

[Cite as *State v. Bundy*, 2009-Ohio-5395.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case Nos. 23063
Plaintiff-Appellee	:	23064
	:	
v.	:	Trial Court Case Nos. 08-CR-1321
	:	03-CR-3160
DAVID MICHAEL BUNDY	:	
	:	(Criminal Appeal from
Defendant-Appellant	:	Common Pleas Court)
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OPINION

Rendered on the 9<sup>th</sup> day of October, 2009.

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{¶ 1}

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FAIN, J.

{¶ 1} Defendant-appellant David Michael Bundy appeals from his conviction and sentence for Failure to Verify a Current Address under R.C. 2950.06(A) and (F). Bundy also appeals from the revocation of community control sanctions that had

been imposed for his prior conviction for failing to register a residence address.

{¶ 2} Bundy contends that the trial court erred in finding him guilty of failing to verify his address, because he had no duty to register as a sex offender under *State v. Champion*, 106 Ohio St.3d 120, 2005-Ohio-4098. Bundy also contends, for the same reason, that the trial court erred in revoking the community control sanctions that were imposed for his prior conviction.

{¶ 3} We conclude that Bundy was required to register as a sex offender and to verify his current address, pursuant to new sex offender registration and notification statutes that became effective in January 2008. Bundy's prior registration status, therefore, is irrelevant to his conviction for failure to verify his address.

{¶ 4} We also conclude that the trial court acted within its discretion by revoking Bundy's community control sanctions, based on his conviction for failure to verify a current address. Furthermore, Bundy's attempt to relitigate his prior conviction for failing to register a residence address is barred by *res judicata*.

{¶ 5} Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 6} Bundy was convicted of Aggravated Burglary in Montgomery County Case No. 87-CR-323 in May 1987, and was given an indefinite sentence of 8 to 25 years in prison. This sentence was suspended, and Bundy was placed on five years probation. Subsequently, Bundy was convicted of additional crimes, which included sexually-oriented offenses. See Montgomery County Common Pleas Case No. 95-CR-1774. The trial court filed a termination entry in Case No. 95-CR-1774 in

December 1995, sentencing Bundy to one year on two counts of Gross Sexual Imposition (person under 13), sixty days on two counts of Sexual Imposition, and six months on one count of Attempt to Commit Corrupting Another with Drugs. These sentences were to be served concurrent with each other, for a total definite sentence of one year. The sentences were also to be served consecutive to the sentence previously imposed in Montgomery County Case No. 87-CR-323.

{¶ 7} Due to the 1995 arrest and conviction, Bundy's probation was revoked, and the court ordered Bundy imprisoned for the 8 to 25 year indefinite term. The termination entry in Case No. 87-CR-323 stated that the sentence would be served consecutive to the sentence imposed in Case. No. 95-CR-1774. Bundy was delivered to prison for these convictions on December 29, 1995, and remained in prison until April 2003, when he was released.

{¶ 8} In January 2000, the trial court entered an order under R.C. 2950.01 and 2950.02, designating Bundy as a sexually-oriented offender. At the time, Bundy was still in prison. The court ordered Bundy to register as a sex-offender under R.C. 2950.03(A)(1).

{¶ 9} Shortly after his release from prison, Bundy was indicted for violating R.C. 2950.04(A)(1) and (D) by failing to register with the Montgomery County Sheriff within seven days of coming into the county. This was a fifth-degree felony. In November 2003, Bundy pled guilty to failure to register, and was sentenced to five years of community control. Among the conditions imposed was that Bundy would abide by all special conditions for sex offenders and all registration requirements for sex offenders. The termination entry further provided that if Bundy failed to abide by

the terms or violated any law, the court could impose a longer time under the same sanction, a more restrictive sanction, or a prison term of twelve months, to be served either consecutively or concurrently.

{¶ 10} Between 2003 and October 2007, Bundy registered as required. His last registration date was October 7, 2007. Under the law that was then in effect, Bundy's next registration date would have been October 7, 2008. In November 2007, Bundy received a letter from the Ohio Attorney General (OAG) notifying him of a change in the law regarding sex offender classification and notification. The letter indicated that Bundy would be classified as a Tier II sex offender, beginning January 1, 2008, and would be required to register personally with the sheriff's office every 180 days for twenty-five years. Bundy was also told to call the sheriff's office after January 1, 2008, to ascertain his new registration date.

{¶ 11} Based on the new law, Bundy was required to verify his address on March 14, 2008. He failed to do so, and the Montgomery County Sheriff's Office sent a seven-day letter on March 19, 2008, indicating that Bundy had until March 24, 2008, to verify his address. When Bundy again failed to appear, Detective Leslie Bunch attempted to call Bundy, but the phone had been disconnected. Bunch then went to Bundy's last-known residence and left a business card.

