[Cite as *State v. Heston*, 2010-Ohio-2939.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	John W. Wise, J.
	:	
-vs-	:	Case No. 2009-CA-0086
	:	
	:	
CHADREN S. HESTON	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Richland County Court of Common Pleas Case No. 2009-CR-183D
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	June 15, 2010
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
JAMES J. MAYER, JR. Prosecuting Attorney Richland County, Ohio BY: KIRSTEN L. PSCHOLKA-GARTNER Assistant Richland County Prosecutor 38 South Park Street Mansfield, Ohio 44902	JOHN A. BOYD Tarkowsky-Baran Law Offices 3 North Main Street, Suite 505 Mansfield, Ohio 44902

Edwards, P.J.

{¶1} Appellant, Chadren S. Heston, appeals a judgment of the Richland County Common Pleas Court convicting him upon pleas of guilty of eleven counts of rape of a child under 13 (R.C. 2907.02(A)(1)(b)), nine counts of rape by force or threat of force (R.C. 2907.02(A)(2)), eleven counts of sexual battery of a child under thirteen as a second degree felony (R.C. 2907.03(A)(5)), two counts of sexual battery of a child under 13 as a third degree felony (R.C. 2907.03), ten counts of gross sexual imposition on a child under 13 (R.C. 2907.05(A)(4)), two counts of gross sexual imposition on a child under 12 (R.C. 2907.05(B)), and two counts of kidnapping with sexual motivation specifications (R.C. 2905.01(A)(4)). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On March 6, 2009, appellant was indicted by the Richland County Grand Jury with 20 counts of rape with sexually violent predator specifications, two counts of sexual battery, eleven counts of sexual battery with sexually violent predator specifications, twelve counts of gross sexual imposition, and two counts of kidnapping with sexual motivation specifications. Appellant entered into a negotiated plea whereby the state agreed to dismiss the sexually violent predator specifications in exchange for guilty pleas to the remaining charges.

{¶3} Because appellant pleaded guilty to the charges, the record does not reflect the specific facts underlying the numerous offenses. However, the transcripts of the change of plea and sentencing hearings reflect that the incidents occurred between October of 1998 and September of 2004, and involved five victims who were the children of appellant's girlfriend at the time. The ages of the victims, who were both

male and female, ranged from three to thirteen. Appellant engaged in sexual conduct with the children, including fellatio, cunnilingus, vaginal intercourse and anal intercourse. Appellant threatened to kill the children, their mother and their siblings if they told anyone what he was doing. Several of the incidents involved locking a child in a separate room or taking a child away in a vehicle, and appellant tied the hands of a child on at least one occasion.

{¶4} At the change of plea hearing, counsel for appellant argued that the sexual motivation specifications which were attached to the kidnapping charges should not carry the mandatory ten year term of imprisonment. The indictment alleged that the acts constituting the kidnapping charges occurred between May 1, 2003, and September 30, 2004. At the time the crimes occurred, the sexual motivation specification did not carry a mandatory term of imprisonment and applied solely to the determination of whether or not the offender was a sexual predator for registration purposes. The kidnapping statute was amended effective January 1, 2008, to require a ten year consecutive term of imprisonment on the specification. The State argued that the date of the plea or conviction controlled, and because the statute was amended before appellant was convicted, he should be sentenced to ten years incarceration on the specification.

{¶5} The court sentenced appellant to life in prison with no consideration for parole for 45 years, and to an additional ten years incarceration on the sexual motivation specification, to be served consecutively. Appellant assigns two errors on appeal:

{¶6} "I. THE TRIAL COURT ERRED WHEN IT RETROACTIVELY APPLIED AMENDED R.C. 2905.01(C)(2), EFFECTIVE JANUARY 1, 2008, AND SENTENCED APPELLANT TO AN ADDITIONAL, CONSECUTIVE, MANDATORY, INDEFINITE TERM OF TEN YEARS TO LIFE IMPRISONMENT BECAUSE THE AMENDMENT DOES NOT CLEARLY PROCLAIM ITS OWN RETROACTIVITY AND BECAUSE THE LEGISLATURE, BY VIRTUE OF ITS LANGUAGE EXPRESSLY PROCLAIMING RETROACTIVITY IN A SIMILAR STATUTE, CLEARLY CONSIDERED WHETHER THE AMENDMENT SHOULD APPLY RETROACTIVELY, BUT REMAINED SILENT.

