[Cite as *In re J.B.A.*, 2010-Ohio-6564.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

J. B. A.

DELINQUENT CHILD

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

Case No. 10-CA-30

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Juvenile Court Division, Case No. A2006-0668
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 30, 2010

APPEARANCES:

For Appellant	For Appellee
AMANDA J. POWELL 250 East Broad Street Suite 1400 Columbus, OH 43215	ALICE L. BOND 20 South Second Street Fourth Floor Newark, OH 43055

Farmer, J.

{¶1} In 2004, appellant, J. B. A., thirteen years of age, admitted to one count of rape involving a minor child, Case No. A2004-0390. Appellant was sent to Boys Village to receive sex offender treatment.

{¶2} In 2006, appellant, at this time fifteen years of age, was charged with delinquency counts of rape and gross sexual imposition involving a twelve year old child, Case No. A2006-0668. The incident occurred at the Boys Village facility.

{¶3} On September 22, 2006, appellant admitted to the two counts, as well as violating his probation in the 2004 case. By judgment entry filed September 25, 2006, the trial court sentenced appellant to the Department of Youth Services for a minimum period of two and one-half years, up to his eighteenth birthday after completion of a sex offender treatment program.

{¶4} On March 4, 2010, the trial court conducted a sexual offender classification hearing pursuant to S.B. No 10, Ohio's Adam Walsh Act. By judgment entry filed same date, the trial court classified appellant as a Tier III juvenile sex offender, subject to community notification requirements.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE LICKING COUNTY JUVENILE COURT ERRED WHEN IT CLASSIFIED [J. B. A.] AS A JUVENILE OFFENDER REGISTRANT UPON HIS RELEASE FROM A SECURE FACILITY IN VIOLATION OF R. C. 2152.82(A)."

II

{¶7} "THE RETROACTIVE APPLICATION OF SENATE BILL 10 TO [J. B. A.] VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION AND THE RETROACTIVITY CLAUSE OF SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION."

III

{¶8} "THE LICKING COUNTY JUVENILE COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT [J. B. A.'S] CLASSIFICATION AS A TIER III JUVENILE SEX OFFENDER REGISTRANT WAS MANDATORY IN VIOLATION OF R.C. 2950.01(E)-(G)."

IV

{¶9} "THE LICKING COUNTY JUVENILE COURT ABUSED ITS DISCRETION WHEN IT ENTERED AN ORDER THAT DOES NOT REFLECT THE MANDATORY REQUIREMENTS FOR A JUVENILE SEX OFFENDER CLASSIFICATION HEARING."

V

{¶10} "THE TRIAL COURT ERRED WHEN IT ORDERED [J. B. A.] TO BE SUBJECT TO COMMUNITY NOTIFICATION."

VI

{¶11} "[J. B. A.] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION, WHEN DEFENSE COUNSEL FAILED TO FAMILIARIZE HIMSELF WITH OHIO'S JUVENILE OFFENDER CLASSIFICATION PROCEDURES."

I

{¶12} Appellant claims the trial court erred in classifying him as a repeat juvenile sex offender pursuant to R.C. 2152.82 because he was not classified at the original dispositional hearing in 2006; therefore, he cannot be so classified upon his release from a secure facility in 2010. We disagree.

{¶13} R.C. 2152.82 governs juvenile offender registrant. Subsection (B) states the following:

{¶14} "An order required under division (A) of this section shall be issued at the time the judge makes the order of disposition for the delinquent child. Prior to issuing the order required by division (A) of this section, the judge shall conduct a hearing under section 2152.831 of the Revised Code to determine whether the child is 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. If the court determines that the delinquent child to whom the order applies is a tier III sex offender/child-victim offender and the child is not a public registry-qualified juvenile offender registrant, the judge may impose a requirement subjecting the child to the victim and community notification provisions of sections 2950.10 and 2950.11 of the Revised Code."