{¶ 12} In late March 2008, Bundy did call Bunch to say that he would be in the next day to verify his residence. But Bundy never appeared, and he was indicted in May 2008 for Failure to Register a Current Address under R.C. 2950.04 or 2950.041.<sup>1</sup> Due to Bundy's prior conviction for failure to register, the charge was

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<sup>1</sup>The indictment was amended at trial to allege a Failure to Verify a Current

elevated to a third-degree felony. Revocation proceedings were also initiated with regard to the community control sanctions that had been imposed for his prior conviction.

{¶ 13} After a bench trial, the trial court found Bundy guilty of Failure to Verify, under R.C. 2950.06, and sentenced Bundy to three years in prison. The court also revoked Bundy's community control sanctions and imposed a twelve-month sentence. Both terms of imprisonment were to be served concurrently.

{¶ 14} Bundy now appeals from his conviction and sentence, and from the revocation of his community control sanctions.

II

{¶ 15} Bundy's First Assignment of Error is as follows:

{¶ 16} "THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY OF FAILING TO VERIFY HIS RESIDENCE IN CASE NO. 08-CR-1321 (CA-23063)."

{¶ 17} Under this assignment of error, Bundy contends that he has no duty to register and that he cannot be charged with failing to verify under R.C. 2950.06, because he completed his prison term for his sexually-oriented offense before July 1, 1997. Bundy also contends that the trial court erred in relying on *State v. Geran*, Butler App. No. 99-03-054, 2002-Ohio-2599, because *Geran* has been overruled by *State v. Champion*, 106 Ohio St.3d 120, 2005-Ohio-4098.

{¶ 18} When Bundy was released from prison in April 2003, R.C. 2905.04 required sex offenders to register with the sheriff of the county within seven days after they come into a county in which they reside or are domiciled for more than

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Address under R.C. 2950.06(A) and (F).

seven days. The existing version of R.C. 2950.04 also stated that the following types of offenders were subject to the registration requirement:

{¶ 19} “(a) Regardless of when the sexually oriented offense was committed, an offender who is sentenced for the sexually oriented offense to a prison term, a term of imprisonment, or any other type of confinement and, on or after July 1, 1997, is released in any manner from the prison term, term of imprisonment, or confinement;

{¶ 20} “(b) Regardless of when the sexually oriented offense was committed, an offender who is sentenced for a sexually oriented offense on or after July 1, 1997, and to whom division (A)(1)(a) of this section does not apply;

{¶ 21} “(c) If the sexually oriented offense was committed prior to July 1, 1997, and neither division (A)(1)(a) nor division (A)(1)(b) of this section applies, an offender who, immediately prior to July 1, 1997, was a habitual sex offender who was required to register under Chapter 2950. of the Revised Code.” R.C. 2950.04(A)(1)(a), (b), and (c), as it existed prior to the amendments in Sub. S. Bill 5, which became effective on July 31, 2003.

{¶ 22} Sub. S. Bill 5 made certain changes in the law that became effective after Bundy’s release from prison, and prior to his first conviction for failure to register. However, the descriptions of the types of offenders in R.C. 2950.04(A)(1)(a), (b), and (c) remained the same. Thus, Bundy would have been required to register as a sex offender after his release from prison in 2003, if he fit within one of the categories listed in R.C. 2950.04(A)(1)(a), (b), or (c).

{¶ 23} Divisions (A)(1)(b) and (c) do not apply, because Bundy was sentenced

prior to July 1, 1997, and he was not a habitual sexual offender. Bundy contends that division (A)(1)(a) also does not apply, because he began serving his one-year term for the sexual offense in December 1995, and completed serving the term for that offense by July 1, 1997.

{¶ 24} In concluding that Bundy was required to register as a sex offender, the trial court relied on *State v. Geran*, Butler App. No. 99-03-054, 2002-Ohio-2599. The defendant in *Geran* had been sentenced to consecutive terms that included a definite term for a sexually oriented offense, and an indefinite term for robbery. By July 1, 1997, the defendant was still serving the aggregate sentence, but had completed the portion of the sentence related to the sexually oriented offense. The Twelfth District Court of Appeals held that the defendant was required to register as a sex offender under R.C. 2950.04(A)(1)(a), because he was still serving his aggregate sentence. 2002-Ohio-2599, at ¶10. The Twelfth District noted that:

{¶ 25} “Other courts have held that where a defendant is ordered to serve a term of imprisonment for a sexually oriented offense consecutive to a sentence for another offense, the defendant is considered to be serving a term of incarceration for a sexually oriented offense throughout the aggregate sentence and is therefore subject to the registration requirements of R.C. 2950.04(A).” *Id.* (Citations omitted).

