[Cite as *State v. Milby*, 2010-Ohio-6344.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 23798
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2009-CR-2381
v.	:	
	:	
DONALD R. MILBY	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 23rd day of December, 2010.

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BROGAN, J.

{¶ 1} The Appellant, Donald Milby, appeals from the judgment of the Montgomery County Court of Common Pleas, finding him guilty of Failure to Notify. Milby contends that his Fourth Amendment rights were violated when a Montgomery County Sheriff violated the curtilage of his property without permission. Milby also

argues that Senate Bill 10 ("S.B. 10_) is unconstitutional because it violates the separation of powers and retroactivity clauses of the Ohio Constitution and the ex post facto, due process, and cruel and unusual punishment provisions of the United States Constitution. Milby further argues that he had ineffective assistance of counsel because his attorney failed to assert a motion to suppress which he claims prejudiced his defense. Since the Fourth Amendment issue was not raised at the trial court level it was not preserved for appeal. We have previously ruled on S.B. 10, and found it to be constitutional. However, Milby's reclassification as a Tier III sex offender by the Ohio Attorney General violated the separation of powers provisions of the Ohio Constitution. We also find that the actions of Milby's counsel did not substantially prejudice Milby's defense. For the following reasons, the judgment of the trial court will be reversed and the matter will be remanded to the trial court for resentencing.

I

{¶ 2} On February 2, 1983, Milby was convicted of Rape, a felony of the first degree. As a result of the conviction, Milby was required to be classified as a sex offender. He was also required to register as a sex offender, provide personal and private information, and was required to notify the Montgomery County Sheriff's Office (MCSO) if he changed his place of residence, pursuant to R.C. 2950.04. On November 14, 2003 while incarcerated, the trial court reclassified Milby as a sexual predator. Once released from prison, Milby was required by then existing R.C. 2950.01(E) to register as a sex offender for life.

{¶ 3} On June 15, 2009, Milby appeared at the Montgomery County Sheriff's Office, and registered his new residence, 105 Seibenthaler Avenue in Dayton, Ohio. On June 18, shortly after midnight, Deputy Kirschner went to the residence to verify if Milby did in fact reside there. Deputy Kirschner knocked on the door, looked in the front window, and then a window on the side of the house. He testified that he saw no furniture, did not see any lights or electricity in the house, and knocked on the door and received no answer. Kirschner also looked inside the mailbox and found no mail.

{¶ 4} On July 7, 2009, the Sheriff's Office received a complaint from two people who lived near the house on 105 Seibenthaler Avenue regarding Milby's sex offender status. Deputy Christopher Plummer was sent to investigate the house on July 9, and found a large box in front of the front door, saw no electricity activity, and knocked on the door and received no answer. Deputy Plummer also looked inside the trash receptacle and found no household trash. Deputy Plummer also went by the house again on July 10, 15, 17, and 20, and found no evidence of Milby living at the residence any of the times he went by the house.

{¶ 5} Plummer was able to find out that the owner of the Seibenthaler home was Kathryn Loikoc and he went to her house, located on 4161 Pafford Road on July 20. When Plummer drove by he saw a blue Ford Escort registered to Milby. He drove past the home on Pafford again on July 22 and again saw Milby's car in the driveway. Plummer drove by again on the next day, July 23, and saw Milby's car, as well as Milby standing in the driveway. Deputy Plummer called for backup, and the two deputies patted down Milby, found several knives, and placed him in the back of

the cruiser. Before being placed in the cruiser, Milby stated "I know I have ten days to change my address with - with the- with the sex offender office." (Transcript of Proceedings, page 75).

{¶ 6} Milby was Mirandized and, after waiving his rights, was interviewed by Deputy Plummer. Milby admitted during questioning that he has been living at 4161 Pafford Road with Kathy Loikoc since June 13, two days before he registered living at 105 Seibenthaler. (Id. at 80-81). He also stated he did not register at the house on Pafford because he did not want the neighborhood to know a sex offender was living at that house. (Id.).

{¶ 7} After placing Milby in the back of the cruiser, the deputies then began talking to Ms. Loikoc, who owned the house on 4161 Pafford Avenue as well as the house on 105 Seibenthaler Avenue. Loikoc explained that she was going to rent the house on Seibenthaler to Milby, but since he could not get electricity there in his name, she was letting him stay with her at Pafford. In the meantime, she rented the house on Seibenthaler to another couple. Loikoc testified that she allowed Milby to sleep in his car in her driveway and occasionally let him sleep inside. Loikoc also testified that she kept Milby's clothes in a spare bedroom, allowed him to shower in her home, and allowed him to eat and play games in her home.

