[Cite as *Toledo v. Rost*, 2010-Ohio-1890.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

City of Toledo — Court of Appeals No. L-08-1202

Appellee — Trial Court No. CRB-06-22549

v.

Richard Rost — **DECISION AND JUDGMENT**

Appellant — Decided: April 30, 2010

* * * * *

David Toska, Chief Prosecutor, and Joseph J. Howe,
Assistant Prosecuting Attorney, for appellee.

Jeffrey M. Gamso and S. Scott Schwab, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Richard Rost, appellant, appeals a judgment of the Toledo Municipal Court convicting him of failing to abate a public nuisance, a violation of Toledo Municipal

Code 1726.08(b) and a third degree misdemeanor.[1] The judgment also imposed sentence: ordering Rost to pay a $100 fine and court costs, sentencing him to serve 60 days imprisonment, suspending sentence, and placing him on probation for two years. The trial court ordered Rost to vacate his residence at 457 Raymer Blvd., Toledo, Ohio, should a school be rebuilt.[2]

{¶ 2} The city of Toledo filed a criminal complaint against Rost on November 3, 2006, in Toledo Municipal Court. The complaint charged Rost with violating Toledo Municipal Code 1726.08(b) on October 9, 2006 by failing "to vacate the premises of 457 Raymer Blvd., as the Defendant is a registered sex offender with the Lucas County Sheriff's Department residing in Lucas County, Ohio, and his occupation of these premises is in violation of Ohio Revised Code Section 2950.031 as the premises is located within one thousand feet of Raymer Elementary School * * *."

{¶ 3} In the trial court, Rost moved to dismiss the charge on multiple grounds. He argued that the statute does not apply retroactively to him. He asserted the city of Toledo lacked authority to criminalize the residency restrictions of R.C. 2950.031 under Section 3, Article XVIII, Ohio Constitution (home-rule). He also argued that the

[1]The original trial court judgment was issued on June 3, 2008. After appellant brought his appeal, we remanded the case on August 10, 2009, to permit the trial court to issue a revised final judgment complying with Crim.R. 32(C). The trial court issued a revised judgment entry on August 28, 2009, and the appeal was reinstated.

[2]After the criminal charge was brought, Raymer Elementary School (the nearby school identified in the criminal complaint) closed and the school building was razed.

municipal ordinance was prohibited as an ex post facto law. The trial court denied the motion to dismiss in a judgment filed on August 17, 2007. Afterwards, Rost pled no contest to the charge.

{¶ 4} Rost asserts four assignments of error on appeal:

{¶ 5} "Assignment of Error No. 1: Even if Mr. Rost is a registered sex offender who occupied premises within 1,000 feet of Raymer School and failed to move when so ordered by the city of Toledo, he did not violate Toledo Municipal Code Section 1726(a)(6) because it was lawful for him to occupy those premises and he should not have been found guilty.

{¶ 6} "Assignment of Error No. 2: Because the General Assembly created a remedy, by way of injunctive relief, to be applied when a registered sex offender lives within 1,000 feet of a school in violation of R.C. 2950.031, the City of Toledo cannot elect instead to punish the violation as a criminal act.

{¶ 7} "Assignment of Error No. 3: The trial court committed error when it overruled the motion to dismiss.

{¶ 8} "Assignment of Error No. 4: The trial court's failure to comply with Crim.R. 11(E) and R.C. 2937.07 requires that the court's finding of guilt must be vacated."

Municipal Ordinance

{¶ 9} Toledo Municipal Code 1726.01(a)(6) defines a public nuisance to include "premises occupied or used by persons engaged in violations of Title 5, General Offenses Code or Title XXIX or Title XLIII of the Ohio Revised Code." The provision was enacted under Toledo Municipal Ordinance 95-04 that was passed on February 24, 2004. Section 3 of the ordinance provides that "[t]his ordinance shall take effect at the earliest date provided by law."