{¶ 26} Subsequently, the Supreme Court of Ohio considered whether a defendant could be required to register as a sexual predator, where he was imprisoned for a sexually oriented offense, was paroled after serving eleven years, and was then returned to prison for a different type of offense. *Champion*, 2005-Ohio-4098, at ¶2. The Supreme Court concluded that the defendant had no

duty to register, because he did not fit within any of the categories outlined in R.C. 2950.04(A)(1)(a), (b), or (c). The Court commented as follows regarding R.C. 2950.04(A)(1)(a):

{¶ 27} “Although we have not considered the statute in light of facts such as these, we have previously held that a defendant who was sentenced for a sexually oriented offense, who was released prior to July 1, 1997, and who was not previously required to register under R.C. Chapter 2950 cannot be required to register as a sexual predator under R.C. 2950.04. *State v. Bellman* (1999), 86 Ohio St.3d 208, 209, 714 N.E.2d 381; *State v. Taylor*, 100 Ohio St.3d 172, 2003-Ohio-5452, 797 N.E.2d 504, at ¶ 9-10.

{¶ 28} “As in *Bellman* and *Taylor*, we must follow the statutory language carefully. R.C. 2950.04(A)(1)(a) states: ‘Regardless of when the sexually oriented offense was committed, an offender who is sentenced for the sexually oriented offense to a prison term \* \* \* and, on or after July 1, 1997, is released in any manner from the prison term’ must register. The language says released ‘from the prison term,’ not released from *any* prison term, as the state would have it. Champion's GSI sentence was two to five years, but his concurrent terms caused him to serve almost 11 years before his first release in 1989. The GSI prison sentence had been completed, at the very latest, in 1983 (assuming the maximum sentence of five years). Champion could not, therefore, have been released from prison on or after July 1, 1997, on his GSI conviction.” 2005-Ohio-4098, at ¶8-9. (Emphasis added.)

{¶ 29} Relying on the above language, Bundy contends that *Geran* has been overruled by *Champion*. Bundy, therefore, contends that he had no duty to register



as a sex offender, or to verify his address, because his definite term for gross sexual imposition was served first, pursuant to the version of R.C. 2929.41 that was in effect at the time he was sentenced. Bundy contends that under R.C. 2929.41(C)(2), his one-year sentence for gross sexual imposition would have been served first, and would have been completed in December 1996, at the latest, even though he was still imprisoned on July 1, 1997, for the indefinite sentence on his robbery conviction.

{¶ 30} The State argues that *Champion* does not apply, because Bundy's sentences were aggregated under R.C. 2929.41(C)(4). The State, therefore, contends that Bundy was still imprisoned under the term of imprisonment for gross sexual imposition on or after July 1, 1997.

{¶ 31} The State and Bundy agree that the pertinent statute is R.C. 2929.41 as it existed at the time of Bundy's sentencing in 1995. This version became effective in October 1994, and states as follows:

{¶ 32} "(A) Except as provided in division (B) of this section, a sentence of imprisonment shall be served concurrently with any other sentence of imprisonment imposed by a court of this state, another state, or the United States. \* \* \*

{¶ 33} "(B) A sentence of imprisonment shall be served consecutively to any other sentence of imprisonment, in the following cases:

{¶ 34} "(1) When the trial court specifies that it is to be served consecutively;

{¶ 35} " \* \* \* \*

{¶ 36} "(3) When it is imposed for a new felony committed by a probationer, parolee, or escapee;

{¶ 37} "(4) When a three-year term of actual incarceration is imposed pursuant

to section 2929.71 of the Revised Code;

{¶ 38} “(5) When a six-year term of actual incarceration is imposed pursuant to section 2929.72 of the Revised Code.

{¶ 39} “(C) Subject to the maximums provided in division (E) of this section:

{¶ 40} “(1) When consecutive sentences of imprisonment are imposed for felony under division (B)(1) of this section, the minimum term to be served is the aggregate of the consecutive minimum terms imposed, and the maximum term to be served is the aggregate of the consecutive maximum terms imposed.

{¶ 41} “(2) When consecutive sentences of imprisonment are imposed for felony under division (B)(2) or (3) of this section, the minimum term to be served is the aggregate of the consecutive minimum terms imposed reduced by the time already served on any such minimum term, and the maximum term imposed is the aggregate of the consecutive maximum terms imposed.

{¶ 42} “(3) When consecutive sentences of imprisonment are imposed under division (B)(4) or (5) of this section, all of the three-year terms of actual incarceration imposed pursuant to section 2929.71 of the Revised Code and all of the six-year terms of actual incarceration imposed pursuant to section 2929.72 of the Revised Code shall be served first, and then the indefinite terms of imprisonment shall be served, with the aggregate minimum and maximum terms being determined in the same manner as aggregate minimum and maximum terms are determined pursuant to division (C)(2) of this section.

