[Cite as *State v. Watkins*, 2013-Ohio-2030.]

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

State of Ohio — Court of Appeals No. L-11-1085

Appellee — Trial Court No. CR0201002134

v.

Lawrence Watkins — **DECISION AND JUDGMENT**

Appellant — Decided: May 17, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney,
and David F. Cooper, Assistant Prosecuting Attorney, for appellee.

George J. Conklin, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which convicted defendant-appellant, Lawrence Watkins, of one count of failure to

notify as a sexually oriented offender, a first degree felony, and sentenced him to a term of three years in prison. Appellant now challenges that judgment through the following assignments of error.

Defendant's First Assignment of Error

The retroactive application of Senate Bill 10 violates the Ex Post Facto and Due Process Clauses of the United States Constitution and the Retroactivity Clause of Section 28, Article II of the Ohio Constitution, Fourteenth Amendment to the United States Constitution; and Section 10, Article I of the United States Constitution[.]

Defendant's Second Assignment of Error

Sentencing in the underlying case of rape in the Lucas County Common Pleas case number CR0200102310 was improper and could not be corrected by a nunc pro tunc entry without notification to the appellant and outside of his presence[.]

Defendant's Third Assignment of Error

Conviction for failure to notify is not supported by sufficient evidence as required by the Due Process Clauses of the United States and Ohio Constitutions because no rational trier of fact could have found that appellant did not prove that he affirmatively proved the defense of impossibility[.]

Defendant's Fourth Assignment of Error

The conviction of appellant must be reversed due to ineffective assistance of trial counsel[.]

{¶ 2} On November 27, 2002, appellant was sentenced in Lucas County Common Pleas case No. CR01-2310, to a term of four years in prison following his conviction on a charge of rape in violation of R.C. 2907.02(A)(1)(b), a first degree felony. As part of that proceeding, the court held an offender classification hearing and designated appellant as a sexually oriented offender.

{¶ 3} Appellant served his sentence in case No. CR01-2310 and was released from prison on July 15, 2006. The day before his release, he was presented with and signed a form known as a "duties letter." That form sets forth the registration duties with which a sexually oriented offender must comply upon his release from prison. In signing that letter, appellant acknowledged that his address upon his release from prison would be 3414 Downing Avenue in Toledo, Lucas County, Ohio. Following his release from prison, appellant apparently did register in Lucas County as required and did live at the Downing Avenue address for approximately six months. Under the terms of his original sentence and his obligations as explained in the duties letter, appellant was required to annually verify his address with the Lucas County Sheriff's Office. He failed to do so.

{¶ 4} On July 15, 2009, appellant was convicted of failure to verify his current address of residence in violation R.C. 2950.06(F) and 2950.99(A)(iii), a felony of the fourth degree, and was sentenced to 15 months in prison.

{¶ 5} On April 28, 2010, appellant was scheduled to be released from prison and he again was presented with and signed a duties letter. As a result in a change in the law regarding the classification of sexually oriented offenders, this duties letter differed from the previous letter and from appellant's original sentence in that it imposed increased obligations on appellant. The letter identified appellant as a "Tier III Sex Offender with Notification: Subject to Community Notification – for your lifetime with verification every 90 days after the initial registration." Through that letter, appellant indicated that his expected residence address upon his release from prison would be "homeless" in Toledo, Ohio. He also acknowledged that he was expected to register in person with the Lucas County Sheriff's Office no later than May 2, 2010.

{¶ 6} Appellant was released from the North Central Correctional Center in Marion, Ohio, on April 29, 2010, and took a bus to Chicago. On May 2, 2010, appellant wrote a letter to the Lucas County Sheriff's Office regarding his registration requirements. That letter reads:

> Sheriff: This is a notice to your office that Lawrence Watkins does not reside in Lucas County Toledo OH 43601.
>
> "Homeless" is not an address which can be verified. I intend to reside in an American Territory which does not have any registration requirements.
>
> Therefore, I will not be there in your office to verify my lack of residence in Lucas County in person.

Charge it to the strawman.

{¶ 7} The envelope from the letter stated a return address of "Chicago, Illinois 60615."

