[Cite as *State v. Topping*, 2012-Ohio-2259.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-07-067
	:	O P I N I O N
- vs -		5/21/2012
	:	
FLINT E. TOPPING,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 10 CR 26456

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Sams, Fischer, Packard & Schuessler, LLC, Robert S. Fischer, Joshua T. Morrow, 209 Reading Road, Mason, Ohio 45040, for defendant-appellant

RINGLAND, J.

{¶ 1} Defendant-appellant, Flint E. Topping, appeals from his conviction and sentence in the Warren County Court of Common Pleas for a violation of his community control.

{¶ 2} In October 2001, appellant pled guilty to rape in Lawrence County, Ohio. Appellant was classified on October 11, 2001, as a sexual predator under former R.C.

Chapter 2950 ("Megan's Law"). See Am.Sub.H.B. No. 180, 146 Ohio Laws, Part II, 2560, enacted in 1996, amended in 2003 by Am.Sub.S.B. No. 5, 150 Ohio Laws, Part IV, 6556. Pursuant to appellant's classification as a sexual predator, he was required to provide notice of any change in address to the sheriff with whom he most recently registered prior to the change.

{¶ 3} Appellant was subsequently reclassified as a Tier III sex offender by the Ohio Attorney General under Am.Sub.S.B. No. 10 ("Senate Bill 10"), which the General Assembly enacted in 2007 to implement the federal Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act"). Under the Adam Walsh Act, appellant was subject to the same address notification requirements as he was under Megan's Law.

{¶ 4} In March 2010, appellant was indicted and charged with failure to provide notice of an address change. On August 18, 2010, appellant pled guilty to attempted failure to notify of a change of address, a second-degree felony under current R.C. 2950.99. On the same day, appellant was sentenced to five years of community control. Appellant did not appeal that judgment.

{¶ 5} Subsequently, appellant was convicted of felonious assault and kidnapping, a violation of his community control. Appellant pled guilty to violating his community control and was sentenced to four years in prison on June 7, 2011.

{¶ 6} Appellant timely filed a notice of appeal on July 5, 2011. The state sought a partial dismissal of this appeal as it related to the August 18, 2010 conviction because appellant had failed to timely appeal that judgment. On August 3, 2011, this court granted the state's motion for partial dismissal of appeal as it related to the August 18, 2010 judgment.

{¶ 7} Appellant appeals, raising three assignments of error. Each of appellant's three assignments of error relate to his August 18, 2010 conviction despite this court's August 3,

2011 entry finding that appellant did not timely appeal from that judgment. However, appellant argues that because he was unconstitutionally reclassified under Senate Bill 10, his August 18, 2010 conviction is void and therefore is subject to attack at any time. We agree with appellant that a conviction that is challenged as void is not subject to the principles of res judicata and remains subject to collateral or direct attack at any time. See *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 12-13; *State v. Grunden*, 8th Dist. App. No. 95909, 2011-Ohio-3687, ¶ 10. Accordingly, we are able to reach the merits of appellant's assignments of error.

{¶ 8} Because appellant's first and second assignments of error are interrelated, and for ease of discussion, we will address those assignments together.

{¶ 9} Assignment of Error No. 1:

{¶ 10} THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY FAILING TO APPLY THE RULE OF LAW ESTABLISHED IN *BODYKE*, AND THUS, IMPROPERLY DENIED APPELLANT'S MOTIONS TO DISMISS THE INDICTMENT.

{¶ 11} Assignment of Error No. 2:

{¶ 12} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY ACCEPTING APPELLANT'S GUILTY PLEA TO ATTEMPTED FAILURE TO NOTIFY OF A CHANGE OF ADDRESS AND SENTENCING APPELLANT TO FOUR YEARS IN PRISON.

{¶ 13} Appellant's first and second assignments of error allege that the trial court erred in failing to apply the rule of law established in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, and in accepting his guilty plea to the failure-to-notify offense because the offense was based upon an unconstitutional reclassification under Senate Bill 10. In essence, appellant contends that he was "improperly charged with, and indicted on, a first-degree felony pursuant to the current [Adam Walsh Act]," rather than a fifth-degree felony under the 2001 version of R.C. 2950.99 that was in effect at the time of his original

classification. Therefore, appellant argues, his conviction and sentence are void.

{¶ 14} In *Bodyke*, the Ohio Supreme Court held that R.C. 2950.031 and 2950.032, which provided for reclassification of sex offenders by the Attorney General of Ohio, violated the separation-of-powers doctrine by allowing the executive branch to review and change past decisions of the judicial branch. Id. at ¶ 2. The court severed the statutory provisions, holding that "R.C. 2950.031 and 2950.032 may not be applied to offenders previously adjudicated by judges under Megan's Law, and the classifications and community-notification and registration orders imposed previously by judges are reinstated." *Id*. at ¶ 66.

{¶ 15} We begin by noting that appellant was not indicted and convicted pursuant to his reclassification under the Adam Walsh Act. Appellant was classified under Megan's Law as a sexual predator on October 11, 2002. He was subsequently reclassified under the Adam Walsh Act as a Tier III sex offender. Pursuant to *Bodyke*, appellant's Megan's Law classification, address notification, and registration orders were reinstated. Appellant's classification under Megan's Law as a sexual predator required him to notify the sheriff of any change of address. That duty remained the same under both versions of R.C. Chapter 2950 and was not affected by any reclassification. In its July 2, 2010 entry, the trial court acknowledged that appellant must be restored to his prior classification under Megan's Law, but that such a reclassification had no effect on his ongoing duty to notify the sheriff of any change of address. The trial court therefore denied appellant's motion to amend or dismiss the indictment. Accordingly, appellant's failure-to-notify offense was not based upon an unconstitutional reclassification, but upon his original classification as a sexual predator under Megan's Law.

{¶ 16} Regardless of whether he was indicted pursuant to the Adam Walsh Act or Megan's Law, appellant alleges that the trial court erred in applying the current version of R.C. 2950.99. R.C. 2950.99 prescribes the penalty for appellant's failure-to-notify offense.

He argues that the court should have applied the version of R.C. 2950.99 that was in effect at the time of his original classification as a sexual predator rather than the current version in effect at the time he committed the act of attempted failure to notify. In essence, appellant argues that current R.C. 2950.99 is being applied retroactively.

{¶ 17} A law is retrospective if it "changes the legal consequences of acts completed before its effective date." See *State v. Williams*, 103 Ohio St.3d 112, 2004-Ohio-4747, ¶ 7. In turn then, a statute that does not change the legal consequences of acts completed before its effective date, but simply mandates an enhanced penalty for acts committed after the effective date of the provision, is not retroactive. *State v. Bowling*, 1st Dist. No. C-1000323, 2011-Ohio-4946, ¶ 25.

{¶ 18} Appellant pleaded guilty to attempted failure to provide notice of change of address on August 18, 2010. The penalty provisions of current R.C. 2950.99 became effective January 1, 2008. Thus, while appellant's duty to provide notice stemmed from his 2001 classification as a sexual predator, his attempted failure to provide notice of change of address was not committed until after the effective date of current R.C. 2950.99's penalty provisions. Therefore, current R.C. 2950.99 was not applied retroactively to appellant's conduct. *Id*. at ¶ 26. Moreover, appellant had ample warning that his conduct in failing to notify would be classified as a felony of the first degree.

{¶ 19} Appellant also incorrectly asserts that it was the Adam Walsh Act that provided stiffer penalties for violations of notification requirements. He argues that *State v. Gingell*, 128 Ohio St.3d 266, 2010-Ohio-2424, supports his proposition that the trial court erred in retroactively applying R.C. 2950.99. In *Gingell*, the Ohio Supreme Court cited *Bodyke* in holding that an offender who was judicially classified as a sexually-oriented offender and ordered to register annually for ten years under Megan's Law could not be prosecuted for failing to comply with a more restrictive registration requirement imposed after reclassification

as a Tier III sex offender under the Adam Walsh Act. *Gingell* therefore dealt with the imposition of the Adam Walsh Act's more restrictive registration requirements upon the past conduct of an offender. The case at bar deals instead with the imposition of current R.C. 2950.99's penalty provisions for conduct that occurred after the effective date of that statute. Therefore, the holding in *Gingell* has no effect upon our holding in the instant case.

