[Cite as *Watkins v. Stevey*, 2009-Ohio-6854.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

DENNIS WATKINS, TRUMBULL COUNTY PROSECUTOR,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2009-T-0022**
- vs -	:	
WESLEY EDWARD STEVEY,	:	
Defendant-Appellee.	:	

Appeal from the Court of Common Pleas, Case No. 2008 CV 1993.

Judgment: Affirmed.

LuWayne Annos, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellant).

Michael D. Rossi, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Defendant-Appellee).

TIMOTHY P. CANNON, J.

{¶1} Dennis Watkins, Prosecuting Attorney for Trumbull County, appeals from a judgment of the Trumbull County Court of Common Pleas enjoining the state of Ohio from enforcing R.C. 2950.034 against Wesley Edward Stevey, a sex offender. The statute prohibits a sex offender from residing within 1,000 feet of school premises. The trial court held the enforcement of the statute against Mr. Stevey, who committed the

sex offense in 1982 before the statute's 2003 enactment, would violate the Ex Post Facto Clause of the United States Constitution. For the following reasons, we affirm.

{¶2} **Procedural and Substantive History**

{¶3} In 1982, Mr. Stevey was indicted on four counts of rape. Mr. Stevey pled guilty to an amended indictment charging him with one count of rape. The trial court sentenced him to four to 25 years in prison for his conviction. After serving the full 25 years, he was released on July 27, 2007.

{¶4} Mr. Stevey resided at his own home at 1605 Adelaide, S.E., Warren, Ohio, at the time of the sexual incidents. When the sexual abuse came to light, he moved to his father's residence at 701 Kayser Road, Leavittsburg, Ohio, in June 1982, and stayed there for several months until his incarceration on November 19, 1982. After his release in 2007, he first resided at 6264 Eagle Creek Road, Leavittsburg, Ohio, and subsequently at 612 Orris Road, also in Leavittsburg. In March 2008, he moved into his father's home at 701 Kayser Road, which is within 1,000 feet of Labrae High School, Labrae Middle School, and Bascom Elementary School. According to the Trumbull County Tax Map, the distance between the house and the school premises is 405 feet to be exact.

{¶5} On July 14, 2008, Mr. Watkins filed a complaint pursuant to R.C. 2950.31, et seq., seeking to enjoin Mr. Stevey from continuing to reside at 701 Kayser Road. Both parties moved for summary judgment.

{¶6} The trial court, relying on the authority of *Mikaloff v. Walsh* (N.D. Ohio 2007), 2007 U.S. Dist. LEXIS 65076, held that the residency statute, R.C. 2950.034, as

applied to Mr. Stevey, is unconstitutional because it violates the Ex Post Facto Clause of the United States Constitution.

{¶7} Mr. Watkins now appeals, assigning the following errors for our review:

{¶8} "[1.] A trial court errs in finding an Ex Post Facto violation when a sex offender, with no property interest in a residence, moves into a house 405 feet from a school premise.

{¶9} "[2.] The court below erred by misapplying the doctrine of stare decisis and giving undue weight to a federal court ruling which is not controlling on any Ohio trial court.

{¶10} "[3.] The trial court erred as a matter of law in failing to grant Appellant's Civ.R. 56(C) motion for summary judgment."

{¶11} In 2003, the General Assembly enacted R.C. 2950.031, effective July 31, 2003, which prohibits sex offenders from residing within 1,000 feet of school premises. R.C. 2950.031 was subsequently amended and recodified as R.C. 2950.034. The current version of the residency provision under Senate Bill 10 is substantially similar to its predecessor. The General Assembly made only a slight change to the prior version by adding day-cares and preschools to the residency prohibition. The current version of the residency statute, R.C. 2950.034, provides, in pertinent part:

{¶12} "(A) No person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises or preschool or child day-care center premises."

{¶13} Ohio's Adam Walsh Act, as amended in R.C. Chapter 2950, et seq., clearly indicates that offenders who were classified under the prior version of the scheme are obligated to comply with the new requirements. See, e.g., R.C. 2950.03, 2950.031, 2950.032(A) and 2950.033(A). The statute at issue in the instant case, however, was not specifically made retroactive. Therefore, the question presented by this case is whether the residency restrictions statute can be applied to a sex offender in Mr. Stevey's situation, who committed the sex offense before the effective date of the statute. Our analysis begins with the threshold issue of whether the statute applies retroactively to Mr. Stevey. Pursuant to *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, at ¶8, this is a two-part analysis. If we determine that the statute can be applied retroactively to Mr. Stevey under *Hyle*'s two-part analysis, then we will consider whether its application violates the Ex Post Facto Clause, the issue raised in appellant's first assignment of error.

