 3d 7, 2008-Ohio-4824, ¶ 46 (Lanzinger, J., dissenting), quoting *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 45-46 (Lanzinger, J., concurring in part and dissenting in part). The court concluded S.B. 10 could not be constitutionally applied retroactively to offenders whose crimes were committed before its enactment. *Williams* at ¶ 21-22.

{¶17} For several reasons, *Williams* does not advance defendant's contentions on appeal. Initially, unlike *Williams*, the passage of S.B. 10 did not alter defendant's duty to register. Under Megan's Law, defendant was required to register for life, and the record reflects defendant's awareness of the requirement. Secondly, defendant's indictment alleges he failed to register within five days of entering the county, the statutory requirement under Megan's Law, even though the current R.C. 2950.04 as amended by S.B. 10 requires an offender to register within three days of entering the county. *See Williams* at ¶ 37, 42 (O'Donnell, J., dissenting). Accordingly, defendant was not prosecuted as a result of " 'new or additional burdens, duties, obligations, or liabilities as to a past transaction.' " *Williams* at ¶ 20, quoting *Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, ¶ 37. Finally, *Williams* specifically invalidated S.B. 10 as applied to sex offenders who committed an offense prior to the enactment of S.B. 10, not as to those offenders whose offenses occurred after the effective date of S.B. 97. The holding in *Williams* therefore does not resolve defendant's sentence.

{¶18} In the final analysis, defendant's conviction is not based on an unlawful reclassification; nor is current R.C. 2950.99 impermissibly applied retroactively to defendant, an offender originally classified under Megan's Law who violated registration duties after the effective date of S.B. 97. As the court noted in *State v. Topping*, 12th Dist. No. CA2011-07-067, 2012-Ohio-2259, our decision joins a growing conflict between the appellate districts about whether to apply R.C. 2950.99 as amended by S.B. 97 to sex offenders who previously were classified under Megan's Law. Our decision agrees with the First, Fifth, and Twelfth Districts. *State v. Freeman*, 1st Dist. No. C-100389, 2011-Ohio-4357; *State v. Poling*, 5th Dist. No. 2009-CA-00264, 2011-Ohio-3201; *Topping*. It conflicts with the Second, Seventh, and Eighth Districts. *State v. Milby*, 2d Dist. No. 23798, 2010-Ohio-6344; *State v. Savors*, 197 Ohio App.3d 61, 2012-Ohio-1297 (7th Dist.); *State v. Grunden*, 8th Dist. No. 95909, 2011-Ohio-3687.

{¶19} The split seems to hinge on divergent applications of *Bodyke* and *Gingell*. Those courts who reach the opposite result in these cases conclude that even when the reporting requirements under Megan's Law and S.B. 10 are the same, those offenders who were originally convicted under Megan's Law can only be sentenced according to the penalties at the time of their original offense, apparently conflating all future violations of registration orders with the offender's original conviction. See *Milby* at ¶ 31; *State v. Williams*, 2d Dist. No. 24452, 2012-Ohio-107 (Grady, P.J., concurring). In doing so, those courts do not speak separately of S.B. 97 and S.B. 10, even though the Supreme Court never ruled on the retroactivity of S.B. 97 as applied to offenses that occurred before its enactment. *Gingell* at ¶ 5; *Williams* at ¶ 7.

{¶20} The Supreme Court's 2011 decision in *Williams* held that an offender who committed a sex offense before the enactment of S.B. 10 could not be subject to the more extensive reporting requirements enacted after the commission of the offense. *Williams* at ¶ 21. It, however, did not hold that violations of reporting requirements arising from the sex offense but committed after the enactment of a subsequent statute increasing the penalties for reporting violations could not be sentenced according to current law. Plaintiff's assignment of error is sustained.

III. Disposition

{¶21} Having sustained the state's single assignment of error, we reverse the judgment of the trial court for failing to impose the three-year mandatory sentence R.C. 2950.99 requires, and we remand for resentencing consistent with this decision.

*Judgment reversed
and cause remanded.*

TYACK and CONNOR, JJ., concur.
