[Cite as *In re D.W.*, 2013-Ohio-3955.]

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

In re D.W.

Court of Appeals No. L-12-1318

Trial Court No. 12223423 01

DECISION AND JUDGMENT

Decided: September 13, 2013

* * * * *

Timothy Young, State Public Defender, and Brooke M. Burns,
Assistant State Public Defender, for appellant.

Julia R. Bates, Lucas County Prosecuting Attorney, and
Lori L. Olender, Assistant Prosecuting Attorney, for appellee.

* * * * *

JENSEN, J.

{¶ 1} In August 1993, in Lenawee County, Michigan, D.W. entered an admission to three counts of criminal sexual conduct for acts that occurred when he was 15 years

old. D.W. was adjudicated delinquent and sentenced to a juvenile detention facility. He was released in October 1997.

{¶ 2} Michigan records indicate D.W. was classified and began registering as a juvenile sexual offender in December 1995. In the years following D.W.'s release from detention, Michigan's sex offender registration and notification laws underwent several changes. The most recent change came in 2011, when the Michigan legislature implemented its version of the federal Adam Walsh Act. Under Michigan's version of the act, D.W. was classified as a Tier III sex offender. As a Tier III sex offender, D.W. was required, for the rest of his life, to report in-person to the proper law-enforcement agency and verify his address. Because D.W. was adjudicated as a juvenile, however, he was not displayed on the Michigan Public Sex Offender Registry website.

{¶ 3} In April 2012, D.W. moved to Toledo and reported to the Lucas County Sheriff as required by law. D.W. was informed that he would be designated a Tier III juvenile sexual offender under the current version of R.C. Chapter 2950, 2007 Am.Sub.S.B. No. 10 ("S.B. 10"), Ohio's version of the federal Adam Walsh Act. D.W. was further informed that the department would mail notification postcards to his neighbors. When D.W. noted that community notification had never been imposed on him as a registrant in Michigan, the sheriff agreed to delay notification for a few days so that D.W. could consult with an attorney.

{¶ 4} D.W. contacted the public defender's office who, in turn, filed a request with the Lucas County Court of Common Pleas, Juvenile Division, to stay the community

notification portion of D.W.'s registration. The trial court granted D.W.'s request and ordered the sheriff to refrain from mailing community notification postcards until further order.

{¶ 5} In June 2012, D.W. filed a petition for declassification under the Megan's Law version of Chapter 2950 of the Ohio Revised Code. The state opposed D.W.'s motion asserting that the former version of R.C. 2950.09(F) was not applicable to D.W. because D.W. was classified under Michigan's Adam Walsh Act prior to relocating to Ohio. D.W. filed a timely reply.

{¶ 6} On September 10, 2012, the trial court issued an order holding that D.W. "is not subject to community notification as to his registration as a juvenile sex offender." On September 14, 2012, a hearing was held before a magistrate on D.W.'s motion for declassification. In a decision journalized October 1, 2012, the magistrate held, in relevant part, as follows:

> [D.W.] was adjudicated a delinquent child in the State of Michigan in 1993 based upon his admission to three counts of criminal sexual conduct. As a result, upon his release from a juvenile correctional facility in MI, he has been required to register as a sexual offender. Based upon his relocation to Toledo, Ohio in April 2012, counsel now asks this Court to declassify him as a sexual predator and terminate his requirement to register. Given that [D.W.'s] offense and subsequent adjudication and dispositions originated in the State of Michigan, this Court does not believe

> it has jurisdiction to alter or vacate another state's decisions. Even assuming this Court has jurisdiction to do so, no evidence was presented outside of proffers by [D.W.'s] counsel that would allow this Court to have a reasonable expectation of the community's safety if it granted [D.W.'s] request. [D.W.'s] request to be declassified, therefore, is denied for good cause not shown. [D.W.] shall continue to meet the requirements of registration per his orders through the State of Michigan, albeit without community notification.

The trial court adopted the decision of the magistrate in a judgment entry journalized October 4, 2012. The judgment entry was mailed to trial counsel on October 18, 2012.

{¶ 7} On October 31, 2012, D.W. filed a motion for leave to file objections to the magistrate's decision and simultaneously filed his objections to the magistrate's decision and a motion for sex offender assessment. The trial court did not issue rulings on any of these motions.

{¶ 8} D.W. filed a notice of appeal on November 2, 2012. He raises three assignments of error for our review:

> ASSIGNMENT OF ERROR I: The juvenile court erred when it found that it lacked jurisdiction to remove [D.W's] sexual predator label, as former R.C. 2950.09 expressly provides Ohio courts the authority to modify an out-of-state registrant's automatic classification as a sexual predator.

ASSIGNMENT OF ERROR II: The juvenile court abused its discretion when it failed to remove [D.W.'s] sexual predator label because he demonstrated, by clear and convincing evidence, that he is not likely to engage in sexually oriented offenses in the future.

ASSIGNMENT OF ERROR III: The juvenile court erred when it declined to find [D.W.'s] automatic classification as a sexual predator under former R.C. 2950.09(A)

First Assignment of Error

{¶ 9} In his first assignment of error, D.W. asserts that the trial court abused its discretion when it refused to allow him to challenge his automatic sexual predator classification under the Megan's Law version of R.C. Chapter 2950.

{¶ 10} In its brief, the state concedes that the juvenile court erred when it found that it lacked jurisdiction to modify D.W.'s classification under former R.C. 2950.09(F). For the reasons that follow, appellant's first assignment of error is found well-taken.