{¶14} **The Two-Part Retroactivity Analysis**

{¶15} As the Supreme Court of Ohio explained in *Hyle*, the first part of the retroactivity analysis involves the rule of statutory construction, adopted in R.C. 1.48. Pursuant to the rule, "'a statute is presumed to be prospective in its operation unless expressly made retrospective.'" *Hyle* at ¶7, quoting *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100. The second part of the analysis asks whether an application of the statute is prohibited by Section 28, Article II of the Ohio Constitution,[1] which states: "'The general assembly shall have no power to pass retroactive laws ***.'" Id. "A retroactive statute is unconstitutional if it retroactively impairs vested substantive

1. Clause 1, Section 10, Article I of the United States Constitution states a similar prohibition: "No State shall *** pass any *** ex post facto Law ***."

rights, but not if it is merely remedial in nature." Id., citing *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, at ¶9.

{¶16} In *Hyle*, the sex offender owned and lived in his home with his wife since 1991, and committed the sex offense before the 2003 enactment of the residency statute. *Hyle v. Porter*, 2008-Ohio-542, at ¶3-5. The Supreme Court of Ohio reviewed the prior version of the residency statute, substantially similar to the current version except for the addition of preschools and day-care centers as prohibited zones. In answering the first part of the inquiry regarding whether the operation of the statute was made expressly retrospective, the *Hyle* Court reached the following conclusion:

{¶17} "On review of the text of R.C. 2950.031, we find that neither the description of convicted sex offenders nor the description of prohibited acts includes a clear declaration of retroactivity. Although we acknowledge that the language of R.C. 2950.031 is ambiguous regarding its prospective or retroactive application, we emphasize that ambiguous language is not sufficient to overcome the presumption of prospective application. The language in R.C. 2950.031 presents at best a *suggestion* of retroactivity, which is not sufficient to establish that a statute applies retroactively." Id. at ¶13. (Emphasis sic.)

{¶18} The *Hyle* Court then stated that: "[o]ur conclusion that R.C. 2950.031 was not expressly made retrospective precludes us from addressing the constitutional prohibition against retroactivity." Id. at ¶24, citing *Van Fossen*, 36 Ohio St.3d at 106. The Court went on to state that: "[w]e hold that because R.C. 2950.031 was not expressly made retroactive, it does not apply to an offender *who bought his home and committed his offense before the effective date of the statute*." Id. (Emphasis added.)

{¶19} Mr. Watkins argues that the holding of the *Hyle* Court is limited to *only* those offenders *who bought their homes* and committed the offense before the effective date of the statute. Mr. Watkins maintains that *Hyle* is not applicable to the case sub judice, as Mr. Stevey committed his offense before the enactment of the statute but never owned the prohibited residence.

{¶20} To determine whether *Hyle* is limited to this narrow holding, as advocated by Mr. Watkins, we find instructive the Supreme Court of Ohio's own application of *Hyle* in its subsequent disposition of several appeals post-*Hyle*.

{¶21} In *Nasal v. Dover*, 169 Ohio App.3d 262, 2006-Ohio-5584, the sex offender committed a sex offense in 1998 for which he served a jail term of 60 days. Id. at ¶4. The Second District held that the statute cannot apply retroactively to prevent him from living in his home, which he and his wife owned and lived in for almost 30 years. Id. at ¶6 & 23. The Supreme Court of Ohio, in *Nasal v. Dover*, 117 Ohio St.3d 531, 2008-Ohio-1592, affirmed that decision on the authority of *Hyle.*

{¶22} In *State v. Mutter*, 171 Ohio App.3d 563, 2007-Ohio-1052, the sex offender committed his offense before the enactment of the statute, for which he received five years of community control sanctions. Id. at ¶4-5. The Second District decided that the statute cannot be retroactively applied to prevent him from living in his home in which he has resided since 1977. Id. at ¶4 & 27. The Supreme Court of Ohio, in *State v. Mutter*, 117 Ohio St.3d 536, 2008-Ohio-1591, affirmed the decision on the authority of *Hyle*.

{¶23} In *State ex. rel. White v. Billings*, 12th Dist. No. CA2006-09-072, 2007-Ohio-4356, the Twelfth District determined the statute can be applied retroactively to

enjoin the sex offender from residing in a home, owned by his wife, who purchased the home sometime before the enactment of the statute. The Supreme Court of Ohio, in *State ex rel. White v. Billings*, 117 Ohio St.3d 536, 2008-Ohio-1590, disapproved of the decision and reversed it on the authority of *Hyle*.