{¶ 10} The city claims that Rost's occupation of the Raymer Blvd. residence on October 9, 2006 was prohibited by R.C. 2950.031 and thereby constituted a public nuisance under the municipal code.[3] Under Toledo Municipal Code 1726.99(a)(1), failure to abate a nuisance in violation of Toledo Municipal Code 1726.01(a)(6) is a third degree misdemeanor, where the offender has no convictions for violating Chapter 1726 (Abatement of Nuisances) or Part Seventeen (Health Code) of the Toledo Municipal Code in the prior two years.

R.C. 2950.031

{¶ 11} The Supreme Court of Ohio undertook a detailed review of the issue of retroactivity of R.C. 2950.031 in the decision of *Hyle v. Porter*, 117 Ohio St.3d 165,

[3]All references to R.C. 2950.031 in this decision refer to the 2003 version of the statute. R.C. 2950.031 was amended and recodified as R.C. 2950.034 by 2007 S 10, effective 7-1-07.

2008-Ohio-542. The same version of R.C. 2950.031(A), as considered in *Hyle*, applies to this case:

{¶ 12} "R.C. 2950.031

{¶ 13} "(A) No person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to either a sexually oriented offense that is not a registration-exempt sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises."

{¶ 14} The record indicates that Rost was convicted of rape, a violation of R.C. 2907.02, in 2002 and was sentenced to imprisonment for three years for the offense. In 2005, Rost registered his residence as 901 Clark Street in Toledo. In April and July 2006, Rost registered his place of residence 457 Raymer Blvd., also in Toledo.

{¶ 15} The record also reflects that Rost resided on Raymer beginning on April 18, 2006, and until after the criminal charge in this case was filed in November 2006. The record includes a copy of a special/limited warranty deed for the Raymer Blvd. property. The deed identifies Brenda Rost as the owner. Brenda Rost is the mother of appellant. The deed is dated March 3, 2005.

Retroactivity under R.C. 1.48

{¶ 16} Under Assignment of Error No. 1, Rost contends that he did not violate R.C. 2950.031, because the statute did not apply to him. He claims that under the Ohio

Supreme Court decision in *Hyle*, residency restrictions under R.C. 2950.031 are prospective only and that he was convicted of rape before the effective date of R.C. 2950.031; that is, before July 31, 2003. The city argues that the ruling in *Hyle* is limited to circumstances where the sex offender both purchased his residence and committed the sex offense upon which the requirement to register is based before that date.

{¶ 17} The defendant in *Hyle* was Gerry R. Porter, Jr. Porter was convicted of sexual imposition in 1995 and sexual battery in 1999. *Hyle* at ¶ 3. Porter owned his own home and had lived there with his wife since 1991. Id. at ¶ 5. In 2003, after enactment of R.C. 2950.031, a township official filed suit against him seeking an injunction enjoining him from continuing to occupy his home. Id. The trial court issued the requested injunction and the court of appeals affirmed. Id. at ¶ 6.

{¶ 18} The central issue in *Hyle* was whether R.C. 2950.031 retroactively applied to Porter. In the opinion, the Ohio Supreme Court identified a two step statutory and constitutional analysis required to determine whether a statute is to be applied retroactively:

{¶ 19} "We are once again required to apply two provisions of Ohio law that limit the retroactive application of statutes. The first is the rule of statutory construction, adopted in R.C. 1.48: 'A statute is presumed to be prospective in its operation unless expressly made retrospective.' See *Van Fossen v. Babcock Wilcox Co.* (1988), 36 Ohio St.3d 100, 105, 522 N.E.2d 489. The second is a rule of constitutional limitation, imposed

in Section 28, Article II of the Ohio Constitution: 'The general assembly shall have no power to pass retroactive laws * * *.' See *Van Fossen,* id. A retroactive statute is unconstitutional if it retroactively impairs vested substantive rights, but not if it is merely remedial in nature. *State v. Consilio,* 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶ 9." *Hyle* at ¶ 7. (Footnote omitted.)

{¶ 20} The *Hyle* court also reaffirmed the principle that when considering whether a statute is retroactive or prospective in application, a court considers the statutory requirements of R.C. 1.48 first. It does not address constitutional prohibitions against retroactivity unless the court first determines that statute meets the requirements for retroactivity under R.C. 1.48:

{¶ 21} "We do not address the question of constitutional retroactivity unless and until we determine that the General Assembly expressly made the statute retroactive. Id. [*Van Fossen,* 36 Ohio St.3d at 106.]; *State v. LaSalle,* 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, ¶ 14; *Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶ 10. '[N]o constitutional question is ripe for judicial review "where the case can be disposed of upon other tenable grounds."' *Van Fossen,* 36 Ohio St.3d at 105, 522 N.E.2d 489, quoting *Ireland v. Palestine, Braffetsville, New Paris, & New Westville Turnpike Co.* (1869), 19 Ohio St. 369, 373." *Hyle* at ¶ 9.

{¶ 22} The *Hyle* court reviewed the language in R.C. 2950.031 to determine whether the statute was expressly retroactive in application in two respects. It considered

the description of convicted sex offenders used in the statute. Id. at ¶ 11. It also considered the words used in the statute's description of prohibited acts, "shall establish a residence" and "occupy residential premises," in an effort to determine acts prohibited under the statute. Id. at ¶ 12. The Supreme Court of Ohio concluded that the wording of R.C. 2950.031 did not meet the requirements of R.C. 1.48 as it was not expressly retroactive in either respect:

{¶ 23} "On review of the text of R.C. 2950.031, *we find that neither the description of convicted sex offenders nor the description of prohibited acts includes a clear declaration of retroactivity*. Although we acknowledge that the language of R.C. 2950.031 is ambiguous regarding its prospective or retroactive application, we emphasize that ambiguous language is not sufficient to overcome the presumption of prospective application. The language in R.C. 2950.031 presents at best a suggestion of retroactivity, which is not sufficient to establish that a statute applies retroactively." Id. at ¶ 13. (Emphasis added.)

{¶ 24} Stated in different terms, the *Hyle* court explained: "The text of R.C. 2950.031 * * * does not feature a clear declaration of retroactivity in either its description of convicted sex offenders or in its description of prohibited acts." Id. at ¶ 19.

{¶ 25} The Supreme Court reversed the trial court judgment that applied the residency restrictions of R.C. 2950.031 retroactively against Porter. The court's syllabus to the decision is limited to the specific facts of the case:

{¶ 26} "Because R.C. 2950.031 was not expressly made retrospective, it does not apply to an offender who bought his home and committed his offense before the effective date of the statute." Id. at syllabus.

{¶ 27} After issuing its decision in *Hyle*, the Ohio Supreme Court issued judgments in four cases, without opinion except for the statement that each judgment was issued "on the authority of *Hyle v. Porter*." See *Franklin Cty. Pros. Atty. v. Walker*, 117 Ohio St.3d 537, 2008-Ohio-1589; *State ex rel. White v. Billings*, 117 Ohio St.3d 536, 2008-Ohio-1590; *State v. Mutter*, 117 Ohio St.3d 536, 2008-Ohio-1591; *Nasal v. Dover*, 117 Ohio St.3d 531, 2008-Ohio-1592. None of the summary dispositions resulted in a retroactive application of R.C. 2950.031 against any sex offender who committed his offense before the effective date of the statute.

{¶ 28} The *Dover* case involved the same fact pattern as considered in *Hyle* – a sexual offender who both committed his sex offense and owned his residence prior to the effective date of R.C. 2950.031. *Nasal v. Dover*, 169 Ohio App.3d 262, 2006-Ohio-5584, ¶ 23. *Walker and Billings* considered sexual offenders who committed their offenses before the effective date of R.C. 2950.031, but who did not own their residence. Walker lived with his mother and step-father in a home they owned. *Franklin Cty. Pros. Atty. v. Walker*, 10th Dist. No. 07AP-165, 2007-Ohio-5095, ¶ 4. Billings moved into a residence owned by his wife after the statute took effect. *State ex rel. White v. Billings*, 12th Dist. No. CA2006-09-072, 2007-Ohio-4356, ¶ 2.

