

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

R.D.

Delinquent Child

JUDGES:

Hon. William B. Hoffman, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 09 CA 97

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Juvenile Division, Case No. A2005-
0820

JUDGMENT:

Vacated and Remanded

DATE OF JUDGMENT ENTRY:

June 28, 2010

APPEARANCES:

For Appellee State of Ohio

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Wise, J.

{¶1} Appellant R.D. appeals the June 29, 2009, Judgment Entry of the Licking County Court of Common Pleas, Juvenile Division, which adjudicated him a Tier III sexual offender subject to statutory registration requirements.

{¶2} Appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶3} On October 13, 2005, the Licking County Prosecutor's Office filed a complaint alleging that R.D., then fourteen years old, was a delinquent child for one count of rape, in violation of R.C. §2907.02(A)(1)(b), a felony of the first degree if committed by an adult.

{¶4} On January 26, 2006, R.D. entered an admission to the rape charge and was adjudicated delinquent.

{¶5} On March 9, 2006, the trial court held a disposition hearing and R.D. was committed to the Department of Youth Services (DYS) for a minimum period of three (3) years, or until the age 21.

{¶6} Upon his release date in June, 2009, the trial court conducted a juvenile sex offender classification hearing. At the conclusion of said hearing, the trial court ordered that R.D. be classified as a "Tier III" juvenile sex offender subject to community notification, requiring him to register as juvenile sex offender every 90 days for the rest of his life. (T. at 37,40). The trial court further found that community notification was "automatic" but that "the court would conduct a hearing in five years and modify the community notification provision, which is separate and apart, of course from the actual registration, which is for life." (T. at 34-35).

{¶7} Defense counsel objected to the constitutionality of S.B. 10, to R.D.'s classification as a Tier III offender and to community notification. The trial court overruled these objections.

{¶8} It is from this classification Appellant appeals, raising the following assignments of error:

ASSIGNMENTS OF ERROR

{¶9} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER ANY OF THE REQUIRED FACTORS IN R.C. 2152.83(D)(1)-(6) BEFORE CLASSIFYING [R. D.] AS A TIER III JUVENILE OFFENDER REGISTRANT.

{¶10} "II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED [R. D.] TO BE SUBJECT TO COMMUNITY NOTIFICATION.

{¶11} "III. THE TRIAL COURT ERRED WHEN IT FOUND SENATE BILL 10 CONSTITUTIONAL AS APPLIED TO [R. D.] AS THE APPLICATION OF SENATE BILL TO [R. D.] VIOLATES HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

{¶12} "IV. THE TRIAL COURT ERRED WHEN IT APPLIED SENATE BILL 10 TO [R. D.], AS THE LAW VIOLATES HIS RIGHT TO EQUAL PROTECTION UNDER THE LAW. FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION 2 OF THE OHIO CONSTITUTION.

{¶13} "V. [R.D.] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO PROPERLY ADVISE THE COURT AS TO THE DISCRETIONARY NATURE OF COMMUNITY NOTIFICATION REQUIREMENTS."

I.

{¶14} In his first assignment of error, Appellant argues that the trial court abused its discretion when it failed to consider any of the required factors in R.C. §2152.83(D)(1)-(6) and in mandatorily classifying R.D. as a Tier III juvenile offender.

{¶15} Senate Bill 10, as in earlier versions of Ohio's sex offender registration statutes, applies to both adult sex offenders and juvenile sex offenders. See R.C. §2950.01(B)(1) ("sex offender" includes a person who is "adjudicated a delinquent child for committing, or has been adjudicated a delinquent child for committing any sexually oriented offense"). The classification scheme for juvenile sex offenders is governed by both R.C. Chapter 2152 and R.C. Chapter 2950. As with the earlier version of the law, Senate Bill 10 requires the juvenile court to engage in a two-step process. See *In re C.A.*, 2d Dist. No. 23022, 2009-Ohio-3303, ¶ 37.

{¶16} First, the juvenile court must determine whether the juvenile sex offender should be designated as a juvenile offender registrant ("JOR") and, therefore, subject to classification and the attendant registration requirements. For certain juvenile sex offenders, the JOR designation is mandatory. See R.C. §2152.82 (applicable to juvenile sex offenders 14 or older who had previously committed a sexually oriented offense); R.C. §2152.83(A)(1) (applicable to juvenile offenders 16 or older); and R.C. §2152.86 (applicable to "serious youthful offenders" who are additionally designated as "public registry-qualified juvenile offender registrant").