{¶ 8} At a bench trial, the trial court found Milby guilty of failing to register at his new address. Milby was sentenced to a prison term of three years. It is from this judgment that Milby appeals.

II

{¶ 9} Milby sets forth four assignments or error. The first assignment of error states as follows:

{¶ 10} "THE APPELLANT'S FOURTH AMENDMENT SEARCH AND SEIZURE RIGHTS WERE VIOLATED WHEN A MONTGOMERY COUNTY SHERIFF'S DEPUTY ENTERED THE CURTILAGE OF THE APPELLANT'S RESIDENCE WITHOUT AUTHORIZATION AND CONDUCTED A WARRANTLESS SEARCH WITHOUT PROBABLE CAUSE."

{¶ 11} Milby argues that his constitutional rights were violated by the officer when he performed a warrantless search of the house located on Seibenthaler Avenue. According to Milby, the information gathered by Deputy Kirschner during that search should not be allowed.

{¶ 12} Crim R. 12 (C) states, in pertinent part:

{¶ 13} "Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial:

{¶ 14} "(3) Motions to suppress evidence, including but not limited to statements and identification testimony, on the ground that it was illegally obtained. Such motions shall be filed in the trial court only."

{¶ 15} Crim. R. 12 (H) states, in pertinent part:

{¶ 16} "Failure by the defendant to raise defenses or objections or to make requests that must be made prior to trial, at the time set by the court pursuant to division (D) of this rule, or prior to any extension of time made by the court, shall constitute waiver of the defenses or objections...."

{¶ 17} Milby never raised the suppression issue before trial, as required by the Ohio Rules of Criminal Procedure. Therefore, Milby has waived his right to raise the suppression issue on appeal.

{¶ 18} Milby's first assignment of error is overruled.

III

{¶ 19} Since Milby's second and third assignments of error are closely related, they will be discussed together.

{¶ 20} Milby's second assignment of error is as follows:

{¶ 21} "THE TRIAL COURT ABUSED ITS DISCRETION BY OVERRULING THE APPELLANT'S MOTION TO DISMISS BECAUSE SENATE BILL 10 VIOLATES THE SEPARATION OF POWERS AND RETROACTIVITY CLAUSES IN THE OHIO CONSTITUTION, AND VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION."

{¶ 22} Milby's third assignment of error is as follows:

{¶ 23} "THE APPLICATION OF THE OHIO SEX OFFENDER REGISTRATION AND RESIDENCY NOTIFICATION PROVISIONS OF SENATE BILL 10 TO THE APPELLANT VIOLATED HIS PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS, AS WELL AS THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE IN THE UNITED STATES CONSTITUTION."

{¶ 24} Milby argues that S.B. 10 violates many constitutional provisions, and that we should give this issue a "fresh review" (Brief of the Appellant, page 10).

{¶ 25} We have previously held in other sexual reclassification cases that S.B.

10 does not violate the above-mentioned constitutional rights. *State v. Desbeins*, Montgomery App. No. 22489, 2008-Ohio-3375; *State v. Barker*, Montgomery App. No. 22963, 2009-Ohio-2274; *State v. Dobson*, Miami App. No. 2008 CA 43, 2010-Ohio-279; *State v. Heys*, Miami App. No. 09-CA-04, 2009-Ohio-5397.

{¶ 26} In *Desbeins*, we held that "S.B. 10 sets forth a civil and non-punitive reclassification and registration scheme." Id., at ¶ 26; citing *State v. King,* Miami App. No. 08-CA-02, 2008-Ohio-2594. Therefore, we rejected the appellant's claims that "S.B. 10 violates several Constitutional rights, including his right to protection from ex post facto laws, his right to substantive due process, his right to contract, and his right to procedural due process." Id. at ¶ 18.

{¶ 27} In *State v. Barker,* we held that since "S.B. 10 is civil and non-punitive, Barker's claim that the legislation violates the cruel and unusual punishment clauses * * * of the United States and Ohio Constitution must fail. * * * " 2009-Ohio-2774, at ¶ 3.

{¶ 28} In *State v. Dobson*, we rejected the argument that residency restrictions impose an unconstitutional restraint and infringe on a fundamental right which would violate substantive due process. 2010-Ohio-274, at ¶ 15.