{¶ 20} Accordingly, we find that where an offender's registration and notification requirements are not altered by his unconstitutional reclassification under the Adam Walsh Act, the penalty modifications of current R.C. 2950.99 are unaffected by the Ohio Supreme Court's holding in *Bodyke*. Therefore, we find that the current penalty provisions should apply to those originally classified under Megan's Law for acts committed after the effective date of the current R.C. 2950.99.

{¶ 21} We recognize that our decision joins a growing conflict amongst Ohio's appellate courts as to the application of R.C.2950.99 penalties on Megan's Law classified sex-offenders post-*Bodyke*. Our decision is in line with that of the First and Fifth Districts. *State v. Freeman*, 1st Dist. No. C-100389, 2011-Ohio-4357; *State v. Poling*, 5th Dist. No. 2009-CA-00264, 2011-Ohio-3201; *Bowling*, 2011-Ohio-4946. Conversely, our holding is in conflict with the Second, Seventh and Eighth Districts. *State v. Milby*, 2nd Dist. No. 23798, 2010-Ohio-6344; *State v. Alltop*, 2nd Dist. No. 24324, 2011-Ohio-5541; State v. Savors, 7th Dist. No. 09-CO-32, 2012-Ohio-1297; *Grunden*, 2011-Ohio-3687.

{¶ 22} Those courts in disagreement with our holding found that the Adam Walsh Act increased the penalty for failure to notify from a third-degree felony to a first-degree felony. See *Milby*, 2011-Ohio-6344, ¶ 31. In turn, those courts held that an offender who was originally classified under Megan's Law was subject only to the penalty provisions under former R.C. 2950.99, in effect at the time of their sentencing. *Id*. It appears that those courts may not have considered the distinction between the bill instituting the Adam Walsh Act

(Senate Bill 10), and the bill that increased the penalties for failure-to-notify. "Although current R.C. 2950.99 has the same effective date as Senate Bill 10, it was not enacted as part of Senate Bill 10. It was enacted as part of Am.Sub.S.B. 97 ('Senate Bill 97'), which, among other things, modified the penalties for violations of the sex-offender registration and notification laws." *Bowling* at ¶ 28. Therefore, as stated above, where an offender's registration and notification requirements are not altered by his unconstitutional reclassification under the Adam Walsh Act, the penalty modifications of current R.C. 2950.99 are unaffected by the Ohio Supreme Court's holding in *Bodyke*.

{¶ 23} In conclusion, appellant's reclassification under the Adam Walsh Act had no bearing on the outcome of his prosecution. Pursuant to *Bodyke*, the trial court properly reinstated his classification as a sexual predator under Megan's Law. 2010-Ohio-2424 at ¶ 66. Appellant's notification requirements remained the same under both the Adam Walsh Act and Megan's Law. Having failed to comply with those requirements, he was appropriately prosecuted, convicted, and sentenced. "The penalty enhancement provisions do not punish the past conduct; instead, they merely increase the severity of a penalty imposed for a present violation of the law." *Poling* at ¶ 33.

{¶ 24} In light of the foregoing, having found that appellant's failure-to-notify offense was not based upon an unconstitutional reclassification and that current R.C. 2950.99 was not applied retroactively to appellant's conduct, appellant's first and second assignments of error are overruled.

{¶ 25} Assignment of Error No. 3:

{¶ 26} APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION.

{¶ 27} To establish a claim of constitutionally ineffective assistance of counsel, a

criminal defendant must show that his trial counsel's performance was "deficient" in that it "fell below an objective standard of reasonableness," and that he suffered "prejudice" as a result of that deficient performance in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-688, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. The defendant must establish both the "performance" and "prejudice" prongs of the Strickland standard to prevail on an ineffective assistance claim. *Id*. at 687. An appellate court must give wide deference to the strategic and tactical choices made by trial counsel in determining whether counsel's performance was constitutionally ineffective. *Id*. at 689.

{¶ 28} In light of our finding that the trial court did not err in denying appellant's motion to dismiss the indictment or in accepting appellant's guilty plea to attempted failure to notify of a change of address under the first and second assignments of error, we cannot find that appellant was prejudiced by his counsel's failure to appeal those decisions. Therefore, we cannot find that appellant was denied effective assistance of counsel.

{¶ 29} Accordingly, appellant's third assignment of error is overruled.

{¶ 30} Judgment affirmed.

POWELL, P.J., and PIPER, J., concur.