{¶17} For juvenile offenders who are 14 or 15 without prior adjudication for a sexually oriented offense and who do not fall within R.C. §2152.86, the trial court has the discretion to determine whether the juvenile offender should be considered a JOR

and therefore subject to the registration requirement. See R.C. §2152.83(B)(1) and *In re C.A.* at ¶ 37.

{¶18} Second, the statutory scheme for the juvenile sex offenders requires the juvenile court to conduct a hearing to determine the tier in which to classify the juvenile offender. R.C. §2152.831(A); R.C. §2152.83(A)(2).

{¶19} For example, a Tier III sex offender is defined, in part, as a “sex offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any sexually oriented offense and who a juvenile court, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier III sex offender/child-victim offender *relative to the offense*.” (Emphasis added.) R.C. §2950.01(G)(3).

{¶20} We find, unlike the automatic classification of the adult sex offenders, R.C. §2152.831(A) explicitly requires the juvenile court to conduct a hearing prior to classifying a delinquent child pursuant to R.C. §2152.82 or R.C. §2152.83, “to determine whether to classify the child a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender.”

{¶21} This provision would be pointless if the juvenile court's classification determination were merely a ministerial act based solely on the offense that the delinquent child had committed. Thus, we find that the determination of the tier classifications for juveniles must therefore include a discretionary determination by the juvenile court as to the tier classification for the juvenile sex offender.

{¶22} Our interpretation of the statute as vesting the juvenile court with discretion in classifying the juvenile offenders is likewise shared by several other

appellate districts. See *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076, ¶ 37 (the statutes vest a juvenile court with full discretion to determine whether to classify a delinquent child as a Tier I, Tier II, or Tier III offender); *In re S.R.P.*, 12th Dist. No. CA2007-11-027, 2009-Ohio-11, ¶ 43 (the appellate court read Senate Bill 10 as giving juvenile courts the discretion to determine which tier level to assign to a delinquent child; regardless of the sexually oriented offense that the child committed, Senate Bill 10 does not forbid a juvenile court from taking into consideration multiple factors, including a reduced likelihood of recidivism); *In re Adrian R.*, 5th Dist. No. 08-CA-17, 2008-Ohio-6581, ¶ 17; *In re J.M.*, 8th Dist. No. 91800, 2009-Ohio-2880, ¶ 11; *In re C.A.* at ¶ 68.

{¶23} In the instant case, R.D. was fourteen (14) years old at the time the offense was committed. The trial court determined that Appellant was a juvenile offender registrant, and then went on to find that because he had been adjudicated delinquent for rape, it was required to classify him as a Tier III offender.

{¶24} Upon review of the record, it appears that while the trial court understood that it had discretion as to juvenile offender registrant classification, the trial court believed that it had no discretion as the tier classification, that such classification was offense-based. We therefore find a remand is necessary for the trial court to exercise its discretion in this matter.

{¶25} However, if after a proper classification hearing and consideration of the factors contained in R.C. §2152.83(D)(1)-(6), the trial court believes that such classification is warranted based on the evidence in this case, it may re-impose such

classification on remand. The important point, however, is that the trial court does possess the discretion to make this determination.¹

{¶26} Accordingly, we sustain Appellant's first assignment of error.

II.

{¶27} In Appellant's second assignment of error, he contends that the trial court erred and abused its discretion when it ordered R.D. to be subject to community notification, finding that such notification requirement was automatic. We agree.

{¶28} Again, upon review of the record, we find, and the State of Ohio concedes, that the trial court appears to have been under the mistaken impression that it did not have discretion to determine whether Appellant should be subject to community notification pursuant to R.C. §2950.11.

{¶29} "THE COURT: That community notification, however, is covered under 2950.11(H)(1), I believe. And that read in relevant part: "Upon the motion of the offender or the prosecuting attorney of the county in which the offender was convicted or pleaded guilty of a sexually oriented offense, for which the offender is subject to community notification under the section, or upon the motion of the sentencing judge or that judge's successor, the judge may schedule a hearing to determine whether the interest of justice will be served suspending the community notification requirement under this section.

{¶30} "Now that seems to imply that there's automatically community notification. Would you agree?

¹ We emphasize that this opinion should not be construed to take any position on the issue of whether R.D. should have been classified as a Tier III sex offender. Rather, we simply conclude that the trial court erred only to the extent that it believed it did not have discretion to decide the matter.

{¶31} “THE STATE: Perhaps, I misspoke, Your Honor. I was thinking that there was a discretionary portion of that as well. I could be wrong.” (T. at 34-35).