{¶ 29} The underlying appellate decisions in both *Walker* and *Billings* held that the residency restrictions under R.C. 2950.031 applied and affirmed trial court judgments issuing injunctions enforcing R.C. 2950.031 residency restrictions. *Franklin Cty. Pros. Atty. v. Walker* at ¶ 24; *State ex rel. White v. Billings* at ¶ 37-38. The Supreme Court of Ohio reversed both judgments, without opinion, under authority of *Hyle*, and thereby refused to apply R.C. 2950.031 residency restrictions against sex offenders who committed their sex offenses before the statute's effective date.

{¶ 30} The Fifth, Tenth, and Eleventh Appellate Districts have subsequently interpreted the Ohio Supreme Court's decision in *Hyle*, and the summary disposition judgments under authority of *Hyle*, as precluding retroactive application of R.C. 2950.031 against convicted sex offenders who committed their sex offenses before the statute's effective date, even where the offender holds no property interest in his residence.

{¶ 31} In *Vandervoot v. Larson*, 5th Dist. No. 07 CA 46, 2008-Ohio-2913, the Fifth District Court of Appeals applied *Hyle* in consolidated cases brought against four sex offenders (Darren Coey, Jerry Groves, Virgil Larson, Jr., and William Rudd). Each of the four was convicted of sexual offenses prior to the effective date of R.C. 2950.031. *Larson* at ¶ 3, 6, 9, 12. Groves' circumstances were identical to those considered in *Hyle* in that he and his wife had purchased their home prior to the effective date of R.C. 2950.031. Id. at ¶ 26. Neither Coey, Larson or Rudd owned their homes. Id.

{¶ 32} Coey moved into a residence that he and his fiancé rented in December 2004 – after the effective date of R.C. 2950.031. Id. at ¶ 4. Larson lived with his mother, in a residence she owned, and had lived there for 18 years. Id. at ¶ 10. Rudd and his wife moved to property owned by his father-in-law and resided there, rent free from 1999 (after his conviction of a sex offense) through June 2006 when the prosecutor filed suit to force him to move. Id. at ¶ 13.

{¶ 33} The Fifth District Court of Appeals ruled that R.C. 2950.031 did not apply to any of the four sex offenders. The court of appeals reasoned that the summary dispositions in *Walker* and *Billings* demonstrated that under *Hyle*, R.C. 2950.031 residency restrictions could not be applied to sex offenders who committed their offenses prior to the effective date of the statute:

{¶ 34} "The offenders in *Walker*, supra, and *Billings*, supra, neither purchased nor owned their residences before the effective date of R.C. 2950.031. Nonetheless, the Ohio Supreme Court still found the statute could not be applied retroactively to these offenders as they committed their offenses prior to the effective date of the statute." Id. at ¶ 34.

{¶ 35} In *Watkins v. Stevey*, 11th Dist. No. 2009-T-0022, 2009-Ohio-6854, the Eleventh District Court of Appeals considered similar circumstances. Wesley Stevey committed rape in 1982 and was convicted and sentenced for the offense. Id. at ¶ 1-2. He was sentenced to serve four to 25 years imprisonment for the offense. Id.

{¶ 36} Stevey lived in his own home prior to his arrest. Id. at ¶ 27. He moved to his father's residence on Kayser Road, Leavittsburg, Ohio in June 1982 and resided there until he was incarcerated in November 1982. Id. at ¶ 4. He was released from prison on July 27, 2007. Id. Stevey lived at different residences after he was released from prison until he moved back to his father's home in 2008. Id. at ¶ 27. The county prosecutor filed suit in 2008 under R.C. 2950.031 against Stevey to enjoin him from residing at the Kayser Road residence. Id. at ¶ 5.