{¶ 8} On June 30, 2010, appellant was indicted and charged with one count of failure to notify the sheriff of a change of address in violation of R.C. 2950.05(F)(1) and 2950.99(A)(1), a first degree felony. Appellant was subsequently arrested and the case proceeded to a trial to the bench at which appellant and Deputy Dave Carter of the Lucas County Sheriff's Office testified. At the conclusion of the trial, the court found appellant guilty of failure to notify, a first degree felony, and sentenced him to three years in prison. It is from that judgment that appellant appeals.

{¶ 9} In his first assignment of error, appellant asserts that his conviction and sentence for failure to notify must be vacated because they were based on the unconstitutional retroactive application of Senate Bill 10 to his circumstance.

{¶ 10} Before discussing this assignment of error, we must address an issue raised by appellee. Appellee asserts that appellant has waived this argument because he failed to raise it in the trial court, either at trial or at sentencing.

{¶ 11} It is well-settled that the "[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue * * * and therefore need not be heard for the first time on appeal." *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus. However, "even where waiver is clear, [an appellate] court reserves the right to

consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it." *In re M.D.*, 38 Ohio St.3d 149, 151, 527 N.E.2d 286 (1988). In the present case, appellant was indicted on June 30, 2010, for failure to notify the sheriff of his change of address. He was convicted and sentenced on March 25, 2011, and that judgment entry was journalized on April 8, 2011. As is clear in our discussion below, the Supreme Court of Ohio did not recognize the S.B. 10 version of R.C. Chapter 2950 as punitive until its decision in *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, which was decided on July 13, 2011. It was in *Williams* that the court declared that S.B. 10, "as applied to defendants who committed sex offenses prior to its enactment, violates Section 28, Article II of the Ohio Constitution, which prohibits the General Assembly from passing retroactive laws." *Id* at the syllabus. Given the timing of this decision, and the subsequent related decisions of the Supreme Court that are discussed below, we find that the rights and interests of both appellant and the state warrant our consideration of appellant's first assignment of error and find that the issue has not been waived.

{¶ 12} Ohio's law governing the registration and classification of sexual offenders, R.C. Chapter 2950, was first enacted in 1963 but was rarely used. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 3. In 1996, however, the Ohio General Assembly passed the Ohio version of "Megan's Law," a New Jersey statute that was enacted in the wake of a notorious crime in which a convicted sex offender in New Jersey abducted, raped and killed a neighbor's young child. *Id.* at ¶ 4;

Am.Sub.H.B. No 180 (Effective October 16, 1996). The 1996 version of R.C. Chapter 2950 ("Megan's Law") created a comprehensive system for the registration and classification of sexual offenders as well as community notification requirements. *Bodyke* at ¶ 7. Under that system, a sexual offender's classification status as a sexual predator, habitual sex offender or sexually oriented offender, would be determined by the sentencing court by clear and convincing evidence. *See* former R.C. 2950.01 and 2950.09. The offender's classification status then controlled his registration requirements.

{¶ 13} In 2007, the Ohio General Assembly passed Am.Sub.S.B. No. 10 ("S.B. 10" or "AWA"), repealing Ohio's "Megan's Law," and enacting classification, registration and community notification requirements in conformity with the 2006 Adam Walsh Act passed by Congress. Under S.B. 10, the three sex offender classification categories were replaced by "Tier I," "Tier II," and "Tier III" classifications which are based solely on the offense for which the offender was convicted. R.C. 2950.01. That is, "judges no longer have discretion to determine which classification best fits the offender." *Bodyke* at ¶ 22. Moreover, and relevant to the issue before this court, "[o]ffenders who had registered before December 1, 2007, were to be reclassified as Tier I, II, or III sex offenders according to the new statutes" and based solely on the offense for which they had been convicted. *Id.*

{¶ 14} In addition to changing the classification, registration and community notification requirements through the passage of S.B. 10, the General Assembly passed

S.B. 97, also effective January 1, 2008, which amended the penalty provisions applicable to sex offenders who violated registration and notification laws. R.C. 2950.99. Relevant to this case, when appellant was convicted of rape in 2002, failure to comply with the change of address notification requirements of R.C. 2950.05 was a fifth degree felony. Former 2950.99(A). The penalty provisions of Megan's Law were amended by S.B. 5, effective January 1, 2004, which increased the penalty for failure to notify to a third degree felony. Pursuant to the S.B. 97 amendments to R.C. 2950.99, failure to comply with the address notification requirements of R.C. 2950.05 is a first degree felony if the underlying sex offense was a first degree felony. R.C. 2950.99(A)(1)(a)(ii). In addition, if the offender has previously been convicted of a registration or notification offense, R.C. 2950.99(A)(2)(b) mandates a three-year prison term.

{¶ 15} On June 3, 2010, the Supreme Court of Ohio in *Bodyke*, *supra* at paragraphs two and three of the syllabus, declared that R.C. 2950.031 and 2950.032, the provisions of S.B. 10 that required the Ohio Attorney General to reclassify sex offenders under the tier system, were unconstitutional as violative of the separation of powers doctrine. The court, therefore, ordered those sections of the AWA severed, determined that they could not be applied to offenders who had been previously adjudicated under Megan's Law, and ordered that the classifications and community-notification and registration orders previously imposed by judges be reinstated.

{¶ 16} In the case before us, appellant was indicted on June 30, 2010, and charged with violating R.C. 2950.05(F)(1), which reads: "No person who is required to notify a

sheriff of a change of address pursuant to division (A) of this section * * * shall fail to notify the appropriate sheriff in accordance with that division." The indictment specified that the offense was a first degree felony. Appellant did not challenge the charge as unconstitutional based on *Bodyke* or on any other basis. His case was tried to the bench on March 22 and 23, 2011. On March 25, 2011, the lower court found him guilty as charged and sentenced him to three years in prison. The judgment entry reflecting that conviction and sentence was journalized on April 8, 2011. That judgment entry also included the following:

> Defendant notified, in case CR01-2310, having been convicted of or plead guilty to a sexually oriented offense and or child victim offense as defined in ORC 2950.01 the Court finds the Defendant is a Tier III Child Victim Offender and is required to comply with the requirements outlined in the Explanation of Duties to Register given to the defendant in writing, in open court, for a lifetime with in-person verification every 90 days.

{¶ 17} Accordingly, and despite the Ohio Supreme Court's pronouncements in *Boydyke* the lower court clearly treated appellant as a Tier III sex offender pursuant to S.B. 10.

{¶ 18} Jurisprudence surrounding the application of S.B. 10 to offenders who were convicted of offenses prior to the bill's passage has continued to evolve. As we stated above, in *William, supra* at syllabus, the Supreme Court of Ohio first declared that S.B 10, "as applied to defendants who committed sex offenses prior to its enactment, violates

Section 28, Article II of the Ohio Constitution, which prohibits the General Assembly from passing retroactive laws." This was also the first time that the court recognized R.C. Chapter 2950 as a punitive measure. *Id.* at ¶ 16. That case was decided on July 13, 2011, approximately three months after appellant was sentenced in this case and filed his notice of appeal.

{¶ 19} On December 6, 2012, the Supreme Court of Ohio released two decisions that are directly relevant to the issue before us. In *State v. Brunning*, 134 Ohio St.3d 438, 2012-Ohio-5752, 983 N.E.2d 316, the court was presented with a defendant who had been originally classified as a sexually oriented offender under Megan's Law, requiring advance notice of any address change and annual address verification for 10 years following his release from prison. After the passage of S.B. 10, Brunning was administratively reclassified as a Tier III sex offender. Subsequently, he was indicted and charged with failing to give notice of a change of residence address in violation of R.C. 2950.05. While the court determined that Brunning's reclassification as a Tier III offender was clearly unconstitutional, the court found that the "overriding question in this case is whether the indictment describes a violation of Megan's Law, the requirements of which the defendant remained obligated to meet." *Id.* at ¶ 18. Answering that question, the court recognized that the requirements for giving notice of a change of residence address are the same under both the Megan's Law and S.B.10 versions of R.C. 2950.05. *Id.* at ¶ 16. Accordingly, the court held that "offenders originally classified under Megan's Law have a continuing duty to abide by the requirements of Megan's Law," and

declared that its holding in *Bodyke* did not require the vacation of a conviction for violating S.B. 10 when the offender, who was originally classified under Megan's Law, was indicted for a violation of S.B. 10 that also constituted a violation of Megan's Law. *Id.* at ¶ 31.