{¶15} In *In re: Rodney Carr,* Licking App. No. 08 CA 19, 2008-Ohio-5689, ¶18, we discussed the meaning of a "dispositional hearing" as follows:

{¶16} "Juv.R. 2(M) defines 'dispositional hearing' as 'mean[ing] a hearing to determine what action shall be taken concerning a child who is within the jurisdiction of the court.' A juvenile court hearing to revoke probation is a dispositional hearing as defined under Juv. R. 2(M). *In re Henderson,* Butler App. Nos. CA2001-07-162 and

CA2001-09-228, 2002-Ohio-2575, at paragraph 12. Thus, the October 29, 2007, hearing was a dispositional hearing. Moreover, in the case sub judice, appellant has not yet been released from a secure facility. Pursuant to *McAllister* [*In re,* Stark App. No. 2006CA00073, 2006-Ohio-5554], supra, the trial court may make a sex offender classification at the time appellant is released from DYS, a secure facility."

{¶17} In *In re: Kristopher W.,* Tuscarawas App. No. 2008 AP 03 0022, 2008-Ohio-6075, this court reviewed a case wherein the juvenile offender was classified as a Tier III juvenile offender registrant at the time of his original dispositional hearing. After analyzing R.C. 2152.83 and the applicable case law, this court concluded the following at ¶18:

{¶18} "Based on the foregoing, we find that the trial court erred in classifying appellant as a juvenile offender registrant when it did. Such determination must be made upon appellant's release from a secure facility."

{¶19} We concur with the analysis of Juv.R. 2(M) in the *Carr* case and find that up to and including a juvenile's final release from a secure facility, a trial court has the jurisdiction to enter a classification under R.C. 2152.82. As noted by the trial court, "this young man is being prepared for release from institutional care with the Ohio Department of Youth Services." T. at 3.

{¶20} As for appellant's arguments regarding *State v. Bodyke,* 126 Ohio St.3d 266, 2010-Ohio-2424, said case addressed the issue of reclassification by the executive branch and the separation of powers doctrine. As such, it does not apply sub judice.

{¶21} Assignment of Error I is denied.

II

{¶22} Appellant claims the application of S.B. No. 10 to a juvenile offender adjudicated delinquent prior to January 1, 2008 violates the ex post facto clause of the United States Constitution and the retroactivity clause of the Ohio Constitution. We disagree.

{¶23} S.B. No. 10, effective January 1, 2008, reorganized Ohio's sex offender classification and registration system. Instead of having three levels of offenders classified as "sexually oriented offenders," "habitual sex offenders," and "sexual predators," the new law imposed a classification based on a tier system that relied on the offense of conviction and/or the number of convictions. See R.C. 2950.01.

{¶24} In *In re: Kristopher W.,* supra, and *In re: Adrian R.,* Licking App. No. 08-CA-17, 2008-Ohio-6581, we addressed the specific arguments herein and rejected them.

{¶25} Assignment of Error II is denied.

III

{¶26} Appellant claims the trial court erred in failing to exercise its discretion and determining his classification as a Tier III juvenile sex offender registrant was mandatory. We disagree.

{¶27} Appellant argues because the probation officer's report stated appellant's classification as a Tier III juvenile offender registrant was mandatory, the trial court did not consider the facts and circumstances in making its determination. However, from our review of the March 4, 2010 hearing, we find the trial court was more than engaged

in the discussion of mandatory versus discretionary and did in fact hear issues beyond a bright line rule:

{¶28} "MS. BOND: ***Two years later we have the instant case where he was 15, and that was one rape and one gross sexual imposition. While he was in DYS, he admitted that he also sexually assaulted a mentally retarded victim, 15 years old, in Boys' Village in Wooster. So, we have a serial sex offender situation here, Your Honor. His record in DYS is not exemplary. There's a lot of accusing the authorities of making things up, or misplacing things. There's breaking windows, because he punched the window multiple times. There's a lot of talk - - a lot of discussion in the documents about sexual-related letters in Mr. [A's] possession while he was in DYS on more than one occasion. And he had 34 rule violations that he did not accept responsibility for while he was in DYS. He threatened to rape another boy in DYS. He admitted to kissing and touching another DYS student. There's a number of concerns that would tend to lead to the State's position that Mr. [A] should be subject to community notification.

{¶29} "THE COURT: Okay. I'm going to take everything step-by-step-by-step, because this is, to a degree, a complicated case. Now, the first sex offender adjudications - - and that's Case Number A2004-0390 - - I have that court case - - the actual case before me right at this - - right at this very moment.***And I see before me that, on or about September the 22nd, 2006 - - is this correct - - he entered a plea of admit?