{¶ 11} In 1996, the Ohio General Assembly enacted H.B. 182, better known as "Megan's Law." Megan's Law established a comprehensive system of sex-offender classification and registration. The act applied retroactively, regardless of when the underlying sex offense had been committed. *See State v. Cook*, 83 Ohio St.3d 404, 700 N.E.2d 570 (1998) ("[T]he registration and notification provisions of R.C. Chapter 2950 do not violate the *Ex Post Facto* Clause because its provisions serve the remedial purpose of protecting the public.").

{¶ 12} "In 2007, the Ohio General Assembly passed Am. Sub. S. B. No. 10 * * * 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." *State v. Watkins*, 6th Dist. Lucas No. L-11-1085, 2013-Ohio-2030, ¶ 13. "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." *Id*. *See also* R.C. 2950.01.

{¶ 13} In *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, the Ohio Supreme Court determined that the retroactive application of S.B. 10's registration requirements is unconstitutional. *Id.* at ¶ 22. *See also State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753 (reclassification provisions of Ohio's S.B. 10 are unconstitutional). Accordingly, any classification of D.W. under S.B. 10 violates Section 28, Article II of the Ohio Constitution. *See State v. Carr*, 2012-Ohio-5425, 982 N.E.2d 146, ¶ 10 (4th Dist.). D.W. was adjudicated delinquent in Michigan in 1993, years before S.B. 10 took effect.

{¶ 14} Megan's Law, however, can be applied to D.W. because he was incarcerated for his sex offenses during the time Megan's Law version of R.C. Chapter 2950 was in effect. *See State v. Love*, 1st Dist. Hamilton No. C-120642, 2013-Ohio-3096, ¶ 6.

{¶ 15} Under Megan's Law, depending on the crime committed and the findings by the trial court at the sexual classification hearing, an offender who committed a

sexually oriented offense could be labeled a sexually oriented offender, a habitual sex offender, or a sexual predator. *See* former R.C. 2950.09. Megan's Law automatically classified as a sexual predator any sexually oriented offender who, by virtue of a prosecution in another state, was required by that state to register as a sexually oriented offender for life, regardless of how a comparable underlying offense would be treated in Ohio. *See* former R.C. 2950.09(A). However, such offender may challenge that classification pursuant to former R.C. 2950.09(F).

{¶ 16} Upon relocating to Ohio, D.W. registered his address with the Lucas County Sheriff. Despite being told he would be classified as a Tier III juvenile sexual offender under Ohio's Adam Walsh Act, Ohio law automatically classified D.W. as a sexual predator under Megan's Law version of R.C. 2950.09(A). As an out-of-state offender automatically classified as a sexual predator, D.W. may petition the court to challenge the automatic classification pursuant to Megan's Law version of R.C. 2950.09(F). *See State v. Carr*, 2012-Ohio-5425, 982 N.E.2d 146 (4th Dist.) and *State v. McMullen*, 8th Dist. Cuyahoga Nos. 97475, 97476, 2012-Ohio-2629. Accordingly, the trial court erred when it determined it was without jurisdiction to review D.W.'s challenge to the sexual predator classification under Megan's Law.

Second Assignment of Error

{¶ 17} In his second assignment of error, D.W. asserts the trial court abused its discretion when it failed to modify his sexual classification after the September 14, 2012 hearing on his petition for declassification. Essentially, D.W. makes two arguments

under this assignment. The first argument is that the trial court failed to remove the sexual predator classification despite D.W. demonstrating by clear and convincing evidence that he is not likely to engage in sexually oriented offenses in the future. The second argument is that the trial court failed to address the merits of D.W.'s sexual predator classification because the court erroneously determined that the Megan's Law version of R.C. 2950.09 did not apply to D.W.

{¶ 18} In its brief, the state argues that a "de novo review of this case is not warranted" because the trial court "never heard evidence on the issue of declassification, because the Court believed it had no jurisdiction to do so." The state asserts that the proffers given by D.W's trial counsel were insufficient to prove by clear and convincing evidence that D.W.'s registration should be modified. We agree.

{¶ 19} After our review of the September 14, 2012 transcript of proceedings we find that D.W. was not afforded an opportunity to introduce evidence in support of his challenge to the sexual predator classification under Megan's Law because the trial court believed it was without jurisdiction to entertain such a challenge. Accordingly, the first argument under D.W.'s second assignment of error is found not well-taken. The second argument under D.W.'s second assignment of error is found well-taken.

Third Assignment of Error

{¶ 20} In his third assignment of error, D.W. contends that his automatic classification as a sexual predator under former R.C. 2950.09(A) violates the due process and equal protection clauses of the United States and Ohio Constitutions. D.W. asks this

court to find his automatic classification as a sexual predator unconstitutional. In the alternative, D.W. asks this court to remand his case to the trial court so that the juvenile court may engage in a proper constitutional analysis.

{¶ 21} It is well established that constitutional questions are not ripe for review until the necessity for a decision arises on the record before the court. *Christensen v. Bd. of Commrs. on Grievances & Discipline*, 61 Ohio St.3d 534, 535, 575 N.E.2d 790 (1991). Here, D.W. first raised his constitutional questions in his objections to the magistrate's decision. The trial court never issued a ruling on these questions because it never addressed the objections.

{¶ 22} We have determined that the trial court erred when it denied D.W. the opportunity to challenge the automatic sexual predator classification under Megan's Law. To that end, upon remand, the trial court shall address D.W.'s challenge to the automatic sexual predator classification under former R.C. 2950.09(F) and, if necessary, any constitutional questions that arise from the application of Megan's Law to the facts of this case. Appellant's third assignment of error is found well-taken.

Conclusion

{¶ 23} For the reasons set forth above, we reverse the judgment of the Lucas County Court of Common Pleas, Juvenile Division, and remand the cause for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE