[Cite as *State v. Lynch*, 2015-Ohio-3460.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff Appellant	:	Hon. Sheila G. Farmer, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case Nos. CT2015-0008
DANIEL D. LYNCH	:	CT2015-0007
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case Nos. CR2014-0286 and CR2014-0362
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT:	August 24, 2015

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
GERALD V. ANDERSON, II 27 North Fifth Street P.O. BOX 189 Zanesville, OH 43701	JOHN D. WEAVER 542 South Drexel Avenue Bexley, OH 43209

Farmer, J.

{¶1} In October 2013, appellee, Daniel Lynch, was convicted on one count of gross sexual imposition in violation of R.C. 2907.05 and one count of unlawful sexual conduct of a minor in violation of R.C. 2907.04. Appellee was classified as a Tier I sexual offender and was required to register as a sexual offender as mandated in R.C. Chapter 2950.

{¶2} On September 17, 2014, the Muskingum County Grand Jury indicted appellee on three counts of failure to register internet identifiers (Facebook page) in violation of R.C. 2950.05(D) and three counts of tampering with records (purpose to defraud by not disclosing Facebook page) in violation of R.C. 2913.42(A)(1) (Case No. CR2014-0286).

{¶3} On November 19, 2014, the Muskingum County Grand Jury indicted appellee on four counts of failure to register in violation of R.C. 2950.04(A)(2)(a) and (B) (Case No. CR2014-0362).

{¶4} On November 4, 2014, appellee filed a motion to dismiss Counts 1, 3, and 5 in Case No. CR2014-0286, claiming R.C. 2950.99, the statute governing penalties for failure to register, does not include a penalty for the failure to register internet identifiers. By entry filed January 9, 2015, the trial court denied the motion.

{¶5} A bench trial commenced on February 3, 2015. At the conclusion of the state's case, appellee made a Crim.R. 29 motion for acquittal and renewed his motion to dismiss Counts 1, 3, and 5. By decision filed February 5, 2015, the trial court dismissed the counts in Case No. CR2014-0286, and found appellee not guilty of the counts in Case No. CR2014-0362. In granting the motion to dismiss Counts 1, 3, and 5, the trial

court found R.C. 2950.99 did not include a punishment for the failure to provide internet identifiers. In granting the Crim.R. 29 motion for acquittal on Counts 2, 4, and 6, the trial court found a criminal offense for purpose to defraud for failing to register the Facebook page did not exist; therefore, there was no tampering with records.

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

I

{¶7} "A *DE NOVO* REVIEW OF THE TRIAL COURT'S JUDGMENT IS REQUIRED BECAUSE THE TRIAL COURT ERRED BY MISINTERPRETING R.C. §2950.99 TO LIMIT WHICH PRESCRIBED PROHIBITIONS DETAILED IN THE SEX OFFENDER STATUTE MAY BE PENALIZED, THEREFORE FINDING THAT ANY VIOLATION OF THE OTHER PRESCRIBED PROHIBITIONS DOES NOT CONSTITUTE A CRIME."

II

{¶8} "THE TRIAL COURT ERRED BY DETERMINING THAT REGISTRATION ONLY REQUIRES A SEX OFFENDER TO PROVIDE THEIR RESIDENCE ADDRESS AND NOT COMPLETE THE REGISTRATION FORMS AS SPECIFIED IN R.C. §2950.04."

III

{¶9} "THE TRIAL COURT ERRED BY RULING THAT A FAILURE TO COMPLETE A GOVERNMENTAL SEX OFFENDER REGISTRATION FORM IS NOT TAMPERING WITH RECORDS BECAUSE THERE WAS NO LEGAL BENEFIT TO OMIT INTERNET IDENTIFIERS AND THEREFORE IT CANNOT BE FRAUDULENT."

I

{¶10} Appellant claims the trial court erred in dismissing Counts 1, 3 and 5. We agree.

{¶11} In its decision filed February 5, 2015, the trial court found the following:

> There are two issues that the Court will deal with in its findings. First, in regards to Case No. CR2014-0286, in regards to Counts 1, 3 and 5, which is the failure to register counts for not identifying his internet identifiers, it's indicated in the motion to dismiss earlier, as well as the arguments made in the Rule 29 motions, there is a case out of Montgomery County that says that is not a crime, and it's void conviction in that particular case in regards to telephone that was not reported and even smuggled into a halfway house, and so on and so forth, on a person who was out on an F1 rape.
>
> That was based upon the fact that 2950.99 does not include any of those items in its penalty section, and still does not include any of those items in its penalty section. The section that comes after that deals in 2901 that in order to be a crime, you're not only prohibited conduct, but there must be a punishment listed. There's no punishment listed for the failure to provide an identifier.
>
> It seems that it's legal for him to have a Facebook, but illegal not to tell anybody about it. It makes no sense to the Court, but that's also in the last part of that section, it allows the attorney general to change the rules

at any time, which is an unlawful delegation of constitutional magnitude of legislative authority to the attorney general. Therefore, in regards to Counts 1, 3 and 5, the Court will grant he motion to dismiss.