{¶ 43} “(4) When a person is serving definite terms of imprisonment consecutively to indefinite terms of imprisonment, to three-year terms of actual

incarceration imposed pursuant to section 2929.71 of the Revised Code, to six-year terms of actual incarceration imposed pursuant to section 2929.72 of the Revised Code, or to both indefinite terms of imprisonment and the three-year or six-year terms of actual incarceration, the aggregate of all of the three-year or six-year terms of actual incarceration shall be served first, then the aggregate of the definite terms of imprisonment shall be served, and then the indefinite terms of imprisonment shall be served, with the aggregate minimum and maximum terms being determined in the same manner as aggregate minimum and maximum terms are determined pursuant to division (C)(2) of this section.” R.C. 2929.41(1994).

{¶ 44} We agree with Bundy that the definite term of imprisonment was to be served first, pursuant to R.C. 2929.41(C)(4). The General Assembly does state in R.C. 2929.41(B)(2) that sentences imposed for new crimes committed by probationers are to be served consecutively to other sentences of imprisonment. However, R.C. 2929.41(C)(4) qualifies this, by requiring definite sentences to be served prior to indefinite sentences. Consequently, under the ruling in *Champion*, Bundy’s sentence for a sexually-oriented offense would have been completed prior to July 1, 1997, and Bundy would not have been required to register under R.C. 2950.04(A)(1)(a). Accord *Townsend*, 181 Ohio App.3d 53, 2009-Ohio-467, and *Lewis v. Leis*, Hamilton App. No. C-080216, 2009-Ohio-3096. Since Bundy does not fit within the remaining categories in R.C. 2950.04(A), he did not have an obligation to register as a sex offender at the time he was released from prison, or at the time of his first conviction in 2003. However, this fact is irrelevant to Bundy’s 2008 conviction, because the law was changed prior to Bundy’s indictment for his second

failure to comply with sex offender registration.

{¶ 45} In June 2007, the General Assembly enacted Am. Sub. S.B. 10, which is also known as the Adam Walsh Child Protection and Safety Act. Am. Sub. S. B. 10 repealed the existing version of R.C. 2950.04, and replaced it with a new version that substantially changed the prior statute. R.C. 2950.04(A)(1) was changed to require immediate registration of offenders whose sentencing hearings are held on or after January 1, 2008. The existing provisions in R.C. 2950.04(A)(1)(a), (b), and (c) were also deleted, and were replaced with the following language in R.C. 2950.04(A)(2), which states that:

{¶ 46} “Regardless of when the sexually oriented offense was committed, each offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a sexually oriented offense shall comply with the following registration requirements described in divisions (A)(2)(a), (b), (c), (d), and (e) of this section.”

{¶ 47} The requirements in divisions (A)(2)(a), (b), (c), (d), and (e) specify that offenders must register personally with the sheriff, or sheriff’s designee, within three days after they come into a county in which they reside or are temporarily domiciled. Offenders must also register immediately in a county in which they attend a school or institution of higher learning, either in Ohio or another state, and must register in the county where they are employed, if they have a temporary domicile in Ohio and have been employed in the county for more than three days or for an aggregate of fourteen or more days in that calendar year. R.C. 2950.04(E) prohibits persons from failing to register, and R.C. 2950.04(F) states that:

{¶ 48} “An offender or delinquent child who is required to register pursuant to divisions (A) and (B) of this section shall register pursuant to this section for the period of time specified in section 2905.07 of the Revised Code, with the duty commencing on the date specified in division (A) of that section.”

{¶ 49} The law in effect on January 1, 2008, eliminates any time-frames for registration of sex offenders. Thus, regardless of when a sexually oriented offense has been committed, the offender has a duty to register.

{¶ 50} Am. Sub. S. B. 10 also required the Ohio Attorney General (OAG) to classify sex offenders as Tier I, Tier II, or Tier III sex offenders/child victim offenders. The OAG was required to notify each offender of changes in R.C. Chapter 2950 that would be implemented on January 1, 2008, including the offender’s right under R.C. 2950.031(E) to request a hearing to contest the application of the new registration requirements under R.C. Chapter 2950. Pursuant to the new law, Bundy was notified that he was classified as a Tier II offender, and that he was required to register every 180 days for twenty-five years. This is an increase in both the frequency and duration of registration. Because Bundy failed to register, he was charged with violating R.C. 2950.06(A) and (F). At the time of the alleged violation, R.C. 2950.06(A) provided, in pertinent part, that:

{¶ 51} “An offender \* \* \* who is required to register a residence address pursuant to division (A)(2), (3), or (4) of section 2950.04 or 2950.041 of the Revised Code shall periodically verify the offender’s \* \* \* current residence address, and an offender \* \* \* who is required to register a school, institution of higher education, or place of employment address pursuant to any of those divisions shall periodically

verify the address of the offender's \* \* \* current school, institution of higher education, or place of employment, in accordance with this section.”

