[Cite as *In re T.D.*, 2010-Ohio-6081.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

IN RE:	:	
T.D.	:	CASE NO. CA2010-01-002
	:	O P I N I O N 12/13/2010
	:	
	:	

APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 20062264

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HENDRICKSON, J.

{¶1} Defendant-appellant, T.D., appeals a decision of the Clinton County Court of Common Pleas, Juvenile Division, denying a motion to vacate his Tier III juvenile sex offender classification. For the reasons outlined below, we affirm the decision of the juvenile court.

{¶2} On June 23, 2006, a complaint was filed in the juvenile court alleging that appellant, then 17 years old, was a delinquent child due to his commission of two counts of rape in violation of R.C. 2907.02(A)(1)(b), an offense which would constitute a first-

degree felony if committed by an adult. Both counts involved the same 12-year-old female victim. Appellant entered an admission to one count in exchange for dismissal of the other count.

{¶3} In an entry dated August 25, 2006, the juvenile court adjudicated appellant delinquent and committed him to the custody of the Ohio Department of Youth Services (DYS) for a minimum term of one year and a maximum term not to exceed his 21st birthday. In a subsequent entry, the court ordered the matter to be set for a sex offender classification hearing once appellant was released from the custody of DYS.

{¶4} On December 28, 2006, appellant was transferred from DYS to Lighthouse Youth Center at Paint Creek (PCYC), a staff-secure residential treatment facility. On January 2, 2008, the juvenile court received notice from DYS regarding an upcoming review hearing to be held on January 30, 2008. The purpose of this hearing was to consider releasing appellant from DYS.

{¶5} The juvenile court conducted appellant's sexual classification hearing on January 23, 2008, one week before the impending review hearing. In an entry dated February 6, 2008, appellant was classified as a Tier III juvenile sex offender registrant. The court ordered that a review of this classification was to be held at the end of disposition, near appellant's 21st birthday.

{¶6} Appellant was transferred back to DYS from PCYC on August 29, 2008. Approximately one year later, appellant moved the juvenile court to vacate his Tier III classification on the basis that the court lacked jurisdiction to classify him because it failed to follow the proper statutory procedure. The juvenile court conducted a statutory review hearing on December 14, 2009 at which time it also considered appellant's motion to vacate.

{¶7} In an entry dated December 22, 2009, the juvenile court denied appellant's

motion to vacate his Tier III classification. In addition, pursuant to the statutory review, the entry reclassified appellant as a Tier II juvenile sex offender registrant. Appellant timely appealed the denial of his motion to vacate, raising three assignments of error.

{¶8} Assignment of Error No. 1:

{¶9} "THE CLINTON COUNTY JUVENILE COURT ERRED WHEN IT DENIED [APPELLANT]'S MOTION TO VACATE HIS JUVENILE SEX OFFENDER CLASSIFICATION."

{¶10} Assignment of Error No. 2:

{¶11} "THE CLINTON COUNTY JUVENILE COURT ABUSED ITS DISCRETION WHEN IT CLASSIFIED [APPELLANT] AS A TIER III JUVENILE SEX OFFENDER REGISTRANT; THEREFORE, THE COURT ERRED WHEN IT RECLASSIFIED TROY D. AS A TIER II JUVENILE SEX OFFENDER REGISTRANT BASED UPON TROY'S INITIAL CLASSIFICATION."

{¶12} Assignment of Error No. 3:

{¶13} "[APPELLANT]'S INITIAL JUVENILE SEX OFFENDER CLASSIFICATION WAS ENTERED FOLLOWING THE RETROACTIVE APPLICATION OF S.B. 10, WHICH VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION AND THE RETROACTIVITY CLAUSE OF SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION; THEREFORE, THE COURT ERRED WHEN IT RECLASSIFIED TROY D. AS A TIER II JUVENILE SEX OFFENDER REGISTRANT BASED UPON THE INITIAL CLASSIFICATION."

{¶14} In his first assignment of error, appellant argues that the juvenile court failed to follow the proper statutory procedure for classifying him. As a result, appellant maintains that the juvenile court did not have jurisdiction to classify him as a Tier III juvenile sex offender in February 2008. Appellant insists that this defect renders his Tier

III sex offender classification void, requiring that it be vacated.

{¶15} Both parties agree that R.C. 2152.83(A)(1) applies to the present matter. The statute provides, in pertinent part:

{¶16} "The court that adjudicates a child a delinquent child shall issue as part of the dispositional order or, if the court commits the child for the delinquent act to the custody of a secure facility, shall issue at the time of the child's release from the secure facility an order that classifies the child a juvenile offender registrant * * * ."

{¶17} As stated, the juvenile court adjudicated appellant a delinquent child in 2006 and committed him to DYS, a secure facility.[1] Pursuant to R.C. 2152.83(A)(1), the court was required to issue a sex offender classification order upon appellant's release from DYS.