{¶24} The instant case is similar to those facts presented in *Franklin Cty. Pros. Atty. v. Walker*, 10th Dist. No. 07AP-165, 2007-Ohio-5095, where the Tenth Appellate District affirmed the trial court's injunction against Walker, a sexual offender, who had occupied a house for nearly 20 years. Id. at ¶1-4. This house was owned by his mother and step-father and was within 1,000 feet of a school. Id. After Walker was informed by the prosecuting attorney that he was in violation of R.C. 2950.031, he moved two doors down, where he leased a residence also within 1,000 feet of a school. Id. In granting the injunction, the trial court reasoned that, as applied to Walker, the statute was not unconstitutionally retroactive, as "he did not have any vested property rights with respect to either of the two residences at issue. The [trial] court concluded [Walker] thus had no substantive property rights that could be infringed by requiring him to vacate either residence pursuant to R.C. 2950.031." Id. at ¶6. In affirming the trial court, the Tenth Appellate District stated:

{¶25} "Unlike the defendant in *Mutter* or *Nasal*, defendant presented no evidence he had any property rights in the house at 742 Mithoff at the time the statute became effective. Defendant thus had no vested right that the statute impaired: he rented the property after the statute became effective when he was on notice of the statutory prohibition against his living within 1,000 feet of a school. As applied to defendant, the statute simply addresses where he may choose to live; it does not expel

him from a residence he owned, occupied, or used at the time the statute was enacted. *** [T]he statute's rule prohibiting defendant from choosing to reside within 1,000 feet of a school premises is remedial in nature, designed to achieve the statutory objective; it is not unconstitutional as impairing a substantive right in this case. See *Hyle*, at ¶24. Accordingly, R.C. 2950.031 is not unconstitutionally retroactive as applied to defendant." Id. at ¶21.

{¶26} The Supreme Court of Ohio, based on the authority of *Hyle*, summarily reversed the Tenth District's decision in *Franklin Cty. Pros. Atty. v. Walker*, 117 Ohio St.3d 537, 2008-Ohio-1589.

{¶27} The record in the instant case reflects Mr. Stevey moved out of his own home after his arrest for the sexual offenses and briefly stayed at his father's home at 701 Kayser Road until his incarceration several months later. He lived at two different addresses after his release from prison in 2007 before moving into his father's home in 2008. Although he did not purchase or own the residence, *Hyle*'s holding is applicable based upon a review of the aforementioned cases and, therefore, the residency statute does not apply retroactively to Mr. Stevey.

{¶28} In addition, although the facts of the instant case are dissimilar to that presented in *Hyle*, the Supreme Court of Ohio noted in its retroactivity analysis that "the absence of a clear declaration *** precludes the retrospective application of R.C. 2950.031[,]" which specifically prohibits an offender from either establishing a residence *or* occupying a residential premises within 1,000 feet of any school premises. *Hyle v. Porter*, at ¶19.

{¶29} One way to resolve the application of this statute to Mr. Stevey is for the legislature, as it did with Senate Bill 10, to specifically make the statute retroactive, thus allowing "courts to consider whether retroactive application of the statute would comport with constitutional requirements." *O'Brien v. Whalen*, 10th Dist. No. 08AP-918, 2009-Ohio-1807, at ¶19.[2] However, until the General Assembly makes the statute retrospective or the Supreme Court of Ohio issues a decision limiting *Hyle* to that suggested by Mr. Watkins, our determination that the statute does not apply retroactively to Mr. Stevey concludes our retroactivity inquiry. As stated in *Hyle*: "[o]ur conclusion that R.C. 2950.031 was not expressly made retrospective precludes us from addressing the constitutional prohibition against retroactivity." *Hyle*, supra, at ¶24. (Citation omitted.)

{¶30} Based on our analysis above, we need not address whether the residency statute violates the Ex Post Facto Clause as applied to Mr. Stevey, who committed his offense prior to the enactment of the statute. Mr. Watkins' first assignment of error is without merit.

{¶31} In the second assignment of error, Mr. Watkins contends the trial court erred in relying on the authority of *Mikaloff*, because it is not a controlling authority in this case.