{¶ 52} R.C. 2950.06(F) prohibits persons from failing to verify their residence, and R.C. 2950.06(G)(2)(c) indicates that an offender is subject to prosecution if he or she fails to comply with R.C. 2950.06(F).

{¶ 53} In the case before us, Bundy was provided with the appropriate notices, and the Sheriff complied with statutory requirements, before this prosecution was initiated. Bundy also chose not to avail himself of the opportunity to file a petition with the common pleas court to contest the application of the new statute. R.C. 2950.031(E) provides that an offender is entitled to request a hearing as a matter of right to contest the application of the new registration requirements under R.C. Chapter 2950. If the offender fails to request a hearing within sixty days after receiving notice of his right to a hearing, the failure is a waiver of the offender’s right to a hearing. R.C. 2950.031(E). The failure to file the petition also means that the offender is “bound by the determinations of the attorney general in the registered letter sent to the offender \* \* \*.” Id.

{¶ 54} Accordingly, even if Bundy did not have an obligation to register his address at the time of his initial conviction in 2003, he was required to register when the new law became effective in January 2008.

{¶ 55} Bundy did challenge the application of S.B. 10 in the trial court, but the court rejected his arguments. Bundy has not raised this issue on appeal, and has instead relied only on the argument that he was not required to register because he had completed his definite term for a sexually oriented offense prior to July 1, 1997.

While this may be true, the law that became effective in January 2008, applies to all offenders who have been convicted of a sexually oriented offense, regardless of when the offense was committed. R.C. 2950.04(A)(2). Therefore, as we said, Bundy's prior status is irrelevant.

{¶ 56} The Supreme Court of Ohio has previously held that sex offender registration and notification provisions do not violate the Retroactivity Clause of the Ohio Constitution when they are applied to a person who was convicted before their effective date. *State v. Ferguson*, 120 Ohio St.3d 7, 16, 2008-Ohio-4824, at ¶13-30 (interpreting S.B. 5, which became effective in 2003, and increased the registration and notification burdens on various sex offenders). Relying on *Ferguson*, the Eighth District Court of Appeals recently concluded that the Ohio Supreme Court would approve the retroactive application of R.C. 2950.04 to crimes that occurred before the effective date of S.B. 10. See *Gildersleeve v. State*, Cuyahoga App. Nos. 91515, 91519, 91521, 91532, 2009-Ohio-2031, at ¶17-32. We reached similar conclusions in *State v. Barker*, Montgomery App. No. 22963, 2009-Ohio-2774, and *State v. Moore*, Greene App. No. 07CA093, 2008-Ohio-6238. Accordingly, there is no basis for refusing to apply the new registration requirements to Bundy, and the trial court did not err in finding Bundy guilty of failing to verify his address under R.C. 2950.06(A) and (F).

{¶ 57} Bundy's First Assignment of Error is overruled.

### III

{¶ 58} Bundy's Second Assignment of Error is as follows:

{¶ 59} "THE TRIAL COURT ERRED IN REVOKING COMMUNITY CONTROL

SANCTIONS (PROBATION) IN CASE NO. 03-CR-3160 (CA-23064).”

{¶ 60} Under the Second Assignment of Error, Bundy contends that the trial court erred in revoking his community control sanctions, because the registration order underlying both convictions is an invalid, void order. We have already concluded that Bundy was required to register under the law that became effective in January 2008, and that he was not required to register at the time of his 2003 conviction.

{¶ 61} Although the order supporting the 2003 conviction was invalid, this does not end our inquiry. The State argues that Bundy’s argument is precluded by *res judicata*, because he failed to raise the matter either at his sex offender classification hearing, which was held in October 1999, or during the 2003 criminal case that was based on Bundy’s failure to register his residence address.

{¶ 62} The State raised the issue of collateral estoppel, or issue preclusion, below, and argued that Bundy is precluded from raising issues regarding his duty to register, because he pled guilty to a prior charge that included the element that he had been released from a prison term for a sexually oriented offense on or after July 1, 1997. The trial court held that facts stipulated in prior actions are not actually litigated, as is required for issue preclusion. Accordingly, the trial court rejected the application of collateral estoppel, because the pertinent issue was never actually litigated in the 2003 case that was based on Bundy’s failure to register his residence.