{¶ 20} In *State v. Howard*, 134 Ohio St.3d 467, 2012-Ohio-5738, 983 N.E.2d 341, the court addressed the penalties applicable to "sex offenders originally classified under Megan's Law who violate former R.C. 2950.05 by failing to give proper notice of an address change." *Id.* at ¶ 1. As the court explained:

> [I]n this case we deal with a defendant who violated *former* R.C. 2950.05, not the current R.C. 2950.05 for which R.C. 2950.99 provides penalties. Pursuant to *Bodyke*, Howard's original classification under Megan's Law and the associated community-notification and registration order were reinstated. *See Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, at ¶ 66. Howard must abide by the requirements of *former*2950.05, not current R.C. 2950.05. R.C. 2950.99 describes punishments for people who violate the requirements of the AWA – it does not reach back to cover offenders who must abide by Megan's Law. Former R.C. 2950.99 addresses punishments for offenders who violate the provisions of Megan's Law, including former R.C. 2950.05. Current R.C. 2950.99 applies to a different statutory landscape; by its own terms it applies to offenders who violate current R.C. 2950.05. Howard's sex-offender-registration

obligations are controlled by Megan's Law. The penalty provisions under Megan's Law thus also apply. *Id.* at ¶ 19.

{¶ 21} The court concluded that the penalties set forth in the version of R.C. 2950.99 that was in place immediately before the repeal of Megan's Law by S.B. 10, that is the S.B. 5 version of R.C. 2950.99, applied to Howard's case. Accordingly, Howard's violation of R.C. 2950.05, was determined to be a third-degree felony rather than a first-degree felony. The court ordered the case remanded for resentencing as a third-degree felony.

{¶ 22} Applying these holdings to the present case, we first conclude that the lower court's continued classification of appellant as a Tier III sexual offender was clearly in error. Appellant was originally classified as a sexually oriented offender under the Megan's Law version of R.C. Chapter 2950, and that is the classification that the lower court was required to maintain. Nevertheless, appellant's conviction for failing to give proper notification of a change in his residence address in violation of R.C. 2950.05 must be affirmed. Although the lower court clearly viewed the charge as a violation of the S.B. 10 version of R.C. 2950.05,

> [T]he AWA and the pre-AWA versions are identical as to persons required to submit a change of residence address: "No person who is required to notify a sheriff of a change of address pursuant to division (A) of this section * * * shall fail to notify the appropriate sheriff in accordance with that division." Both mention R.C. 2950.05(A), and both the current and

former versions of R.C. 2950.05(A) require offenders to provide a 20-day notification of a change in their residence address. *Brunning*, *supra*, at ¶ 24.

{¶ 23} Accordingly, because the conduct for which appellant was charged and convicted constituted a violation of both the S.B. 10 and the Megan's Law versions of R.C. 2950.05, and appellant was obligated to comply with the Megan's Law version of the statute, his conviction must be affirmed. Under the Supreme Court of Ohio's ruling in *Howard,* however, this case must be remanded to the trial court for resentencing as a third-degree felony. The first assignment of error is well-taken in part.

{¶ 24} In his second assignment of error, appellant challenges a nunc pro tunc entry was that filed by the trial court in his underlying rape case, Lucas County Common Pleas case No. CR01-2310. He claims that because the nunc pro tunc entry was the foundation upon which the sentence in the present case was based, his sentence in the present case is fatally flawed.

{¶ 25} On November 27, 2002, the trial court filed a judgment entry of sentence in the underlying rape case. Relevant to the issue before us, that entry read in relevant part: "Defendant has been given notice under R.C. 2929.19(B)(3) and of appellate rights under R.C. 2953.08." On April 14, 2006, the court filed a nunc pro tunc entry to correct the original sentencing entry to read: "Defendant given notice of appellate rights under R.C. 2953.08 and post release control notice under R.C. 2929.19(B)(3) and R.C. 2967.28." Appellant did not challenge this entry by filing a motion to vacate or appeal it in any way.