{¶32} We recognize that the final arbiter of state law is the state's highest court. See *State v. Burnett* (2001), 93 Ohio St.3d 419, 423-424 (the state's highest court stated it is not bound by rulings made by a federal court other than the United States Supreme Court; "the lower federal courts exercise no appellate jurisdiction over the

2. It should be noted that Sub.S.B. 42, passed by the Ohio Senate to explicitly make R.C. 2950.034 retroactive, would do just that.

state courts"). Since the decision of *Mikaloff*, the Supreme Court of Ohio reviewed the residency provision in *Hyle*, which is the controlling and binding authority on the constitutionality of the provision. As we concluded, the holding in *Hyle* is *not* limited to only those offenders who bought their homes and committed the offense before the effective date of the statute.

{¶33} Additionally, Mr. Watkins maintains that the trial court's reliance upon *Mikaloff* ignored a prior holding of this court in *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059. *Swank* is distinguishable from the instant case because Swank waived his challenge of the residency restriction on appeal, as he failed to challenge it in the trial court; Swank failed to present evidence of an actual injury; and Swank did not have standing to challenge the constitutionality of the residency restriction as he did not suffer "actual deprivation of his property rights as a result of the application of such restriction to him." Id. at ¶109-111.

{¶34} The second assignment of error is without merit.

{¶35} In the third assignment of error, Mr. Watkins asserts the trial court should have granted the state's motion for summary judgment. We disagree.

{¶36} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. "Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Holik v. Richards*, 11th Dist. No. 2005-A-0006, 2006-Ohio-2644, ¶12, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. "In addition, it must appear from the evidence and stipulations that

reasonable minds can come to only one conclusion, which is adverse to the nonmoving party." Id., citing Civ.R. 56(C).

{¶37} Accordingly, "[s]ummary judgment may not be granted until the moving party sufficiently demonstrates the absence of a genuine issue of material fact. The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Brunstetter v. Keating*, 11th Dist. No. 2002-T-0057, 2003-Ohio-3270, ¶12, citing *Dresher* at 292.

{¶38} "Once the moving party meets the initial burden, the nonmoving party must then set forth specific facts demonstrating that a genuine issue of material fact does exist that must be preserved for trial, and if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." Id., citing *Dresher* at 293.

{¶39} Based on the foregoing analysis regarding the constitutionality of the residency provision as applied to a sex offender in Mr. Stevey's situation, we conclude the trial court did not err in its disposition of Mr. Watkins' motion for summary judgment. The third assignment of error is without merit.

{¶40} Based on the opinion of this court, the judgment of the Trumbull County Court of Common Pleas is hereby affirmed.

COLLEEN MARY O'TOOLE, J., concurs,

MARY JANE TRAPP, P.J., dissents with Dissenting Opinion.

MARY JANE TRAPP, P.J., dissents with Dissenting Opinion.

{¶41} I respectfully dissent.

{¶42} Mr. Stevey was indicted in 1982 on four counts of rape, which stemmed from his sexual conduct in 1980 and 1982 with a total of four children. Two of the victims were his four-year-old son and two-year-old daughter; the other two victims were his wife's cousins, an eight-year-old girl and a five-year-old girl. Stevey admitted to engaging in sexual conduct with these children and pled guilty to an amended indictment charging him with one count of rape. His presentence investigation report reflected an early conviction in 1978 in Virginia for frequenting for lewdness related to an incident where he masturbated in an adult book store. The PSI also included a psychologist's report which noted that he was also charged with voyeurism at age 10. The psychologist diagnosed Mr. Stevey as a pedophile, noting he not only demonstrated sexual attraction to children, but also fantasized about physically harming them. The psychologist stated she was "most apprehensive at the prospect of Mr. Stevey's remaining at large."

{¶43} Based on *Nasal*, *Mutter*, *Billings*, and *Walker*, I believe the *Hyle* holding that the residency restrictions statute does not apply retroactively under certain circumstances should be narrowly construed. The holding only applies to those offenders who either owned or had long resided in the prohibited residence. Therefore, in my opinion, *Hyle* is not applicable to Mr. Stevey, who committed his offense before the enactment of the statute, but never owned or otherwise possessed any property interest in the subject residence, and was merely a temporary resident there for a brief period after his commission of the sex offenses.

{¶44} In *Nasal*, the residence in question was the sex offender's own home, where he and his wife owned and lived for almost thirty years. In *Mutter*, the subject residence was also the offender's home, in which he had resided since 1977. In *Billings*, the prohibited residence was likewise the offender's own home, owned by his wife, who purchased the home sometime before the enactment of the statute. Finally, in *Walker*, the subject residence was a home owned by the offender's mother and stepfather, where he had lived for over twenty years.