{¶ 63} Relying on *Townsend*, 181 Ohio App.3d 53, 2009-Ohio-467, Bundy contends that the trial court was without jurisdiction to require him to register, that his conviction is void, and that *res judicata* would not apply. In *Townsend*, the



defendant had completed his sentence for rape in 1984, and was not thereafter convicted of a sexual offense, although he was subsequently imprisoned for other offenses. *Id.* at ¶2. The defendant also was not incarcerated on any charge at the time of his H.B. 180 hearing in December 2007. *Id.* Following *Champion*, the Eighth District Court of Appeals concluded that the defendant had completed his sentence for the sexually oriented offense prior to July 1, 1997, and that “the trial court was without jurisdiction to require Townsend [the defendant] to register as a sexual predator.” *Id.* at ¶6 (bracketed material added). The Eighth District did not clarify what it meant by the jurisdictional comment.<sup>2</sup>

{¶ 64} Similarly, in *Lewis v. Leis*, Hamilton App. No. C-080216, 2009-Ohio-3096, the plaintiff filed a motion for declaratory relief to prevent the sheriff and prosecuting attorney from enforcing Ohio’s sexual-offender registration requirements against him. *Id.* at ¶1. The plaintiff was sentenced in 1985 to 18 months for gross sexual imposition and to an indefinite term of 9 to 25 years for aggravated burglary. The sentence for gross sexual imposition was completed in 1986, but the plaintiff remained in prison until 2002 on the aggravated burglary charge. *Id.* at ¶2-3. The plaintiff also had sex offender classification hearings in 2000 and 2001, but did not raise an issue as to the registration requirements. *Id.* at ¶3-4, and 15. The record does not indicate whether the plaintiff registered between 2002, when he was released from prison, and 2007, when he initiated the declaratory judgment action. We will assume for purposes of argument, that the plaintiff did

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<sup>2</sup>We also note that *Townsend* deals with H.B. 180, which was effective in July 1997. It does not deal with the defendant’s duty to register under S.B. 10, which became effective in January 2008.

comply with the registration requirements during that time.

{¶ 65} Following *Champion*, the First District Court of Appeals concluded that the trial court erred in dismissing the declaratory judgment petition, because the plaintiff had completed his sentence for the sexually oriented offense in 1986, and was not subject to any registration requirements. *Id.* at ¶7-12. The First District also rejected the trial court's conclusion that *res judicata* barred the claim, due to the plaintiff's failure to raise it during his sexual classification hearings. *Id.* at ¶15. In this regard, the First District observed that:

{¶ 66} “Both classification hearings were held before Lewis's release from prison, before any duty to register had arisen, and before the release of the supreme court's decision in *State v. Champion*. We note that an offender's classification is ‘distinct from the duty to register.’ \* \* \* And since neither classification proceeding adjudicated, on the merits, the disputed issue in this case – whether Lewis has a duty to register – we hold that *res judicata* did not bar its resolution here.” *Id.* (Footnote omitted).

{¶ 67} Notably, *Lewis* involves only the duty to register under the law prior to January 1, 2008. The First District noted that the plaintiff had filed a separate declaratory judgment action challenging the application of the new registration requirements, and that the action had been stayed pending the resolution of the current appeal. *Id.* at ¶6. *Lewis* is also distinguishable, because the plaintiff had only been subjected to a registration hearing while in prison; he did not have an opportunity to raise the issue, as Bundy did, in a proceeding initiated after he was released from prison.

{¶ 68} *Res judicata* would not impact the issue of Bundy's duty to register under the law that became effective in 2008, because that law applies to sex offenders regardless of the date on which they were convicted. Furthermore, the 2008 conviction provides a basis for revoking Bundy's community control sanctions, because the sanctions required him to avoid violating the law, and to comply with all sex offender registration requirements – even though he did not actually have any valid registration requirements prior to the law that was enacted in January 2008. “The right to continue on community control depends on compliance with community control conditions” and rests within the trial court's sound discretion. *State v. Ault*, Champaign App. No. 06-CA-19, 2007-Ohio-3435, at ¶6 (citation omitted). Accordingly, even if Bundy were not subject to registration prior to January 1, 2008, his community control sanctions were properly revoked based on his failure to abide by the law that became effective in January 2008.

{¶ 69} As an additional matter, Bundy is essentially attempting to have his original conviction set aside on the ground that it is void. The State's argument would be that *res judicata* precludes the attempt.

{¶ 70} The doctrine of *res judicata* involves two related concepts: claim preclusion; and issue preclusion, or collateral estoppel. *Whitehead v. General Tel. Co.* (1969), 20 Ohio St.2d 108, 112. Claim preclusion involves the effect of a prior judgment on an action based on the same cause of action. *Id.*

{¶ 71} “If the plaintiff in the prior action is successful, the entire cause of action is ‘merged’ in the judgment. The merger means that a successful plaintiff cannot recover again on the same cause of action, although he may maintain an action to

enforce the judgment. If the defendant is successful in the prior action, the plaintiff is 'barred' from suing in a subsequent action, on the same cause of action." *Id.*, citing Restatement of the Law, Judgments, Section 45, comment (b).