{¶30} "***

{¶31} "THE COURT: Okay. He entered pleas of admit to Count 1, rape?

{¶32} "MR. GORDON: Yes.

{¶33} "THE COURT: Was there a second count of rape?

{¶34} "MS. BOND: Yes, Your Honor. There was a 13-year-old victim and a four - - I'm sorry, an eight-year-old victim and a four-year-old victim. There were two counts. One count was dismissed, he pled to the other count according to the notes in our file.

{¶35} "***

{¶36} "THE COURT: ***Now listen to me very carefully, because I'm going to recite what I believe to be my understanding of the law. Notwithstanding the fact that he was 13 years of age at the time and, therefore, he was not subject to any type of registration, that fact notwithstanding, I think the law clearly provides that prior adjudication can still be used against him for purposes of determining his classification on the subsequent sex offense.

{¶37} "***

{¶38} "MS. BOND: On the first case he was originally just placed on probation, Your Honor.

{¶39} "THE COURT: But that one has great significance, in terms of using one of the adjudications to the other. They were unrelated cases and they were different - - at different times?

{¶40} "MR. WEDEMEYER: That's correct.

{¶41} "THE COURT: All right. And that effects (sic) the ultimate outcome.

{¶42} "MS. BOND: And they were all different victims, Your Honor.

{¶43} "***

{¶44} "THE COURT: ***[J] competed the standard needs sex offender program on December 29th, 2009; however, this was not completed without difficulty. Reports from the Department of Youth Services suggests several inappropriate relationships with other youth in the institution in a section marked special concerns. On the most recent report dated January the 12th, 2010, [J's] social worker states: '[J's] distorted perception of how he engages in practices of manipulated' - - parentheses - - 'associated with cognitive beliefs related to a maladaptive attitude (inaudible) sexual offending behavior. This is a high-risk factor that needs to be addressed with him in treatment, in counselling (sic), once he's released into the community.'

{¶45} "As recently as November of 2009, the same social worker worries, quote, '[J] at this point of programming is still exhibiting pathological problems associated with his deviant thinking and marginal compliance to being held accountable for his behaviors. [J] skillfully manipulates situations to gain intended results that motivate his being the center of configured disruption to the order of the unit in establishing healthy peer associations. During the June to October 2009 reporting period, [J] accumulated 34 rule violations for which he did not accept responsibility. As recently as the above-mentioned reporting period, [J] accused another youth of inappropriately touching him. It was later discovered [J] concocted the allegation in efforts to have himself removed from the unit to another where he hoped to foster a relationship with a youth located there.***" T. at 7-14.

{¶46} The trial court concluded the following:

{¶47} "THE COURT: ***Due to the fact that [J] was adjudicated delinquent of a previous sex offense in Case Number 2004-0390 prior to his delinquency case in the

A26-0668 (sic), his classification as a Tier III juvenile offender registrant appears to be mandatory under Ohio law. And that's this Court's conclusion as well, although I'll listen to any argument to the contrary, should someone wish to make such an argument.

{¶48} "***

{¶49} "THE COURT: ***Now, notwithstanding the fact that this classification is mandatory, the Court finds - - independent of the requirements under Ohio law, the Court finds that public interest and safety require Tier III classification and community notifications." T. at 15-17.

{¶50} Given the trial court's statements, we find the decision to require registration was clearly made on the trial court's independent judgment.

{¶51} Assignment of Error III is denied.

IV

{¶52} Appellant claims the trial court erred by not including in its order the applicable statute, R.C. 2152.82(A), and that upon completion of his disposition, a hearing will be conducted on modification or termination of the classification. We disagree.

{¶53} Appellant has yet to complete his disposition so his opportunity for a hearing is not yet ripe, and he clearly knows of his right to a hearing under R.C. 2152.82(B)(1). *In re Hass* (1975), 45 Ohio App.2d 187; *In re Carrie O.,* Huron App. No. H-05-007, 2006-Ohio-858.

{¶54} Appellant has not demonstrated that the failure to notify him of the possibility of future modification has caused him any prejudice.

{¶55} Assignment of Error IV is denied.

V

{¶56} Appellant claims the trial court erred when it ordered him to be subject to community notification when it did not find that he would have been subject to community notification under prior law. We disagree.