{¶12} We have reviewed this exact issue in *State v. Reed,* 5th Dist. Muskingum No. CT2015-0006, 2015-Ohio-2498, ¶ 10-12, and found the following:

Recently, this Court, in *State v. Arnold,* 5th Dist. Muskingum No. CT2015–0004, 2015–Ohio2019, addressed the same issue. In *Arnold,* the appellant was indicted on one count of failing to register in violation of R.C. 2950.05(D) and other charges. He filed a motion seeking to dismiss the indictment, arguing that no penalty existed for failure to notify of a change of email address or internet identifiers and that, therefore, failure to provide notice of such change under Ohio law could not constitute a criminal offense. After the trial court denied the motion to dismiss, the appellant pleaded no contest to the charge of failure to register and the remaining charges were dismissed.

The appellant then appealed, arguing that no penalty existed under the statute for failure to notify of internet identifiers and that, therefore, the trial court erred in failing to dismiss the indictment. This Court, in affirming the decision of the trial court, stated, in relevant part, as follows at paragraph 13: "Here, Appellant did not fulfill his initial duty to register. Where the registration form clearly indicated Appellant was to provide all

> email identifiers at the time of registration, including email and internet identifiers, e.g. Facebook, Appellant failed to provide the same. Therefore, Appellant failed to register initially; ..." We further found that "the statute requires the submission of an accurate and complete registration form[.]" Id. at 18.
>
> Based on the foregoing, we find that the trial court erred in dismissing the charge of failure to provide an internet identifier when registering. As in *Arnold,* appellee failed to provide accurate and complete information when registering as a sex offender.

{¶13} Based upon this court's decisions in *Reed* and *Arnold,* cited in *Reed,* we find the trial court erred in dismissing Counts 1, 3, and 5. The counts are reinstated.

{¶14} Assignment of Error I is granted.

II, III

{¶15} Under these assignments of error, appellant challenges the trial court's not guilty verdicts in Case No. CR2014-0362 and the granting of the Crim.R. 29 motion for acquittal on Counts 2, 4, and 6 in Case No. CR2014-0286.

{¶16} R.C. 2945.67(A) states the following in pertinent part:

> A prosecuting attorney***may appeal as a matter of right any decision of a trial court in a criminal case***which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property

> or grants post conviction relief pursuant to sections 2953.21 to 2953.24 of the Revised Code, and may appeal by leave of the court to which the appeal is taken any other decision, *except the final verdict,* of the trial court in a criminal case***. (Emphasis added.)

{¶17} Generally, a prosecutor may not appeal a final verdict of the trial court because the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution protect criminal defendants against multiple prosecutions for the same offense. As explained by the Supreme Court of Ohio in *State v. Brewer,* 121 Ohio St.3d 202, 2009-Ohio-593, ¶ 15:

> The principle behind the Double Jeopardy Clause " 'is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for the alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' " *State v. Roberts,* 119 Ohio St.3d 294, 2008-Ohio-3835, 893 N.E.2d 818, ¶ 11, quoting *Green v. United States* (1957), 355 U.S. 184, 187–188, 78 S.Ct. 221, 2 L.Ed.2d 199. "Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance." *Tibbs v. Florida* (1982), 457 U.S. 31, 41, 102 S.Ct. 2211, 72 L.Ed.2d 652. Therefore, " '[t]he Double Jeopardy Clause forbids a

> second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.' " *State v. Calhoun* (1985), 18 Ohio St.3d 373, 376, 18 OBR 429, 481 N.E.2d 624, quoting *Burks v. United States* (1978), 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1.

{¶18} Appellant is attempting to appeal the trial court's final verdicts of not guilty and judgment of acquittal, respectively. As held by the Supreme Court of Ohio in *State ex rel. Yates v. Court of Appeals for Montgomery County,* 32 Ohio St.3d 30, syllabus (1987):

> A judgment of acquittal by the trial judge, based upon Crim.R. 29(C), is a final verdict within the meaning of R.C. 2945.67(A) and is not appealable by the state as a matter of right or by leave to appeal pursuant to that statute. (*State v. Keeton* [1985], 18 Ohio St.3d 379, 18 OBR 434, 481 N.E.2d 629, approved and followed.)

{¶19} Assignments of Error II and III are denied.

{¶20} The judgment of the Court of Common Pleas of Muskingum County, Ohio is hereby reversed, and the matter is remanded to said court for further proceedings consistent with this opinion.

By Farmer, J.

Gwin, P.J. and

Baldwin, J. concur.

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