{¶ 72} In the criminal context:

{¶ 73} " 'Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from the judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from the judgment.' " *State v. Ishmail* (1981), 67 Ohio St.2d 16, 18, quoting from *State v. Perry* (1967), 10 Ohio St.2d 175. Because Bundy could have raised issues regarding his registration status on direct appeal from his 2003 conviction, *res judicata* prevents relitigation of those issues in the action brought to revoke his probation.

{¶ 74} In *State ex rel. O'Brien v. Hamilton*, Franklin App. No. 07AP-501, 2007-Ohio-7004, the Tenth District Court of Appeals noted that there are two means of challenging a conviction and sentence – either by direct appeal or through a petition for post-conviction relief. *Id.* at ¶9. "A final judgment of conviction, pursuant to the doctrine of *res judicata*, bars a convicted defendant who was represented by counsel from raising and litigating any defense or any claimed lack of due process that was raised or properly could have been raised in either a direct appeal or a petition for post-conviction relief." *Id.* at ¶10.

{¶ 75} Bundy failed to directly appeal his 2003 conviction, and he also failed to

file a petition for post-conviction relief. Bundy is therefore precluded from collaterally attacking his conviction. Like Bundy, the defendant in *O'Brien* attempted to argue that his conviction was void, and that *res judicata* did not apply. The Tenth District disagreed, noting that a judgment is void only if the court lacks jurisdiction either over the subject matter or the defendant. *Id.* at ¶11. See, also, *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶12 (noting that “In general, a void judgment is one that has been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act. \* \* \* Unlike a void judgment, a voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but the court’s judgment is invalid, irregular, or erroneous.”) (Citation omitted).

{¶ 76} In *O'Brien*, the Tenth District found no evidence in the record to support a lack of jurisdiction, because the trial court had followed the prescribed procedure for filing a complaint and the defendant had appeared with counsel in open court. The defendant also ultimately pled guilty to one count of rape. 2007-Ohio-7004, at ¶2 and 12-13. Accordingly, the Tenth District concluded that the defendant was precluded by *res judicata* from relitigating the validity of his conviction in the current proceeding, which involved the State’s attempt to obtain an injunction to prevent the defendant from residing within 1,000 feet of a school. *Id.* at ¶1 and 14.

{¶ 77} Even if Bundy were only attempting to relitigate the factual issue of whether he had a duty to register in 2003, relitigation of that issue would also be precluded by collateral estoppel, or issue preclusion. Collateral estoppel “precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action which was based on a different cause of

action.” *Whitehead*, 20 Ohio St.2d at 112 (citations omitted). The Supreme Court of Ohio has also indicated that:

{¶ 78} “Collateral estoppel applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action.” *Thompson v. Wing*, 70 Ohio St.3d 176, 183, 1994-Ohio-358, citing *Whitehead*, 20 Ohio St.2d 108, paragraph two of the syllabus.

{¶ 79} Application of the collateral estoppel doctrine is a question of law, and trial court decisions are reviewed *de novo*. *State v. Hill*, 177 Ohio App.3d 171, 181, 2008-Ohio-3509, at ¶ 37 (citations omitted). Furthermore, in considering collateral estoppel claims, we “must examine the record of the earlier proceeding in order to determine which issues were actually decided therein.” *State v. Phillips*, 74 Ohio St.3d 72, 80, 1995-Ohio-171.

{¶ 80} In the case before us, the trial court relied on *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 174 Ohio App.3d 135, 150, 2007-Ohio-6594, for its conclusion that the facts were not actually litigated in the prior criminal action between Bundy and the State of Ohio. In *Davis*, the Tenth District Court of Appeals held that collateral estoppel did not apply to a statement that the Supreme Court of Ohio had made in a prior case about the Ohio Public Defender’s status as a county agency. *Id.* at ¶¶31-38. The Tenth District concluded that the Supreme Court of Ohio had accepted the uncontested assertions of the parties in the prior case, and had not actually considered the issues. *Id.* at ¶38. During its discussion of this point, the

Tenth District noted that “[i]n a similar vein, Ohio courts have held that a fact stipulated in a prior action was not actually litigated, as required to invoke the doctrine of issue preclusion in a subsequent action.” *Id.* at ¶35.

