[Cite as *State v. Stivender*, 2011-Ohio-247.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

C.A. CASE NO. 23973

v.

: T.C. NO. 10CR319

REGINALD STIVENDER : (Criminal appeal from Common Pleas Court)

Defendant-Appellant :

:

. . . . . .

O P I N I O N

Rendered on the 21st day of January, 2011.

. . . . . .

JOHNNA M. SHIA, Atty. Reg. No. 0067685, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

WILLIAM A. SHIRA, III, Atty. Reg. No. 0005472, 432 Silvercrest Terrace, Beavercreek, Ohio 45440
Attorney for Defendant-Appellant

. . . . . .

DONOVAN, J.

{¶ 1} Defendant-appellant Reginald Stivender appeals from his conviction and sentence for one count of failure to notify, in violation of R.C. 2950.05(A) and (F)(1), a felony

of the first degree.

{¶ 2} On February 8, 2010, Stivender was indicted for one count of failure to notify the Montgomery County Sheriff's Office (MCSO) of his intent to reside in Hamilton County, Ohio, between the dates of January 14, 2010, and January 29, 2010. Stivender's duty to notify purportedly stemmed from a conviction on June 6, 2001, for kidnapping (sexual activity), in violation of R.C. 2905.01(A)(4), a felony of the first degree. An element of the kidnapping charge was that the crime was committed with "purpose to engage in sexual activity with the victim against the victim's will." As a result of his conviction, Stivender was sentenced to eight years in prison.

{¶ 3} "In 2006, Congress passed the Adam Walsh Child Protection and Safety Act * * *," which "divides sex offenders into three categories or 'tiers' - Tier I, Tier II, and Tier III - based solely on the crime committed." *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶ 18. In 2007, the Ohio General Assembly "enacted 2007 Am.Sub.S.B. No. 10[, which] repealed Megan's Law and replaced it with a new, retroactive scheme that includes the tier system required by Congress. R.C. Chapter 2950." Id. at ¶ 20. Ohio law required the Ohio Attorney General to determine the new classification for existing offenders, and to provide notification of the reclassification. Id. at ¶ 22, citing R.C. 2950.031(A)(1) and 2950.032(A)(1)(a) and (b).

{¶ 4} Although not entirely clear from this record, before he was released from prison, Stivender was notified that he had been classified as a Tier III sex offender with community notification, which required him to notify the MCSO of where he intended to reside prior to leaving the institution. Stivender left Montgomery

County without notifying the MCSO of his intent to relocate, and simply appeared at the Hamilton County Sheriff's Office in order to register. As a result, Stivender was charged with failure to notify pursuant to R.C. 2950.05(A) and (F)(1). Following a plea of guilty entered on March 4, 2010, the trial court sentenced Stivender to a mandatory prison term of three years.

{¶ 5} It is from this judgment that Stivender now appeals.

I

{¶ 6} As they are interrelated, Stivender's first, second, and fourth assignments of error will be discussed together as follows:

{¶ 7} "IT WAS ERROR TO INDICT DEFENDANT/APPELLANT FOR FAILURE TO REPORT PURSUANT TO CHAPTER 2950 OF THE OHIO REVISED CODE. (AWA)"

{¶ 8} "IT WAS ERROR FOR THE TRIAL COURT TO ACCEPT DEFENDANT/APPELLANT'S PLEA OF GUILTY."

{¶ 9} "IT WAS ERROR FOR THE TRIAL COURT NOT TO DISMISS THE CASE PRIOR TO GUILTY PLEA, OR FOR NOT DISMISSING AFTER THE PLEA."

{¶ 10} In his first assignment, Stivender contends that his conviction for failure to notify should be vacated because the trial court did not designate him as a sexual offender and require him to register as a result of his 2001 conviction for kidnapping (sexual activity), and because the Ohio Supreme Court recently held in *Bodyke* that the reclassification scheme in R.C. 2950.31 and 2950.32 was unconstitutional. Thus, Stivender reasons that he had no duty to register as a sexual offender, and therefore was not required to notify the MCSO of his intent to reside in Hamilton

County. The State, however, argues that the *Bodyke* decision, which came out after Stivender plead guilty to the charged offense, cannot provide the basis to vacate his conviction for failure to notify.

{¶ 11} Stivender entered a guilty plea of to the charge against him, and a guilty plea is a complete admission of the defendant's guilt. Crim.R. 11(B)(1). For that reason, and because the alleged errors are not ones which constitute plain error, we believe the sound and orderly administration of justice supports an exercise of our discretion to decline to review the errors assigned. *State v. Puckett*, Greene App. No. 05CA48, 2006-Ohio-1127.

{¶ 12} Stivender's first, second, and fourth assignments of error are overruled.

II

{¶ 13} Stivender's third assignment of error is as follows:

{¶ 14} "COUNSEL WAS INEFFECTIVE FOR ADVISING A GUILTY PLEA."

{¶ 15} In his third assignment, Stivender argues that his counsel was ineffective for advising him to plead guilty to the charge of failure to notify the MCSO of his intent to relocate. A plea of guilty waives any claim that the accused was prejudiced by ineffective assistance of trial counsel, except to the extent that the ineffectiveness alleged may have caused the guilty plea to be less than knowing, intelligent, and voluntary. *State v. Barnett* (1991), 73 Ohio App.3d 244. The focus of that inquiry is the procedures by which the accused's constitutional rights were waived. *State v. Kelley* (1991), 57 Ohio St.3d 127.

{¶ 16} On the record now before us, we find nothing which establishes that Stivender plead guilty as a result of the alleged deficient performance of defense

counsel. Thus, the trial court did not err in accepting the plea.

{¶ 17} Stivender's third assignment of error is overruled.

III

{¶ 18} Upon review, however, we note that a complete record may support the filing of a motion to withdraw Stivender's guilty plea with the trial court. If the record of his original conviction for kidnapping (sexual activity) affirmatively establishes that the trial court elected **not** to designate Stivender as a sexually oriented offender in 2001 then he was not subject to any sex offender classification in the first instance. If it is established that Stivender's original sentence carried no offender designation by court order, then his plea may be subject to a motion to vacate pursuant to Crim. R. 32.1.

{¶ 19} The State cites *Brady v. United States* (1970), 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747, for the proposition of law that a voluntary guilty plea cannot be vacated "because later judicial decisions indicate that the plea rested on a faulty premise." However, the *Brady* case relied on by the State addressed whether a defendant's plea was coerced and rendered involuntary because of the fear of the imposition of the death penalty if the case were tried to a jury. Stivender, however, does not contend that he was coerced into pleading guilty due to fear of receiving a harsher penalty. Rather, Stivender's contention is that he was never lawfully subject to classification as a sexual offender due to a judicial determination in his 2001 conviction. Thus, the State's reliance on *Brady* is misplaced and has no applicability or bearing on this case.

{¶ 20} All of Stivender's assignments of error having been overruled, the

judgment of the trial court is affirmed.

. . . . . .

GRADY, P.J., and FAIN, J., concur.

Copies mailed to:

Johnna M. Shia
William A. Shira, III
Hon. Mary L. Wiseman