{¶ 29} The parties to this appeal were asked to brief the implications of the recent Ohio Supreme Court case of *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, decided June 3, 2010. In that case the Supreme Court struck down as unconstitutional R.C. 2950.031 and 2950.032, which required the Attorney General to reclassify sex offenders who had already been classified by court order under former law. Id. At ¶ 60-61. The Court remedied the constitutional violation

by severing R.C. 2950.031 and 2950.032. Id. at ¶ 66. Those provisions "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.

{¶ 30} Pursuant to *Bodyke*, Milby's reclassification as a Tier III sex offender and the community-notification and registration orders attending that reclassification may not be applied, and his original classification as a sexual predator and the community-notification and registration orders attending that classification are reinstated.

{¶ 31} When Milby's original sexual predator classification and registration requirements are applied to the facts of his case, his failure to notify conviction is not offended. Under former law, Milby was required to provide notice of an address change twenty days prior to the change. R.C. 2950-05(A). This requirement did not change with the enactment of S.B. 10. Therefore, because Milby had an ongoing duty since his release from prison to notify MCSO of any change of his registered address, neither S.B. 10 nor *Bodyke* changed this requirement or his duty. See *State v. Huffman*, Mont. App. No. 23610, 2010-Ohio-4755. AWA did increase the penalty for failure to notify to a first-degree felony. That penalty may not be applied to Milby. Under the former law, violation of the reporting requirement was a felony of the third degree. See former R.C. 2950.99(A)(1)(a)(I). Since the trial court improperly treated Milby's conviction as a first-degree felony, we will remand this matter to the trial court for resentencing as a third-degree felony conviction. The appellant's second assignment is Sustained in part. The appellant's third

assignment is Overruled.

IV.

{¶ 32} Milby's fourth assignment of error is as follows:

{¶ 33} "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND THUS DEPRIVED OF HIS RIGHT TO DUE PROCESS UNDER BOTH THE OHIO AND UNITED STATES CONSTITUTION."

{¶ 34} Milby claims that his counsel failed to assert a motion to suppress the information gathered by law enforcement, which Milby asserts was obtained in violation of the Fourth Amendment of the United States Constitution. Milby further argues that if a motion to suppress had been, the outcome of the trial would have been significantly different.

{¶ 35} *Strickland v. Washington* set forth a two-part test that must be satisfied to prevail on an ineffectiveness of counsel claim. *Strickland v. Washington* (1984), 466 U.S. 668, 687. The first step is that Appellant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* Second, Appellant must show the "deficient performance prejudiced the defense." *Id.* A properly licensed attorney in Ohio is presumed to be competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56.

{¶ 36} We begin our analysis of this issue by noting that "failure to file a suppression motion does not constitute per se ineffective assistance of counsel." *Kimmelman v. Morrison* (1986), 477 U.S. 265, 384, 106 S.Ct. 2574, 91 LED.2d 305; *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389.

{¶ 37} In order to determine if the failure to suppress the evidence would have caused a deficient performance that prejudiced the defense, we must examine if law enforcement would have determined the whereabouts of Milby by means other than looking inside the house on Seibenthaler from inside the curtilage. The record shows that a member of the Montgomery County Sheriff's Office, Deputy Plummer, received complaints from two people that lived close to 105 Seibenthaler Avenue. (Transcript of Bench Trial, page 69). Deputy Plummer went by the house on Seibenthaler five different times and never once saw Milby at the house, and saw no evidence of anyone living there. (Id. at 72). Deputy Plummer then learned that Ms. Loikoc was the owner of the property, and upon going to her home on 4161 Pafford Avenue, saw Milby's car. (Id. at 73-74).

{¶ 38} Deputy Kirschner developed considerable evidence that Milby did not live at the Seibenthaler address independent of the alleged violation of Milby's Fourth Amendment rights. Also, since there was substantial evidence Milby did not live at the Seibenthaler address nor was an overnight guest at that location, he lacked standing to raise the Fourth Amendment claim. *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684 (1984). Milby failed to show he was prejudiced by his counsel's conduct.

{¶ 39} Even if Milby could demonstrate his counsel's conduct fell below an objective standard of reasonableness, the second prong of the *Strickland* test is not satisfied because there is no evidence that the performance of Milby's counsel prejudiced the defense.

{¶ 40} Milby's fourth assignment of error is overruled.

V

{¶ 41} The judgment of the trial court is Reversed and Remanded for further proceedings consistent with this Opinion.

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GRADY and CANNON, JJ., concur.

(Hon. Timothy P. Cannon, Eleventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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