{¶ 81} One of the cases the Tenth District cites for this statement is our own decision in *Allstate Ins. Co. v. Merrick* (June 23, 1993), Montgomery App. No. 13812, 1993 WL 224658. In *Merrick*, we considered whether an insurer should be bound by stipulations entered into during a prior proceeding against its insured. We held that collateral estoppel would not apply. We noted that even if the insurer were considered a party to the prior judgment against its insured, the issue of whether the insured’s conduct was negligent, rather than intentional, was not “ ‘actually litigated’ ” at a damages hearing that had been held. *Merrick*, 1993 WL 224658, \*4. We stressed that no testimony was taken at the damages hearing, and counsel for the plaintiff had “simply read a stipulation of facts into the record which contained the statement that some of Merrick’s conduct was negligent, some was reckless, and some was intentional.” *Id.* We also noted that “the Restatement of the Law Second, Judgments section 27, comment (e), states that an issue is not actually litigated if it is the subject of a stipulation between the parties unless the parties manifested an intention to that effect.” *Id.* After making these remarks, we concluded that the insurer was not a party to the stipulations and obviously did not manifest its intention to be bound. *Id.*

{¶ 82} Other courts have analyzed the collateral estoppel issue in terms of whether the finding in question was essential to the prior proceedings. See *State v. Hill*, 177 Ohio App.3d 171, 2008-Ohio-3509, at ¶39 (focusing on whether collateral

estoppel should be applied in post-conviction proceedings to preclude relitigation of the defendant's mental retardation. The court of appeals concluded in *Hill* that relitigation would be appropriate, because a finding of mental retardation was not essential at the time the death penalty was imposed on the defendant).

{¶ 83} In *Hill*, the court of appeals also rejected the defendant's contention that collateral estoppel should apply, because cases decided after the original trial had established a new standard for what constitutes mental retardation under the Eighth Amendment. *Id.* at ¶61. The court of appeals observed that:

{¶ 84} “ ‘Collaterally estopping a party from relitigating an issue previously decided against it violates due process where it could not be foreseen that the issue would subsequently be utilized collaterally, and where the party had little knowledge or incentive to litigate fully and vigorously in the first action due to the procedural and/or factual circumstances presented therein.’ ” *Id.* at ¶55 (citations omitted).

{¶ 85} The issue before us, therefore, is whether Bundy's prior guilty plea manifested an intent to be bound, whether collateral use of the guilty plea could be foreseen, and whether Bundy had knowledge or incentive to fully litigate whether he had a duty to register his address. And, as noted, we examine the former proceedings to decide what issues were actually litigated.

{¶ 86} The indictment in the case involving the conviction for failure to register charged that Bundy:

{¶ 87} “having been convicted of or having pled guilty to a sexually oriented offense, to wit: Gross Sexual Imposition, and having been sentenced for the sexually oriented offense to a prison term, a term of imprisonment, or any other type of



confinement, and, on or after July 1, 1997, \* \* \* said defendant was released from the prison term, term of imprisonment, or confinement, did fail to register with the Sheriff of Montgomery County, Ohio, within seven (7) days of coming into Montgomery County for purposes of residency or temporary domicile for more than seven (7) days; contrary to the form of the statute (in violation of Sections 2950.04(A)(1) and (E) of the Ohio Revised Code \* \* \*."

{¶ 88} An attorney was appointed for Bundy in October 2003, and Bundy subsequently pled guilty in November 2003, to "Failure to Register 2950.04(A)(1)(F5)." Entry of Waivers and Plea(s) on Indictment, Entry and Order, filed in Case No. 2003-CR-3160 on November 12, 2003. A termination entry was then filed, sentencing Bundy to community control sanctions, including a requirement that he abide by all registration requirements for sex offenders.

{¶ 89} Some courts have held that " 'taking a guilty plea is not the same as an adjudication on the merits after full trial \* \* \*.' " *State v. Haggard* (Oct. 6, 1999), Lorain App. No. 98CA0077154, 1999 WL 812937, \* 2 (citations omitted). As an example, we held in *Merrick* that an offender's guilty plea to four acts of criminal misconduct could not be collaterally applied to prevent the victim from proving that Merrick had acted negligently for purposes of a subsequent civil action. We noted that the sexual conduct between the parties occurred over a period of seven years, and that there was no evidence that the four acts in question were the same acts alleged to have been negligent misconduct. *Merrick*, 1993 WL 224658, \*4.

{¶ 90} In contrast, the duty to register as a sex offender was a necessary element of Bundy's guilty plea to failure to register under R.C. 2950.04(A)(1) and (E).

Bundy had the incentive and opportunity to challenge his duty to register in the prior criminal action, but chose not to do so. Furthermore, even though the Supreme Court had not yet decided *Champion*, Bundy was entitled to raise the issue of how R.C. 2950.04(A)(1)(a) should be interpreted. Accordingly, Bundy is precluded from raising the issue to prevent revocation of the community control sanctions that were imposed in 2003 for his failure to register a residence address.

{¶ 91} Bundy's Second Assignment of Error is overruled.

IV

{¶ 92} Both of Bundy's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and FROELICH, JJ., concur.

Copies mailed to:

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