

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 14AP-201
	:	(C.P.C. No. 10CR-01-79)
v.	:	
	:	(REGULAR CALENDAR)
Charles R. Reed,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 4, 2014

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

Charles R. Reed, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶ 1} This is an appeal by defendant-appellant, Charles R. Reed, from a judgment of the Franklin County Court of Common Pleas denying his "motion to vacate registration and classification scheme."

{¶ 2} On January 7, 2010, appellant was indicted on two counts of rape, in violation of R.C. 2907.02, two counts of sexual battery, in violation of R.C. 2907.03, and three counts of gross sexual imposition, in violation of R.C. 2907.05. The indictment alleged conduct by appellant occurring January 1 through 31, 1998 (Counts 1, 3, and 6), December 20 through 26, 2002 (Counts 2, 4, and 7), and November 8 through 17, 1997 (Count 5), respectively.

{¶ 3} On March 23, 2010, appellant entered a guilty plea to two counts of sexual battery (Counts 3 and 4), and one count of gross sexual imposition (Count 5). The trial court entered a nolle prosequi as to the remaining counts. By judgment entry filed May 3, 2010, the court sentenced appellant to three years incarceration on each of the sexual battery counts, and 18 months incarceration as to the count of gross sexual imposition, with all counts to be served consecutive to each other. The trial court's judgment entry noted that the court "notified the Defendant that by entering into this plea the Defendant will be a sexual offender and classified pursuant to S.B. 10 as a Tier III with registration duties to last a lifetime."

{¶ 4} On May 30, 2012, appellant filed a "motion to vacate registration and classification scheme," asserting that his classification as a Tier III offender was improper under the Supreme Court of Ohio's recent decision in *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374. On May 31, 2012, plaintiff-appellee, State of Ohio, filed a memorandum in opposition to the motion. By decision and entry filed February 14, 2014, the trial court denied appellant's motion.

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

Whether the trial court abused its discretion in ignoring the mandates of the General Assembly and holdings of the Ohio Supreme Court.

{¶ 6} Under his single assignment of error, appellant contends the trial court erred in failing to grant his motion to vacate registration. Appellant contends that, because the offenses at issue were committed prior to the effective date of Am.Sub.S.B. No. 10 ("S.B. 10"), Ohio's version of the Adam Walsh Act ("AWA"), the court should have granted his motion seeking reclassification under the law in effect at the time the offenses were committed based on the Supreme Court's holding in *Williams*. We agree.

{¶ 7} In 2011, the Supreme Court held in *Williams* that "S.B. 10, as applied to * * * any * * * sex offender who committed an offense prior to the enactment of S.B. 10, violates Section 28, Article II of the Ohio Constitution, which prohibits the General Assembly from enacting retroactive laws." *Id.* at ¶ 22. Subsequent to *Williams*, the Supreme Court "clarified that only persons who commit their underlying crime on or after the *effective* date of the AWA—January 1, 2008—are subject to the requirements of the AWA."

(Emphasis sic.) *State v. Howard*, 134 Ohio St.3d 467, 2012-Ohio-5738, ¶ 16, citing *In re Bruce S.*, 134 Ohio St.3d 477, 2012-Ohio-5696. In accordance with the decision in *Williams*, "defendants whose crimes were committed prior to the AWA's enactment should have been classified according to the statutory scheme in place at the time they committed their crimes, even if they were sentenced after the enactment of the AWA." *State v. Johnson*, 3d Dist. No. 16-11-05, 2013-Ohio-136, ¶ 7, citing *Williams*.

{¶ 8} Notwithstanding the Supreme Court's pronouncement in *Williams*, the state argues that the trial court properly denied appellant's motion as barred by the doctrines of waiver and res judicata. The state relies in part on *State v. Awan*, 22 Ohio St.3d 120 (1986), syllabus, for the general proposition that the failure to raise the issue of a statute's constitutionality at the trial level, which issue is apparent at the time of trial, constitutes a waiver of such issue and, therefore, need not be heard for the first time on appeal. This court, however, in applying *Williams*, has previously considered and rejected these same arguments in *State v. Salser*, 10th Dist. No. 12AP-792, 2014-Ohio-87, ¶ 10, *discretionary appeal not allowed*, 140 Ohio St.3d 1453, 2014-Ohio-4414 (rejecting the "state's contention that waiver and/or res judicata bar appellant's attempt to benefit from *Williams* because of his failure to directly appeal his classification").

{¶ 9} We note that other Ohio appellate courts have similarly found unpersuasive such arguments in light of the *Williams* holding. See, e.g., *State v. Simmons*, 7th Dist. No. 12 MA 138, 2014-Ohio-582, ¶ 31-32 (observing that "waiver doctrine announced in *Awan* is discretionary," and that the Supreme Court has reversed and remanded for application of *Williams* cases "in which the defendant had failed to raise their constitutional challenge below"); *State v. Watkins*, 6th Dist. No. L-11-1085, 2013-Ohio-2030, ¶ 11 (declining to apply waiver doctrine of *Awan*, noting that "the Supreme Court of Ohio did not recognize the S.B. 10 version of R.C. Chapter 2950 as punitive until its decision in * * * *Williams*"); *State v. Clemons*, 7th Dist. No. 11 BE 26, 2012-Ohio-5362, ¶ 12 (rejecting state's reliance on *Awan*, and noting that "the Ohio Supreme Court's own treatment of cases like this one post-*Williams* further supports our decision here to reach Clemons's constitutional challenge despite his having failed to raise it below"); *State v. Weaver*, 7th Dist. No. 11 BE 12, 2011-Ohio-6402, ¶ 18 (affording appellant relief based on *Williams* despite court's

acknowledgment that appellant "did not appeal the original sentencing order," and that his "2011 motion is an untimely postconviction motion").

{¶ 10} In the instant case, the record indicates, and the state does not dispute, that the trial court sentenced appellant as a Tier III offender for acts alleged to have occurred in 1997, 1998, and 2002, respectively (i.e., prior to the effective date of S.B. No. 10). Pursuant to *Williams*, appellant's classification as a Tier III offender for offenses committed prior to the enactment of S.B. No. 10 "was in violation of Ohio's Retroactivity Clause." *Salser* at ¶ 9.

{¶ 11} Under *Williams*, " 'the remedy for improper classification is to remand the matter to the trial court for a classification hearing in accordance with the law in effect at the time the offense was committed.' " *Salser* at ¶ 13, quoting *State v. Alsip*, 8th Dist. No. 98921, 2013-Ohio-1452, ¶ 10. Accordingly, appellant's classification as a Tier III offender under S.B. No. 10 is vacated, and we remand this matter to the trial court for the limited purpose of holding a hearing to classify him pursuant to the law that existed at the time he committed his offenses. *Id.*

{¶ 12} Based on the foregoing, we sustain appellant's single assignment of error, 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, consistent with this decision.

Judgment reversed; cause remanded.

KLATT and DORRIAN, JJ., concur.