{¶18} Initially, appellant argues that his classification was conducted too late to comply with R.C. 2152.83(A)(1). Appellant construes his transfer from DYS to PCYC on December 28, 2006 as his "release from a secure facility" due to the fact that PCYC was a staff-secure facility and not a "secure facility" within the meaning of the statute. See R.C. 2152.83(G) and R.C. 2950.01(O). Consequently, appellant contends, the juvenile court lost jurisdiction to classify him after this "release" date lapsed.

{¶19} Contrary to appellant's argument, the record supports that DYS did not "release" him from its custody upon his admission to PCYC on December 28, 2006. Rather, appellant's conveyance to PCYC was merely a temporary transfer to a rehabilitation facility where he received substance abuse and sex offender treatment. While the juvenile court prompted DYS to consider appellant for transfer to PCYC, the court placed the determination as to appellant's eligibility for the program within the

1. There does not appear to be any dispute that DYS is a "secure facility" within the meaning of the applicable statutes. See R.C. 2152.83(G) and R.C. 2950.01(O).

discretion of DYS. Apparently, DYS found appellant eligible and assented to his transfer.

{¶20} While appellant was still housed at PCYC, DYS sent a 30-day notice to the juvenile court regarding appellant's upcoming release review hearing. Filed into the record on January 2, 2008, the notice alerted the court that the hearing was scheduled for January 30, 2008. If DYS had intended to relinquish custody of appellant upon his transfer to PCYC, it would not have sent the court notification of appellant's potential release *from DYS*.

{¶21} Furthermore, at the hearing on the motion to vacate, the court asked appellant where he took up residence when he was released from DYS. Appellant replied that he moved in with his grandmother. The court also asked appellant when he was released. Appellant replied with the date of his 21st birthday. These responses reflect appellant's understanding that he was not released from DYS when he was transferred to PCYC, but when he reached the age of 21.

{¶22} Because it is apparent from the record that DYS intended to retain custody of appellant for the duration of his treatment at PCYC, appellant's argument that he should have been classified upon his transfer to PCYC is without merit. Alternatively, appellant asserts that his classification was conducted too early to comply with R.C. 2152.83(A)(1).

{¶23} As previously noted, R.C. 2152.83(A)(1) provides that the juvenile court *shall* classify a child previously adjudicated delinquent for committing a sexual offense at *one of two* times: (1) as part of the dispositional order, or (2) if the child is committed to a secure facility, at the time he is released from the facility. The procedural history in the present matter seems to reflect an attempt on the part of the juvenile court to comply with the spirit of R.C. 2152.83(A)(1). The court received notice of the upcoming January

30, 2008 release review hearing and, in contemplation of appellant's *possible* release from a secure facility, held a sex offender classification hearing a week before the release hearing.

{¶24} As it turns out, however, appellant was not found fit for release on January 30, 2008. Although he was classified as a Tier III offender in an entry dated February 6, 2008, appellant was not actually released from DYS until his 21st birthday on September 7, 2009. That means appellant was classified as a sex offender approximately 19 months *before* he was actually released from DYS.

{¶25} The precise language of R.C. 2152.83(A)(1) does not appear to afford the juvenile court any discretion with regards to the timing of the sex offender classification hearing. As the Fourth Appellate District observed:

{¶26} "[A]lthough a juvenile court has discretion as to the type of disposition it makes, the court apparently does not have discretion to determine *when* the delinquent child can be adjudicated a sexual predator. If a child is committed to DYS, the legislature has decided that such a determination must wait until the child's release. We recognize that courts must follow a statute's plain language, regardless of the wisdom of the particular statutory provision." *In re P.B.*, Scioto App. No. 07CA3140, 2007-Ohio-3937, ¶8. (Emphasis in original.)

{¶27} The Fifth Appellate District followed the Fourth District's example in the case of *In re Kristopher W.*, Tuscarawas App. No. 2008 AP 03 0022, 2008-Ohio-6075. Kristopher was adjudicated delinquent for multiple counts of rape and gross sexual imposition and committed to DYS. The commitment entry also classified Kristopher a Tier III juvenile offender registrant. Quoting the *In re P.B.* decision at length, the Fifth District ruled that the juvenile court erred in classifying Kristopher when it did. The appellate court opined that "[s]uch determination must be made upon [Kristopher's]

release from a secure facility." Id. at ¶18. Accord *In re H.P.*, Summit App. No. 24239, 2008-Ohio-5848, ¶14 (ruling, "[i]n the case where a juvenile is committed to a secure facility, [the court] must wait to classify the juvenile upon his release from the secure facility").

{¶28} In sum, the mandates of R.C. 2152.83(A)(1) are quite clear. If a juvenile sex offender is *not* committed to a secure facility, he must be classified *as part of the dispositional order*. If a juvenile sex offender *is* committed to a secure facility, he must be classified *upon release*. Accordingly, the timing for sex offender classification is dictated by the commitment of the child to a secure facility or the lack thereof.