{¶32} Revised Code §2152.83(C)(2) provides that after determining that the offender is a tier III offender, and after determining that he is not a public registry-qualified offender:

{¶33} “ * * * the judge *may* impose a requirement subjecting the child to the victim and community notification provisions of R.C. 2950.10 and 2950.11 of the Revised Code. *If* the judge imposes a requirement subjecting the child to the victim and community notification provisions of sections 2950.10 and 2950.11 of the Revised Code, the judge shall include the requirement in the order. ” (Emphasis added).

{¶34} As the above community notification statute includes the words “may” and “if”, we find that such notification is not mandatory. We would therefore again order that, upon remand, the trial court utilize its discretion in making this determination

{¶35} Appellant’s second assignment of error is sustained.

III., IV.

{¶36} In his third and fourth assignments of error, Appellant challenges the constitutionality of S.B. 10 arguing that it violates Appellant’s right to due process and equal protection under the law. We disagree.

{¶37} This Court has previously addressed and rejected similar claims regarding *In re: Adrian R.* (December 11, 2008), Licking App. No. 08CA17, 2008-Ohio-6581. In that opinion, this Court rejected the Constitutional challenges raised based upon the holding and rationale set forth in *State v. Cook* (1998), 83 Ohio St.3d 404, 700 N.E.2d 570, wherein the Supreme Court of Ohio characterized the prior sex offender

registration statutes as civil and remedial rather than criminal. See *also State v. Williams* (2000), 88 Ohio St.3d 513, 528, 728 N.E.2d 342.

{¶38} Unless and until the Supreme Court of Ohio reverses or modifies this decisional construct we are constrained by the weight of precedent.

{¶39} Based on our previous holdings, Appellant's third and fourth assignments of error are overruled.

V.

{¶40} In Appellant's Fifth Assignment of Error he contends that he was denied effective assistance of counsel. Specifically, he argues that trial counsel was ineffective for failing to know the relevant juvenile offender classification procedures, failing to present the court with an accurate statement of the law as it related to Appellant's duty to register under R.C. 2152.83 and failing to be and zealously advocate on behalf of Appellant. We agree.

{¶41} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶42} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley*, 42 Ohio St.3d at 142, 538 N.E.2d 373. Because of the difficulties

inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

{¶43} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley* at 143, 538 N.E.2d 373, quoting *Strickland* at 697.

{¶44} "When counsel's alleged ineffectiveness involves the failure to pursue a motion or legal defense, this actual prejudice prong of *Strickland* breaks down into two components. First, the defendant must show that the motion or defense 'is meritorious,' and, second, the defendant must show that there is a reasonable probability that the outcome would have been different if the motion had been granted or the defense pursued." *In re Adrian R.*, 5th Dist. No. 08-CA-17, 2008-Ohio-6581, at ¶ 23, citing *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (other citations omitted).

{¶45} Upon review, under the first prong of the *Strickland* test, we find counsel's performance at the classification hearing deficient.

{¶46} R.D.'s counsel did not raise any argument that R.D. should not be subject to classification. Further, R.D.'s counsel made no argument based on the factors listed as mandatory considerations under R.C. §2152.83(D) before the court issued its order. Stated differently, even if the trial court understood the discretionary nature of its determination, defense counsel made no argument that indicated that the trial court should decline to issue an order classifying R.D. as a juvenile offender registrant, let

alone make that argument on the basis of the mandatory factors listed in the statute. *In re T.M.*, Adams App. No. 08CA863, 2009-Ohio-4224 at ¶ 14.

{¶47} This Court has previously stated that where a court fails to appreciate it has discretion and an attorney fails to argue based on that discretion, our confidence in the outcome of the proceedings is undermined. See *In the Matter of B. W.*, Darke App. No. 1702, 2007-Ohio-2096, at ¶ 28-30; *In re J.M.*, supra, at ¶ 14; *In re T.M.*, Adams App. No. 08CA863, 2009-Ohio-4224 at ¶ 14..

{¶48} Accordingly, we sustain R.D.'s fifth assignment of error insofar as he contends that he was denied effective assistance of counsel at his classification hearing.

{¶49} Based on the foregoing, we hereby vacate R.D.'s classification and remand this matter to the trial court for a re-classification hearing.

By: Wise, J.

Hoffman, P. J., and

Farmer, J., concur.

/S/ JOHN W. WISE

/S/ WILLIAM B. HOFFMAN

/S/ SHEILA G. FARMER

JUDGES

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

R.D.

DELINQUENT CHILD

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JUDGMENT ENTRY

Case No. 09 CA 97

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Juvenile Division, Licking County, Ohio, is vacated and the matter remanded for further proceedings consistent with this opinion.

Costs assessed to Appellee.

/S/ JOHN W. WISE

/S/ WILLIAM B. HOFFMAN

/S/ SHEILA G. FARMER

JUDGES