The charge in the present case, however, was based on appellant's failure to notify the sheriff of a change in his address. He was not charged in the present case with a post release control violation and issues of post release control were not addressed in the proceedings below except to the extent that they are to be imposed following appellant's term of imprisonment in the present case.

{¶ 26} Accordingly, the nunc pro tunc entry was not relevant to the charges in this case and the second assignment of error is not well-taken.

{¶ 27} Under his third assignment of error, appellant asserts that his conviction for failure to notify was not supported by sufficient evidence. Specifically, he contends that no rational trier of fact could have found that appellant failed to prove the affirmative defense of impossibility of compliance with the notification requirement.

{¶ 28} Appellant was convicted of failing to notify the sheriff of a change of address. As discussed above, appellant's failure to notify was a violation of his registration duties under Megan's Law, which reads in relevant part:

> (E)(1) No person who is required to notify a sheriff of a change of address pursuant to division (A) of this section shall fail to notify the appropriate sheriff in accordance with that division. Former R.C. 2950.05.

{¶ 29} Division (A) sets forth the offender's registration obligations as follow:

> If an offender * * * is required to register pursuant to section 2950.04 or 2950.041 of the Revised Code, the offender, * * * at least twenty days prior to changing the offender's * * * residence address, * * *

during the period during which the offender * * * is required to register, shall provide written notice of the residence * * * address change * * * to the sheriff with whom the offender * * * most recently registered the address under section 2950.04 or 2950.041 of the Revised Code or under division (B) of this section. If a residence address change is not to a fixed address, the offender * * * shall include in that notice a detailed description of the place or places at which the offender * * * intends to stay and, not later than the end of the first business day immediately following the day on which the person obtains a fixed residence address, shall provide that sheriff written notice of that fixed residence address. Former R.C. 2950.05.

{¶ 30} The statute then sets forth an affirmative defense to a charge of failure to notify that the offender can attempt to establish:

(F)(1) It is an affirmative defense to a charge of a violation of division (E)(1) of this section that it was impossible for the person to provide the written notice to the sheriff as required under division (A) of this section because of a lack of knowledge, on the date specified for the provision of the written notice, of a residence * * * address change, and that the person provided notice of the residence * * * address change to the sheriff specified in division (A) of this section as soon as possible, but not later than the end of the first business day, after learning of the address change by doing either of the following:

(a) The person provided notice of the address change to the sheriff specified in division (A) of this section by telephone immediately upon learning of the address change or, if the person did not have reasonable access to a telephone at that time, as soon as possible, but not later than the end of the first business day, after learning of the address change and having reasonable access to a telephone, and the person, as soon as possible, but not later than the end of the first business day, after providing notice of the address change to the sheriff by telephone, provided written notice of the address change to that sheriff.

(b) The person, as soon as possible, but not later than the end of the first business day, after learning of the address change, provided written notice of the address change to the sheriff specified in division (A) of this section. Former R.C. 2950.05

{¶ 31} Appellant asserts that given his financial status and homelessness, he was prevented from notifying the Lucas County Sheriff of his change of address and, therefore, he established the affirmative defense of impossibility. The record reveals that appellant originally registered with the Lucas County Sheriff in 2006. Immediately preceding his April 2010 release from prison (after he had served a term for his first conviction for failure to notify), he signed a duties letter in which he indicated that his expected residence address was "homeless" in Toledo, Ohio. He was released from prison on April 29, 2010. He had $83 in his pocket and bought a bus ticket to Chicago,

Illinois. Appellant testified at the trial below that he had a nephew in Chicago who was willing to help him, but that he never established residency in Chicago. Regardless, on May 2, 2010, appellant wrote the letter quoted above expressing his intention to not register or verify his address because he was homeless.