{¶29} In the present matter, there was a 19-month lapse between appellant's Tier III juvenile sex offender classification and his actual release from DYS. Indeed, at the hearing on appellant's motion to vacate, the juvenile court acknowledged that it "did proceed early there" in classifying appellant. In view of the precise language of R.C. 2152.83(A)(1), we find that the juvenile court erred in classifying appellant before he was released from DYS.

{¶30} The juvenile court's failure to follow the procedure outlined in R.C. 2152.83(A)(1) implicates an improper exercise of the court's subject matter jurisdiction. Cf. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶24; *In re McCallister*, Stark App. No. 2006CA00073, 2006-Ohio-5554, ¶10. The court's error in the *exercise* of its subject matter jurisdiction is distinguishable from appellant's assertion that the court *lacked* jurisdiction to classify him, however. *Pratts* at ¶10. The Ohio Supreme Court adopted the distinction between these two concepts delineated by a Michigan appellate court in the following case:

{¶31} " '[W]here it is apparent from the allegations that the matter alleged is within the class of cases in which a particular court has been empowered to act,

jurisdiction is present. Any subsequent error in the proceedings is only error in the "exercise of jurisdiction," as distinguished from the want of jurisdiction in the first instance. * * *' " *State v. Filiaggi*, 86 Ohio St.3d 230, 240, 1999-Ohio-99, quoting *In re Waite* (1991), 188 Mich.App. 189, 200.

{¶32} Put another way, "[o]nce a tribunal has jurisdiction over both the subject matter of an action and the parties to it, ' * * * the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred * * *.' " *State ex rel. Pizza v. Rayford* (1992), 62 Ohio St.3d 382, 384, quoting *Sheldon's Lessee v. Newton* (1854), 3 Ohio St. 494, 499.

{¶33} It is well established that, if a court rules upon a matter over which it does not possess subject matter jurisdiction, the resulting judgment is void. *Pratts* at ¶12, quoting *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833, ¶22 (Cook, J., dissenting). By contrast, when a court possesses jurisdiction over a subject but improperly exercises that jurisdiction, the resulting judgment is voidable. *Pratts* at ¶12. Whereas an appeal from a void judgment must be dismissed with no further action taken, an appeal from a voidable judgment may be remanded for the lower court to proceed from the point at which the error occurred. Id. at ¶21, 22.

{¶34} As our analysis indicates, the juvenile court in the case at bar failed to classify appellant upon his release from DYS in accordance with the plain language of R.C. 2152.83(A)(1). The court's February 6, 2008 order classifying appellant as a Tier III juvenile sex offender registrant amounted to an improper exercise of its subject matter jurisdiction, rendering the judgment voidable. *Pratts* at ¶21. See, also, *State ex rel. Wright v. Griffin* (July 1, 1999), Cuyahoga App. No. 76299, 1999 WL 462338 at *4 (noting that a court's exercise of jurisdiction, also known as "jurisdiction over a particular case," encompasses compliance with statutory requirements).

{¶35} Despite this defect in the proceedings, we may not remand the case for the juvenile court to proceed from the point at which the error occurred. The Ohio Supreme Court has ruled that defects in a trial court's exercise of subject matter jurisdiction may not be challenged in a collateral attack:

{¶36} " '[I]n cases where the court has undoubted jurisdiction of the subject matter, and of the parties, the action of the trial court, though involving an erroneous exercise of jurisdiction, which might be taken advantage of by direct appeal, or by direct attack, yet the judgment or decree is not void though it might be set aside for the irregular or erroneous exercise of jurisdiction if appealed from. *It may not be called into question collaterally*.' " *Filiaggi*, 86 Ohio St.3d at 240, quoting *In re Waite*, 188 Mich.App. at 200. (Emphasis in original.) See, also, *Pratts* at ¶32.

{¶37} In the present matter, appellant did not timely appeal the February 6, 2008 entry classifying him as a Tier III juvenile sex offender registrant. In fact, this court dismissed appellant's April 6, 2010 appeal of the original classification entry. We subsequently denied appellant's motion to consolidate the belated appeal with the present appeal. Rather, as the procedural posture indicates, the mechanism by which the propriety of appellant's Tier III classification is before this court is appellant's motion to vacate.

{¶38} In accordance with the case law enunciated by the Ohio Supreme Court, we find that appellant's motion to vacate his original classification for lack of jurisdiction amounted to an impermissible collateral attack on a voidable judgment. *Filiaggi* at 240; *Pratts* at ¶32. The appropriate avenue for appellant to raise this issue was by way of a direct appeal. This he did not do. As a result, we are foreclosed from addressing the juvenile court's error in failing to follow the proper statutory procedure in originally classifying appellant.

{¶39} Appellant's first assignment of error is overruled.

{¶40} Our disposition of appellant's first assignment of error renders his second and third assignments moot; therefore, we need not address them. App.R. 12(A)(1)(c). See, e.g., *State v. Dean*, ___ Ohio St.3d ___, 2010-Ohio-5070, ¶76.

{¶41} Judgment affirmed.

BRESSLER, P.J., and RINGLAND, J., concur.