{¶7} "II. IF THE TRIAL COURT WAS CORRECT WHEN IT RETROACTIVELY APPLIED R.C. 2905.01(C)(2) IN SENTENCING THE APPELLANT, THE AMENDMENT, AS APPLIED, VIOLATES MR. HESTON'S SUBSTANTIVE RIGHTS BECAUSE THE AMENDMENT, WHICH BECAME EFFECTIVE JANUARY 1, 2008, SUBJECTED THE APPELLANT TO A NEW, ENHANCED, MANDATORY CRIMINAL PENALTY OF AN INDEFINITE TERM OF TEN YEARS TO LIFE IMPRISONMENT FOR AN OFFENSE THAT PREDATED THE PROVISION, AND IT THUS VIOLATES THE EX POST FACTO CLAUSES OF THE UNITED STATES AND OHIO CONSTITUTIONS."

I

{¶8} In his first assignment of error, appellant argues that the court erred in sentencing him to a ten year definite term of incarceration on the sexual motivation specification attached to the kidnapping charges because under the law at the time he committed the crimes, the specification did not result in an additional ten year sentence, and the amended statute does not apply retroactively.

{¶9} R.C. 2905.01(C), as amended effective January 1, 2008, provides:

{¶10} "(C)(1) Whoever violates this section is guilty of kidnapping. Except as otherwise provided in this division or division (C)(2) or (3) of this section, kidnapping is a felony of the first degree. Except as otherwise provided in this division or division (C)(2) or (3) of this section, if the offender releases the victim in a safe place unharmed, kidnapping is a felony of the second degree.

{¶11} "(2) If the offender also is convicted of or pleads guilty to a specification as described in section 2941.1422 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, the court shall order the offender to make restitution as provided in division (B)(8) of section 2929.18 of the Revised Code and, except as otherwise provided in division (C)(3) of this section, shall sentence the offender to a mandatory prison term as provided in division (D)(7) of section 2929.14 of the Revised Code.

{¶12} "(3) If the victim of the offense is less than thirteen years of age and if the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, kidnapping is a felony of the first degree, and, notwithstanding the definite sentence provided for a felony of the first degree in section 2929.14 of the Revised Code, the offender shall be sentenced pursuant to section 2971.03 of the Revised Code as follows:

{¶13} "(a) Except as otherwise provided in division (C)(3)(b) of this section, the offender shall be sentenced pursuant to that section to an indefinite prison term consisting of a minimum term of fifteen years and a maximum term of life imprisonment.

{¶14} "(b) If the offender releases the victim in a safe place unharmed, the offender shall be sentenced pursuant to that section to an indefinite term consisting of a minimum term of ten years and a maximum term of life imprisonment."

{¶15} Because this issue requires interpretation of a statute, which is a question of law, our standard of review is de novo. *State v. Consilio*, 114 Ohio St.3d 295, 871 N.E.2d 1167, 2007-Ohio-4163, ¶8.

{¶16} Statutes are presumed to apply prospectively unless expressly declared to be retroactive. R.C. 1.48; *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 105, 522 N.E.2d 489. A statute must clearly proclaim its own retroactivity to overcome the presumption that it applies prospectively. *Consilio*, *supra*, at syllabus one, citing *Kelley v. State* (1916), 94 Ohio St. 331, 114 N.E. 255. "Retroactivity is not to be inferred." Id. The General Assembly's failure to clearly enunciate retroactivity ends the analysis, and the statute in question must be applied only prospectively. Id. at ¶10. "Requiring the General Assembly to clearly enunciate its intent in plain terms allows casual readers of the law to immediately know what statutes are retroactive." Id. at ¶23.

{¶17} The instant statute includes no language of retroactivity. Therefore, the statute only applies prospectively and the court erred in sentencing appellant to ten years incarceration on the sexual motivation specification in accordance with the amended statute.

{¶18} The State concedes that the statute is not expressly retroactive and was not in effect on the date the crimes were committed. However, the state argues that the legislature's failure to include language making the specification retroactive is a mere oversight due to the legislature's inclusion of language of retroactivity in R.C.