{¶45} In light of these cases, I believe the *Hyle* holding that "[b]ecause R.C. 2950.031 was not expressly made retrospective, it does not apply to an offender who bought his home and committed his offense before the effective date of the statute," is to be narrowly construed. *Hyle* at syllabus. In all these cases, the prohibited residence was either the offender's own home or, in the case of *Walker*, the offender's parents' home where the offender had been a long-term resident.

{¶46} A different panel in a recent case from our court has already espoused this narrow view of *Hyle*, in *State v. Candela*, 11th Dist. No. 2008-A-0068, 2009-Ohio-4096, ¶51. There, the sex offender challenged the constitutionality of the residency provision under Senate Bill 10. Our court, citing *Hyle*, explained that if the sex offender "bought his home and committed his offense before the effective date of the statute, R.C. 2950.034 cannot be applied to his residency at that home." See, also, *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051, ¶99 (without an indication in the record that he purchased the residence prior to the enactment of the statute, *Hyle* is not applicable).

{¶47} In this case, Mr. Stevey moved out of his own home, where he had resided with his wife and children, after his arrest for the sexual offenses. He then briefly stayed at his father's home at 701 Kayser, until his incarceration several months later. He lived at two different addresses after his release from prison in 2007 before moving into his father's home in 2008. He did not purchase, own, or otherwise have any property interest or right in his father's residence; neither had he been a resident there at the time he committed the offenses. Under these circumstances, I believe *Hyle*'s narrow holding is not applicable and the residency statute applies retroactively to Mr. Stevey.

{¶48} The determination that the statute applies retroactively to a sex offender is not the end of the retroactivity inquiry. In the second part of the analysis, pursuant to *Hyle*, the court still must consider whether a sex offender's substantive right is affected by the application of the statute. "A retroactive statute is unconstitutional if it retroactively impairs vested substantive rights, but not it if is merely remedial in nature." *Hyle* at ¶7. If a substantive right is impaired, then the application of the statute would violate the prohibition against retroactive laws.

{¶49} *Hyle* does not provide guidance in this regard. The *Hyle* court never reached this part of the analysis because of its conclusion that the statute does not apply to the offender as the offender in that case bought his home and committed the offense before the enactment of the statute. As a result, the court did not have an opportunity to address the circumstances under which a sex offender's substantive right would be affected when prevented from living in a residence within the school zone.

{¶50} Under the circumstances of the instant case, where the sex offender did not purchase or otherwise possess any property interest or right in the prohibited residence, and, furthermore, did not reside there at the time he committed the sex offenses, there is no doubt in my mind that the state's prohibiting him from living in that residence does not impair a substantive right. Mr. Stevey's connection to the prohibited residence before the statute went into effect is tenuous and tangential – he stayed there briefly following his arrest after he moved out of his own home where he had resided with his wife and children. There is no evidence that he was paying rent or otherwise had a leasehold interest in his father's home.

{¶51} Under these circumstances, although I recognize Mr. Stevey faces significant housing disadvantages, I do not believe his freedom to reside in that residence, which is within 1,000 feet of three different schools, rises to the level of a substantive right. The circumstances here are readily distinguishable from *Nasal*, where the appellate court determined that the offender's substantive right would be affected if forced to divest himself of the ownership of his home that he owned and occupied for years prior to his offense, as well as from *Mutter*, where the appellate court similarly concluded that the sex offender's right to continue to own and occupy his residential property constituted a substantive right.

{¶52} Having determined that the statute can be applied to Mr. Stevey without violating the prohibition against retroactive laws, the question remains regarding whether the residency statute violates the Ex Post Facto Clause as applied to Mr. Stevey, who committed his offense prior to the enactment of the statute. The trial court

decided it does, and Mr. Watkins challenges that determination in his first assignment of error.

{¶53} "Any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, *** is prohibited as ex post facto." *Beazell v. Ohio* (1925), 269 U.S. 167, 169-170.

{¶54} The Ex Post Facto Clause is only implicated if the residency restrictions are considered penal. Here, I find the analysis provided by the U.S. District Court for the Southern Division in *Coston v. Petro* (S.D. Ohio 2005), 398 F.Supp.2d 878, although not a controlling authority, rather persuasive. The district court held that the residency provision neither is a criminal provision nor has a punitive effect. It reasoned as follows:

{¶55} "[The residency provision] does not, however, impose punishment and accordingly is not a criminal statute. [The provision] on its face imposes no criminal sanctions *** and the expressed intent of the sex offender registration statute is to protect the safety and general welfare of the public." Id. at 885.