{¶57} Appellant cites this court to the following section of R.C. 2152.82(B) as cited supra:

{¶58} "If the court determines that the delinquent child to whom the order applies is a tier III sex offender/child-victim offender and the child is not a public registry-qualified juvenile offender registrant, the judge may impose a requirement subjecting the child to the victim and community notification provisions of sections 2950.10 and 2950.11 of the Revised Code."

{¶59} R.C. 2950.11(F)(2) specifically states the following:

{¶60} "The notification provisions of this section do not apply to a person described in division (F)(1)(a), (b), or (c) of this section if a court finds at a hearing after considering the factors described in this division that the person would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment."

{¶61} Appellant argues the trial court failed to make the proper findings to support an order of community notification, and the trial court did not make the order at the proper time, in September 2006.

{¶62} The state correctly argues this court has determined that a hearing pursuant to R.C. 2150.11(F)(2) is not mandatory but is discretionary:

{¶63} "R.C. 2950.11(F)(2) does not mandate a hearing; rather, a plain reading of the statute reveals that the hearing is discretionary. See *State v. Dehler,* 11th Dist. No.2008-T-0061, 2009-Ohio-5059, ¶63. R.C. 2950.11(F)(2) outlines the factors a court must consider *if* it holds a hearing. Thus, it provides that the community notification provisions of R.C. 2950.11 do not apply if, after considering the eleven factors of R.C. 2950.11(F)(2)(a)-(k), the court determines that the offender would not have been subject to the notification provisions of former R.C. 2950.11." *State v. Wood,* Stark App. No. 09-CA-205, 2010-Ohio-2759, ¶36.

{¶64} The dialogue between the trial court, defense counsel and the prosecutor during the 2010 hearing is confusing at best. However, nowhere was a request made for a hearing to determine if appellant would have been subject to community notification under the prior law. Holding such a hearing is within the trial court's discretion. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217.

{¶65} As noted supra, the trial court based its determination on appellant's specific actions. Appellant was classified as high risk to reoffend. T. at 23-24.

{¶66} Appellant further argues the community notification determination should have been made in 2006. We have rejected this argument in Assignment of Error I.

{¶67} Upon review, we find the trial court timely ordered community notification and supported the determination by the facts in the reports presented.

{¶68} Assignment of Error V is denied.

VI

{¶69} Appellant claims he was denied effective assistance of trial counsel as his counsel was deficient in not being educated on the classification process. We disagree.

{¶70} The standard this issue must be measured against is set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011. Appellant must establish the following:

{¶71} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶72} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶73} Consistent with our ruling in the assignments of error supra, we do not find any ineffective assistance of counsel sub judice.

{¶74} Assignment of Error VI is denied.

{¶75} The judgment of the Court of Common Pleas of Licking County, Ohio, Juvenile Court Division is hereby affirmed.

By Farmer, J.

Wise, J. concur and

Hoffman, P.J. dissents.

_s/ Sheila G. Farmer_____

_s/ John W. Wise_____

_____

JUDGES

SGF/sg1119

Hoffman, P.J., dissenting

{¶76} I respectfully dissent from the majority's disposition of Appellant's first assignment of error. Unlike the *Carr*, *Kristopher W.* and *McAllister* cases, all of which dealt with R.C. 2152.83, the case sub judice deals with R.C. 2152.82. As noted by the majority, R.C. 2152.82(B) requires the classification order be issued "at the time the judge makes **the** order of disposition" (emphasis added). This distinguishes it from R.C. 2152.83(B)(1), which specifically provides two alternative times for classification. A distinction I find not to be without difference.

{¶77} While the March 4, 2010 Judgment Entry may be a dispositional order under Juv.R. 2(M), I interpret R.C. 2152.82 as requiring the classification be made at the first dispositional order.

{¶78} Based upon the above, I would sustain Appellant's first assignment of error, find the remaining assignments of error to be moot, and reverse the trial court's judgment regarding Appellant's classification as a juvenile offender registrant.

_____

HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	
	:	JUDGMENT ENTRY
J. B. A.	:	
	:	
DELINQUENT CHILD	:	CASE NO. 10-CA-30

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, Juvenile Court Division is affirmed. Costs to appellant.

_s/ Sheila G. Farmer_____

_s/ John W. Wise_____

_____

JUDGES