{¶ 32} The provisions of R.C. 2950.05 quoted above clearly provide that the registration requirements apply equally to homeless individuals. *State v. Lowry*, 12th Dist. No. CA2010-12-036, 2011-Ohio-2850, ¶ 18. Moreover, former R.C. 2950.05(H) (now R.C. 2950.05(I)) states that "change of address" includes "any circumstance in which the old address for the person in question no longer is accurate, regardless of whether the person in question has a new address." To establish the affirmative defense of impossibility, the offender must show that on the date when he was required to notify the sheriff of his change of address (i.e. 20 days before the change), he did not know that his address was going to change. He must then notify the sheriff as soon as possible, but no later than the end of the first business day after learning of the address change. If an offender is homeless, he is to include in the notice "a detailed description of the place or places" he intends to stay. Homelessness, therefore does not make it impossible to comply with the registration requirements of R.C. 2950.05. *Lowry*, at ¶ 19; *State v. Ohmer*, 162 Ohio App. 3d 150, 2005-Ohio-3487, 832 N.E. 2d 1243, ¶ 20-21 (1st Dist.).

{¶ 33} An appellate court's function when reviewing the sufficiency of the evidence is to determine whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the

crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. The evidence submitted at the trial below clearly supports the finding that appellant failed to notify the Lucas County Sheriff of his change in address and that appellant did not sustain his burden of proving the affirmative defense of impossibility. The third assignment of error is not well-taken.

{¶ 34} In his fourth and final assignment of error, appellant contends that he was denied the effective assistance of counsel at the trial below. He asserts that his trial counsel was ineffective by failing to object to inadmissible evidence, failing to challenge the admissibility of testimony and evidence, failing to require the state to provide proof of all of the elements of the offense, and failing to aggressively defend appellant.

{¶ 35} The standard for determining whether a trial attorney was ineffective requires appellant to show: (1) that the trial attorney made errors so egregious that the trial attorney was not functioning as the "counsel" guaranteed appellant under the Sixth Amendment, and (2) that the deficient performance prejudiced appellant's defense. *Strickland v. Washington*, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In essence, appellant must show that his trial, due to his attorney's ineffectiveness, was so demonstrably unfair that there is a reasonable probability that the result would have been different absent his attorney's deficient performance. *Id.* at 693.

{¶ 36} Furthermore, a court must be "highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" in reviewing a claim of ineffective assistance of counsel. *Id.* at 689. A

properly licensed attorney in Ohio is presumed to execute his duties in an ethical and competent manner. *State v. Hamblin*, 37 Ohio St.3d 153, 155-156, 524 N.E.2d 476 (1988). Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995). Even if the wisdom of an approach is debatable, "debatable trial tactics" do not constitute ineffective assistance of counsel. *State v. Clayton*, 62 Ohio St.2d 45, 48-49, 402 N.E.2d 1189 (1980). Finally, reviewing courts must not use hindsight to second-guess trial strategy, and must keep in mind that different trial counsel will often defend the same case in different manners. *Strickland* at 689; *State v. Keenan*, 81 Ohio St.3d 133, 153, 689 N.E.2d 929 (1998).

{¶ 37} It was undisputed that appellant failed to notify the sheriff of his change of address. Trial counsel's defense strategy, therefore, was to argue the affirmative defense of impossibility under R.C. 2950.05(F)(1). While counsel could have objected to the testimony and evidence presented by the state, there is not a reasonable probability that such objections would have resulted in an acquittal. Similarly, because the case was tried to the court, the admission of Detective Carter's testimony regarding the registration requirements under R.C. Chapter 2950 was harmless. The court is presumed to know the law regarding those requirements. Finally although appellant has not asserted that his counsel was ineffective in allowing the lower court to treat him as a Tier III sex offender, he does argue that his counsel failed to aggressively defend him. Given our disposition

of the first assignment of error, and that this case is to be remanded for resentencing, any error in this regard is harmless.

{¶ 38} Appellant was not denied the effective assistance of trial counsel and the fourth assignment of error is not well-taken.

{¶ 39} On consideration whereof, appellant's conviction for failure to notify is affirmed but his sentence is vacated. This case is remanded to the trial court for resentencing as a third degree felony. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed, in part
and reversed, in part.

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

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____

Stephen A. Yarbrough, J. _____
JUDGE
CONCUR.

_____
JUDGE