2971.03(A)(3)(b)(ii), also amended January 1, 2008. The state also argues that in the amendment to R.C. 2905.01(C), the General Assembly indicated that a person need only be convicted of or plead guilty to the specification and does not reference the date on which the crime occurred, which indicates legislative intent to impose the enhanced penalty on anyone who is convicted or pleads guilty after January 1, 2008. The state also argues that the intent to apply the statute retroactively is evidenced by the recent trend of imposing harsher punishments and registration requirements on sex offenders.

{¶19} We reject the State's argument that the legislature's failure to make R.C. 2905.01(C) retroactive is a mere oversight. We reject the state's argument based on the legislature's inclusion of such language in R. C. 2971.03(A)(3)(b)(ii) regarding sentencing on a sexually violent offender specification.[1] This statute provides in pertinent part:

{¶20} "(b) Except as otherwise provided in division (A)(4) of this section, if the offense for which the sentence is being imposed is kidnapping that is a felony of the first degree, it shall impose an indefinite prison term as follows:

{¶21} "(ii) *If the kidnapping is committed prior to the effective date of this amendment* or division (A)(3)(b)(i) of this section does not apply, it shall impose an indefinite term consisting of a minimum term fixed by the court that is not less than ten years and a maximum term of life imprisonment."

{¶22} Contrary to the State's argument, the inclusion of language expressly conveying retroactivity in R.C. 2971.03(A)(3)(b)(ii), amended the same date as R.C. 2905.01(C), does not lead us to the conclusion that the failure to include retroactivity

[1] While appellant was charged with sexually violent offender specifications, these specifications were dismissed by the State as part of the negotiated plea agreement.

language in R.C. 2905.01(C) is an oversight, but rather leads to a conclusion that had the legislature intended to make R.C. 2905.01(C) retroactive, it would have expressly done so. The General Assembly is presumed to know that it must include retroactivity language to create that effect in the statute, and it has done so in the past. *Consilio* 114 Ohio St.3d at ¶15. A court may not add words to an unambiguous statute, but must apply the statute as written. *Davis v. Davis*, 115 Ohio St.3d 180, 873 N.E.2d 1305, 2007-Ohio-5049, ¶15.

{¶23} We further reject the State's argument that the use of the phrase "if the offender also is convicted of or pleads guilty to a specification" indicates an intent that the statute apply to every defendant who is convicted of or pleads guilty after the effective date of the statute, regardless of when the crime was committed. The Ohio Supreme Court considered a similar argument in *Consilio*, supra, and concluded that the mere use of present-tense language did not make the statute retroactive. 114 Ohio St.3d at ¶17. In the absence of more express evidence of retroactivity, the presumption that the statute applies prospectively controls. Id.

{¶24} We also reject the State's argument that interpreting the statute retroactively is in accordance with the legislature's trend concerning treatment of sex offenders for sentencing and registration. A court is not a judicial legislature, and cannot modify the clear and unambiguous terms of a statute to make it say something different from what the language actually says and means. *Ritchey Produce Co. v. Ohio Dept. of Adm. Servs.* (1999), 85 Ohio St.3d 194, 206, 707 N.E.2d 871, 881.

{¶25} The first assignment of error is sustained.

II

{¶26} In his second assignment of error, appellant argues that if the trial court correctly found the statute to apply retroactively, such retroactivity violates the ex post facto clauses of the United States and Ohio Constitutions. Because we have found the statute is not retroactive and the court erred in applying it retroactively, we need not address the second assignment of error.

{¶27} The judgment of the Richland County Common Pleas Court is reversed as to the imposition of a term of incarceration of ten years on the finding of guilt on the sexual motivation specification. This cause is remanded to that court for resentencing in accordance with this opinion.

By: Edwards, P.J.

Hoffman, J. and

Wise, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/John W. Wise

JUDGES

JAE/r0308

[Cite as *State v. Heston*, 2010-Ohio-2939.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
CHADREN S. HESTON	:	
Defendant-Appellant	:	CASE NO. 2009-CA-0086

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is reversed as to the imposition of the term of incarceration of ten years on the finding of guilt on the sexual motivation specification, and remanded to the trial court for further proceedings. Costs assessed to appellee.

s/Julie A. Edwards

s/William B. Hoffman

s/John W. Wise

JUDGES