{¶56} "[A]lthough [the provision] prohibits sex offenders from living within the designated areas, this statute is unlike the traditional punishment of banishment because sex offenders are not expelled from the community or even prohibited from accessing these areas for employment or conducting commercial transactions." Id. (Citation omitted.)

{¶57} "[The provision] does impose an affirmative restraint or disability in that registered sex offenders are precluded from living within designated areas of the state. Nevertheless, [the provision] imposes no physical restraint on sex offenders and in fact

is less restrictive than the involuntary commitment provisions for mentally ill sex offenders held to be nonpunitive in *Kansas v. Hendricks*, 521 U.S. 346, 363-65, 117 S.Ct. 2072, 138 L. Ed. 2d 501 (1997). [S]ex offenders are free to move about within the zone, but they cannot establish a permanent residence there. Therefore, the Court cannot conclude that this relatively limited restraint on sex offenders constitutes punishment." Id. at 885-886.

{¶58} I also find persuasive the First District's reasoning on this issue in *Hyle*, 170 Ohio App.3d 710, 2006-Ohio-5454, overruled on other grounds, *Hyle*, 2008-Ohio-542. The First District stated:

{¶59} "Although the rule affirmatively restrains or disables in the sense that convicted sex offenders may not live within 1,000 feet of a school, we cannot say that this restriction rises to the level of restraint that constitutes punishment. We note that the rule does not physically restrain or otherwise impede sexually-oriented offenders from (1) traveling through school zones, (2) entering these areas for employment, or (3) conducting commercial transactions within the zone. Moreover, the rule does not prohibit an offender from owning, renting, or leasing a home within 1,000 feet of a school. Sexually-oriented offenders are simply prohibited from living within 1,000 feet of a school. The restriction does not affirmatively disable or restrain offenders so severely as to be penal." Id. at ¶13.

{¶60} I share the view held by these courts. The residency provision is a measure for protecting the safety and general welfare of the public, rather than a law imposing additional punishment on a sex offender. It is civil in intent and the effect of the restrictions is not so punitive as to negate the legislature's non-punitive intent.

Therefore, it does not violate the Ex Post Facto Clause when applied retroactively to an offender who committed the offense before the statute's enactment. See *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195; *State v. King*, 2d Dist. No. 08-CA-02, 2008-Ohio-2594, ¶16. Accordingly, I would sustain the first assignment of error.

{¶61} The trial court in this case based its decision on the authority of *Mikaloff v. Walsh* (N.D. Ohio 2007), No. 5:06-CV-96, 2007 U.S. Dist. LEXIS 65076. In this federal case, the offender committed rape, robbery, burglary and felonious assault in 1986 when he was 18 and living at home. After serving 16 years in prison, he was paroled to his family in 2002 and lived with his partner and their two children in a guest home on the back of his parents' residence, located within 1,000 feet of school premises. The constitutional claim raised by the parties in that case is whether the residency provision violated the Ex Post Facto Clause of the United States Constitution. The court determined that, as applied to that offender, the residency limitation imposed an onerous affirmative disability and restraint and therefore violated the Ex Post Facto Clause. Id. at *23.

{¶62} In the second assignment of error, Mr. Watkins contends the trial court erred in relying on the authority of *Mikaloff*, because it is not a controlling authority in this case. I agree. The final arbiter of state law is the state's highest court. See *State v. Burnett* (2001), 93 Ohio St.3d 419, 424 (the state's highest court stated it is not bound by rulings made by a federal court other than the United States Supreme Court; "the lower federal courts exercise no appellate jurisdiction over the state courts"). Since the decision of *Mikaloff*, the Supreme Court of Ohio reviewed the residency restrictions

statute in *Hyle*, which became the only controlling and binding authority on the constitutionality of the statute. *Hyle* significantly limits the precedential value of *Mikaloff*, and therefore I would sustain the second assignment of error.

{¶63} In the third assignment of error, Mr. Watkins asserts the trial court should have granted the state's motion for summary judgment. I agree, because the facts are not in dispute that Mr. Stevey did not purchase and does not own or otherwise have any property interest in the residence at issue, and furthermore did not reside there at the time he committed the sex offenses. No genuine issues remain to be litigated. Therefore, I would sustain Mr. Watkins' third assignment of error.

{¶64} For the foregoing reasons, I respectfully dissent.