{¶ 37} The Eleventh District Court of Appeals reviewed *Hyle* and the four summary disposition judgments issued under authority of *Hyle*. The court of appeals held that although Stevey did not purchase or own the residence, the holding in *Hyle* nevertheless applied. Id. at ¶ 27. The court cited the *Hyle* court's conclusion that the text in R.C. 2950.031 lacked a clear declaration of retroactivity and that its absence precluded retrospective application. *Watkins v. Stevey* at ¶ 28, citing *Hyle* at ¶ 19.

{¶ 38} In *O'Brien v. Whalen*, 10th Dist. No. 08AP-918, 2009-Ohio-1807, the Tenth Appellate District considered litigation seeking to enforce the residency restrictions under R.C. 2950.031 against a sex offender who was convicted of corruption of a minor in 2001 and had purchased a home within 1000 feet of an elementary school in June 2005. Id. at ¶ 2, 4. The court of appeals held that while prohibiting the establishment of a residence in June 2005 would not be a retrospective application of R.C. 2950.031, applying the restriction against sexual offenders who committed their offenses prior to

the statute's effective date would. Id. at ¶ 18-19. The Tenth District Court of Appeals held that the Ohio Supreme Court's decision in *Hyle* determined that R.C. 2950.031 did not apply retroactively to persons who committed a sex offense before the effective date of the statute. Id.

{¶ 39} We agree with the decisions of the Fifth, Eleventh, and Tenth appellate districts in holding that the Ohio Supreme Court's decision in *Hyle* precludes retroactive application of R.C. 2950.031 to sex offenders who committed their offenses before the effective date of the statute. Under *Hyle*, R.C. 2950.031 lacks a clear declaration of retroactivity in its description of sex offenders to which it applies. Its language is insufficient under R.C. 1.48 to establish retroactive application of the statute against convicted sex offenders who committed their offenses prior to R.C. 2950.031's effective date.

{¶ 40} We are a court of intermediate appellate jurisdiction and are bound by the Ohio Supreme Court's decision in *Hyle*. As stated by the Tenth District in *O'Brien* and the Eleventh District in *Stevey*, the residency restrictions of R.C. 2950.031 cannot be retroactively applied to convicted sex offenders who committed their sex offense before the effective date of R.C. 2950.031 absent the Ohio Supreme Court issuing a decision limiting *Hyle* in a manner that would permit such application or through action by the General Assembly making R.C. 2950.031 expressly retroactive. *O'Brien* at ¶ 19; *Stevey*

at ¶ 29. Such action would eliminate the bar to retroactivity under R.C. 1.48 and allow us to address whether retroactivity is constitutionally prohibited. Id.

{¶ 41} Accordingly, we conclude appellant was not prohibited by R.C. 2950.031 from residing on Raymer Blvd. in September or October 2006. His occupation of the residence, therefore, did not constitute a public nuisance under Toledo Municipal Code 1726.01(a)(6). By residing at the Raymer Blvd. residence, appellant did not fail to abate a public nuisance in violation of Toledo Municipal Code 1726.08(b). Appellant's Assignment of Error No. 1 is well-taken.

{¶ 42} As this appeal is disposed of on statutory grounds, we do not consider appellant's constitutional argument that a city is without authority under Section 3, Article XVIII, Ohio Constitution to make violation of R.C. 2950.031 a criminal offense. We also do not consider the contention that retroactive application of R.C. 2950.031 against appellant violates constitutional prohibitions against ex post facto laws. Appellant's Assignments of Error Nos. 2 and 3 are moot.

{¶ 43} Under Assignment of Error No. 4, appellant argues that his no contest plea is invalid because the trial court failed to comply the requirements of R.C. 2937.07 and Crim.R. 11(E) before accepting his no contest plea. In view of our ruling on Assignment of Error No. 1, the issues raised under Assignment of Error No. 4 are also moot.

{¶ 44} We conclude that the trial court erred in overruling appellant's motion to dismiss. The August 28, 2009 judgment of the Toledo Municipal Court against appellant is hereby reversed. We order appellee, city of Toledo, to pay costs pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE