[Cite as *State v. Kuhn*, 2015-Ohio-2589.]

STATE OF OHIO, MONROE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	CASE NO. 14 MO 12
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	OPINION
	)	
DUSTIN KUHN,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Monroe County, Ohio Case No. 2007-155

JUDGMENT: Affirmed in part and Vacated in part.

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: June 18, 2015

[Cite as *State v. Kuhn*, 2015-Ohio-2589.]
ROBB, J.

{¶1} Defendant-appellant Dustin Kuhn ("Appellant") appeals the post-sentencing decision of the Monroe County Common Pleas Court classifying him as a child victim offender subject to ten years of reporting under Megan's Law (which was in effect at the time of his offense). He asked the court to invalidate his prior classification as a Tier I child victim offender subject to fifteen years of reporting under the Adam Walsh Act (which was in effect at the time of his sentencing) due to the Ohio Supreme Court's holding that the new classifications could not be applied retroactively to one who committed the offense prior to the law's enactment. After a hearing, the trial court agreed and found Appellant's Adam Walsh Act Tier I child victim offender classification invalid. The court then classified Appellant as a child victim offender under Megan's Law.

{¶2} On appeal, Appellant states that the court erred in not holding a second hearing before reclassifying him because there is a factual dispute as to whether he committed a sexually oriented offense. This argument is irrelevant because the trial court labeled Appellant a child victim offender, which classification is not defined by a sexually oriented offense.

{¶3} Appellant also argues that the trial court abused its discretion by taxing costs against him since he successfully challenged the application of the Adam Walsh Act. The state responds that Appellant was not a prevailing party because the second argument in his motion (reflected in his first assignment of error) is without merit. As the trial court found Appellant's threshold issue had merit under Supreme Court case law, prompting the court to rectify the classification, Appellant was the prevailing party and costs should not be taxed to him.

{¶4} In accordance, the trial court's decision changing Appellant's classification from a Tier I child victim offender under the Adam Walsh Act to a child victim offender under Megan's Law is affirmed. The trial court's decision on costs is reversed and modified to eliminate the judgment against Appellant for costs on his motion.

STATEMENT OF THE CASE

{¶5} On the morning of May 4, 2007, the Monroe County Sheriff's Department received a call that a sixteen-year-old female was kidnapped from her car in her driveway in Lewisville, Ohio. The suspect was identified as Appellant, who was the victim's eighteen-year-old ex-boyfriend. Upon being released later that day, the victim reported that Appellant threatened her with a gun and a knife, drove her to a secluded spot, walked her into the woods, raped her, and then contemplated killing them both. The police recovered his loaded handgun, a used condom, a ratchet strap, and other items which he had hidden in the woods.

{¶6} Appellant was indicted for one count of rape in violation of R.C. 2907.02(A)(2) which involves force or threat of force, two counts of R.C. 2905.01(A)(2) kidnapping to facilitate a felony or flight thereafter, two counts of R.C. 2905.01(A)(3) kidnapping to terrorize or inflict serious physical harm, two counts of R.C. 2905.01(A)(4) kidnapping to engage in non-consensual sexual activity, with firearm specifications attached to all of the above counts, and three counts of tampering with evidence.

{¶7} On October 4, 2007, Appellant pled guilty to one count of kidnapping (to terrorize or inflict serious physical harm) in violation of R.C. 2905.01(A)(3), one firearm specification, and one count of tampering with evidence. In return, the state dismissed the other charges. The state agreed to recommend the maximum sentence of ten years for kidnapping plus three consecutive years for the gun specification with a concurrent sentence of three years for tampering with evidence. A pre-sentence investigation was ordered and filed.

{¶8} At the time of Appellant's offense, S.B. 5, or what is called Megan's Law, was in effect. Just prior to Appellant's sentencing, a new classification scheme was enacted by S.B. 10, or what is called the Adam Walsh Act, effective January 1, 2008. Under the Adam Walsh Act, offenders are placed into one of three tiers with increased reporting requirements, and was to be applied retroactively to prior offenders. The court noted the change in a pre-sentence judgment entry.

{¶9} A classification hearing was held immediately prior to the sentencing hearing. At the January 9, 2008 sentencing, the state recited some facts from the bill of particulars. The victim confirmed to the court that Appellant kidnapped and raped her and changed her life permanently. (Tr. 140). The court sentenced Appellant to five years in prison for kidnapping plus three consecutive years on the gun specification and a concurrent sentence of four years for tampering with evidence.

{¶10} Appellant was labeled a child victim offender and classified under Tier I, which involved reporting for fifteen years under the newly-enacted Adam Walsh Act. There was no dispute as to this classification at sentencing or at the classification hearing except for a suggestion that application of the new act may be unconstitutional. This argument was overruled.

{¶11} No timely appeal was taken. After filing five motions for judicial release in a two-year period (the first of which were denied after the state's responses detailed the incident and pointed out that the state had recommended a much longer sentence), Appellant was granted judicial release on November 5, 2013 and placed on five years of community control. That entry ordered him to immediately register as a child victim offender.

{¶12} On April 10, 2014, Appellant filed a motion to set aside the January 9, 2008 entry requiring him to register as a child-victim offender. The motion pointed out that classification under the Adam Walsh Act was unconstitutional due to the Ohio Supreme Court's *Williams* case. In that case, the Court concluded that S.B. 10 was punitive. The Court stated that, as applied to defendants who committed offenses prior to its enactment, S.B. 10 violates Section 28, Article II of the Ohio Constitution, which prohibits the General Assembly from passing retroactive laws. *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, ¶ 21. Appellant's motion also stated in a one-sentence argument that he would not have been required to register under Megan's Law.

{¶13} The state's response agreed that Appellant should not have been classified under the Adam Walsh Act. The state insisted, however, that Appellant would still have been subject to Megan's Law as a child-victim offender, pointing out

that the victim of the kidnapping was 16 years of age (and the offense was listed in the statute as automatically qualifying). The state noted that a hearing would be required under Megan's Law in order to label him as a child-victim predator as opposed to merely a child-victim offender.

{¶14} A hearing was held on June 4, 2014. The defense argued that another hearing would be required in order to reclassify Appellant where the state would have to present evidence of the factors in R.C. 2950.09(B), which deals with whether a sexually oriented offender's classification should be elevated to that of sexual predator. At the hearing, the state agreed that Appellant was entitled to reclassification under Megan's Law and mentioned that a hearing should be held to consider the factors in R.C. 2950.09(B)(3). The court advised that it would take the matter under consideration to ascertain whether a further evidentiary hearing was required in order to reclassify Appellant.

{¶15} On July 31, 2014, the trial court filed an entry finding that Appellant's "Adam Walsh Act Tier I child-victim offender classification is invalid under *Williams*, 129 Ohio St.3d 344 (2011) and *State v. Bodyke*, 126 Ohio St.3d 266 (2010)."[1] The court classified Appellant as a child-victim offender under Megan's Law, which imposes a duty to register for ten years with annual residence verification. The court ordered costs to be taxed against Appellant (stating that judgment was granted to the clerk). Appellant filed a timely notice of appeal. Appellant's new attorney filed a brief contesting the new classification and the allocation of costs.

ASSIGNMENT OF ERROR NUMBER ONE

{¶16} Appellant's first assignment of error and issue presented contend:

"THE TRIAL COURT ERRED WHEN IT DID NOT CONDUCT A HEARING PRIOR TO CLASSIFYING APPELLANT AS A 'CHILD VICTIM OFFENDER'."

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[1] In *Bodyke*, the Supreme Court held that the provision in the Adams Walsh Act calling for the attorney general to reclassify prior offenders violated the separation of powers doctrine. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753. Appellant was not reclassified by the attorney general as the trial court applied the Adam Walsh Act to him at sentencing, which occurred just days after the act went into effect.

"When there is a factual dispute as to whether the defendant committed a 'sexually oriented offense,' the trial court is required to conduct a hearing."

{¶17} Appellant points out that kidnapping in violation of R.C. 2905.01(A)(3) qualified as a sexually oriented offense only if the offense was committed with a sexual motivation, citing former R.C. 2950.01(D)(1)(b)(vi) (victim under 18) and (c) (any age victim). He states that the trial court could not find sexual motivation merely by relying on the dismissed charges of rape or the dismissed R.C. 2905.01(A)(4) kidnapping to engage in sexual activity against the victim's will.

{¶18} Appellant claims the trial court should have granted his request made at the hearing to hold a subsequent factual hearing to determine whether he is subject to classification under Megan's Law. He concludes that in order to find he committed a sexually oriented offense, he had a due process right to a hearing where the state would have the burden by clear and convincing evidence to show that the kidnapping offense to which he pled was committed with a sexual motivation.

{¶19} The state responds that the applicable definition of a sexually oriented offense was contained in R.C. 2950.01(D)(1)(b)(vi). The state notes that it was undisputed that the victim was under 18. The state posits that the trial court was permitted to consider the dismissed charges to find a sexual motivation behind the kidnapping.

{¶20} The state asserts that although the court could have held a factual hearing before issuing the classification order, the lack of a hearing was harmless because Appellant received the lowest classification, which the state says was a sexually oriented offender (as opposed to a habitual offender or a sexual predator). In addition, it is pointed out that a hearing is not required where the lowest tier attaches by operation of law. *See State v. Hayden*, 97 Ohio St.3d 211, 2002-Ohio-4169, 773 N.E.2d 502, ¶ 6-15 (where attempted rape is automatically defined as a sexually oriented offense, the trial court need not hold a hearing to classify prior

offender into lowest classification of a sexually oriented offender and no due process violation).[2]

{¶21} Appellant replies that the state's harmless error and operation of law arguments miss his point. He states he should not have been classified at all because there is no evidence of sexual motivation in order to cause the kidnapping offense to fall under the definition of a sexually oriented offense. He adds that his classification did not arise as a matter of law due to the factual dispute as to whether he committed the kidnapping with sexual motivation.

{¶22} However, both sides are arguing an irrelevant matter. The trial court did not find that Appellant committed a sexually oriented offense or label Appellant a sexually oriented offender. Rather, Appellant was labeled a child-victim offender. That was his label when the court classified him under the Adam Walsh Act at his January 9, 2008 sentencing, and that remained his label when the court reclassified him under Megan's Law. The difference was that his classification was no longer subject to the Adam Walsh Act's tier system or longer reporting period.

{¶23} Under both Megan's Law and the Adam Walsh Act, a child-victim offender included a person who committed kidnapping in violation of R.C. 2905.01(A)(3) (the charge to which Appellant pled guilty) when the victim was under eighteen years of age and was not the offender's child. *See* R.C. 2950.01(C)(1); former R.C. 2950.01(S)(1)(a)(i), (b)(i). Under both laws, a R.C. 2905.01(A)(3) kidnapping offense only qualifies as a sexually oriented offense if the kidnapping was committed with sexual motivation. *See* R.C. 2950.019(A)(7); former R.C. 2950.01(D)(b)(vi).

{¶24} Under Megan's Law, the child-victim offender was subject to the same ten-year reporting as a sexually oriented offender. *See* former R.C. 2950.041(A), (B),

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[2] Under either act, the kidnapping here was automatically classified as a child-victim offense if the victim is a minor. No one disputed the fact that the victim was a minor at the time of the original classification and sentencing hearing, at the reclassification hearing, or on appeal. Appellant has failed to argue the only factual issue that could exist in classification to the lowest tier. As set forth above, Appellant failed to distinguish *Hayden* and other cited cases.

(F); R.C. 2950.07(B)(3). Under the Adam Walsh Act, the child-victim offender was placed in Tier I and subject to the same fifteen-year reporting as certain sex offenders (or in a higher tier depending on previous classifications for prior offenses). Notably, a person who committed kidnapping in violation of R.C. 2905.01(A)(3) with sexual motivation would have been placed in Tier II (not Tier I as Appellant was originally placed). *See* R.C. 2950.01(F).

{¶25} We proceed to further explanation with reference only to Megan's Law. The premise behind Appellant's argument lies in his statement that the classification provisions in former R.C. 2950.09 (A) through (E) depend upon a defendant having been convicted of a sexually oriented offense. Those provisions deal with a defendant who has been convicted of a sexually oriented offense and entail the trial court ascertaining whether such defendant is a sexual predator after a hearing. That statute has no relation to whether a defendant is to be labeled a child-victim offender.

{¶26} The pertinent kidnapping offense involving R.C. 2905.01(A)(3) is a sexually oriented offense only if it was committed with sexual motivation. *See* former R.C. 2950.01(D)(1)(b)(vi), (c). However, contrary to the asserted basis for Appellant's argument here, the trial court's decision did not pertain to a sexually oriented offense.

{¶27} Kidnapping in violation of R.C. 2905.01(A)(3) of a minor victim (that is not the child of the offender) is a child-victim oriented offense. *See* former R.C. 2950.01(S)(1)(a)(i). **A determination of sexual motivation behind the kidnapping is not involved in ascertaining whether the kidnapping entails a child-victim oriented offense.** *See id. See also State v. Cheetham*, 8th Dist. No. 84193, 2004-Ohio-6013, ¶ 36 (sexual motivation is not required for abduction offense to qualify as a child-victim oriented offense).

{¶28} The registration duties of a person convicted of a child-victim oriented offense are generally set forth in former R.C. 2950.041. Said statute provides that the child-victim offender shall register in the manner prescribed in R.C. 2950.04(B). *See* former R.C. 2950.041(B). The registration period for the child-victim offender is the same as provided in R.C. 2950.07. *See* former R.C. 2950.041(F). Thus, even

though they have overlapping registration requirements, there is a major distinction between a sexually oriented offender and child-victim oriented offender where the offender commits kidnapping in violation of R.C. 2905.01(A)(3): sexual motivation for the kidnapping is only required to satisfy the definition of a sexually oriented offense and not to satisfy the definition of a child-victim oriented offense.[3]

{¶29} In summary, Appellant's argument under this assignment of error revolves around his assertion that a hearing was required to resolve the factual dispute as to whether he committed a sexually oriented offense. However, the trial court did not find that he committed a sexually oriented offense. The court found that he was a child-victim offender; sexual motivation is not pertinent to whether a defendant is a child-victim offender. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

{¶30} Appellant's second assignment of error and issue presented provide:

"THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED APPELLANT TO PAY COURT COSTS."

"A trial court should not assess court costs to a party who successfully challenges his classification under the Adam Walsh Act."

{¶31} Appellant points out that he successfully challenged the application of the Adam Walsh Act to his offense. He notes that the trial court specifically found the prior Tier I classification to be invalid (which resulted among other things in five years less reporting time). He asserts that it was unfair and unreasonable for the trial court to order him to pay the court costs involved in a motion found to be warranted under the Ohio Supreme Court's *Williams* case. Appellant states that in the criminal arena, it is improper to impose court costs on a defendant for an offense for which he was not convicted and a court can impose costs only if the state is successful in

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[3] Ohio's version of the federal Megan's Law was enacted in 1996, but was significantly amended in 2003 by S.B. 5. Prior to the 2003 amendments to the classification scheme, certain offenses were automatically considered to be sexually oriented offenses even if there was no sexual motivation. Various court rulings found there was often no rational relation between the sexually oriented offender label and the underlying offense. *In 2003, the legislature changed the scheme to add a child-victim oriented offender for those registration-worthy defendants who lacked sexual motivation.*

convicting the defendant. *See, e.g., State v. Simmons*, 8th Dist. No. 91628, 2008-Ohio-6291 (trial court erred in refusing to refund court costs after conviction was vacated on appeal and then dismissed by the state); *In re Graham*, 7th Dist. No. 02CA67, 2002-Ohio-7294 (juvenile court could not assess court costs against minor upon dismissal of his delinquency case).

{¶32} These cases involved statutes which permitted assessment of costs only upon conviction. This case involves a post-sentence motion for relief on one aspect of the sentence and the limited issue of costs involved in ruling on the motion. Appellant mentions that his motion should not be treated as a civil, post-conviction motion as it was filed in the case in which he was sentenced. However, a post-conviction petition is typically filed with the criminal case number and is still considered a civil, collateral attack on the judgment. Appellant adds that if his motion was considered similar to a post-conviction petition and civil in nature, Civ.R. 54(D) provides that "costs shall be allowed to the prevailing party unless the court otherwise directs." He asks that we apply our reasoning in *Bies* and relieve him from the trial court's judgment of costs as to his motion.

{¶33} In *Bies*, the defendant was classified under Megan's Law and later reclassified by the attorney general under the Adam Walsh Act, at which point he filed a petition challenging the reclassification. The case was stayed pending various other cases such as *Bodyke*. Eventually, the attorney general reinstated the defendant's Megan's Law classification, prompting the state to ask the court to dismiss the defendant's petition as moot. The trial court granted the state's motion and charged costs against Bies. On appeal, he stated that his petition should not have been rendered moot but should have been granted as he was entitled to a court order to ensure he will not be subject to future reclassification under S.B. 10. This court agreed. *Bies v. State*, 7th Dist. No. 12MA3, 2012-Ohio-5572, ¶ 25.

{¶34} Bies also assigned as error the taxing of costs to him. This court noted that R.C. 2947.23(A)(1)(a) provides that in all criminal cases the judge shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs. Yet, we found that the civil rule for imposing court costs should apply

as the petition was one in post-conviction, which is a collateral civil attack on a criminal judgment. *Id.* at ¶ 29.

{¶35} We pointed to Civ.R. 54(D)'s statement that "costs shall be allowed to the prevailing party unless the court otherwise directs." *Id.* at ¶ 30. It was concluded that the trial court had discretion to order the prevailing party to pay all or part of its own costs (but the court was not permitted to award costs to the non-prevailing party). *Id.*, citing *Vance v. Roedersheime*r, 64 Ohio St.3d 552, 555, 597 N.E.2d 153 (1992). We defined the "prevailing party" as "one in whose favor the decision or verdict is rendered and judgment entered." *Bies*, 7th Dist. No. 12MA3 at ¶ 30.

{¶36} This court concluded that based upon the resolution of Bies' other assignment of error (that he was entitled to a judgment declaring that he was not subject to reclassification under the Adam Walsh Act), he was "now clearly the prevailing party. Consequently, the costs of Appellant's petition are to be assessed against the state." *Id.* at ¶ 31. We held the same in our *Phillips* case. See *Phillips v. State*, 7th Dist. No. 12MA2, 2012-Ohio-5573, ¶ 32.

{¶37} In the state's brief in the present case, it is not disputed "that the prevailing party, in these types of cases is allowed costs, as several cases have addressed the subject." The state then posits that Appellant is not the prevailing party because his first assignment of error lacks merit. Although the state agreed with Appellant's threshold contention below that the trial court's Adam Walsh Act Tier I classification was invalid under *Williams*, the state urges that he was not the prevailing party as he "does not prevail on his quest to eradicate his responsibility to register under Megan's Law, and therefore cannot be considered the prevailing party in an effort to avoid having the court costs assessed to him." Essentially, the state distinguishes *Bies* on the grounds that although Appellant's entire motion (on the same threshold issue) was successful, the *Bies* defendant did not also set forth an alternative argument suggesting that no classification can remain at all.

{¶38} Appellant replies that where the defendant's post-conviction motion initially prevails due to Ohio Supreme Court precedent declaring his classification under the new act unconstitutional, he should be considered a prevailing party. He

insists that merely because he sought additional relief (no classification at all), he does not become the non-prevailing party. He points out that the state's argument focuses on who will be the prevailing party on appeal.

{¶39} Civ.R. 54(D) does not grant an absolute right for the prevailing party as to court costs. *State ex rel. Gravill v. Fuerst*, 24 Ohio St.3d 12, 13, 492 N.E.2d 809 (1986). Rather, a trial court has discretion as to how the costs of an action shall be assessed under that rule. *State ex rel. Estate of Hards v. Klammer*, 110 Ohio St.3d 104, 107, 2006-Ohio-3670, 850 N.E.2d 1197, 14; *Vance*, 64 Ohio St.3d at 555 (except that the court cannot award them to the non-prevailing party). Generally, an abuse of discretion can be found where the court's decision was arbitrary, unconscionable, *or unreasonable*. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶40} Although post-conviction petitions are civil in nature, the underlying case is criminal. The reason the Supreme Court found the application of the Adam Walsh Act unconstitutional as to those who committed an offense before the law's enactment is because the act was found to be criminally punitive in nature. This consideration weighs in the defendant's favor as to whether a decision ordering him to pay costs of a motion is unreasonable where the threshold argument is successful due to a Supreme Court precedent on unconstitutionality of the applied act. In keeping with our *Bies* and *Phillips* holdings, we conclude that a defendant who successfully seeks elimination of an Adam Walsh Act classification due to Supreme Court law on the unconstitutionality of the application of said act should not have to pay costs for his motion filed in the trial court.

{¶41} Contrary to the state's contention, even though the argument supporting Appellant's first assignment of error is without merit, this does not mean the criminal defendant should not be considered a prevailing party for purposes of that motion. It was due to his unconstitutional classification under the Adam Walsh Act that his motion was filed. Setting forth an additional, alternative argument asking for even more relief does not eliminate his status as the prevailing party for purposes of the costs of his motion under the particular circumstances of this case. Although

his additional argument failed, no additional hearing was held (and no additional costs were incurred).

{¶42} Therefore, we conclude that it was unreasonable to enter a costs judgment against Appellant for filing a successful motion to invalidate his Adam Walsh Act Tier I classification (with a fifteen-year reporting requirement) merely because he did not prevail on an additional argument. This assignment of error is sustained.

{¶43} In conclusion, the trial court's decision changing Appellant's classification from a Tier I child victim offender under the Adam Walsh Act to a child victim offender under Megan's Law is affirmed. The trial court's decision on costs is reversed and vacated.

Donofrio, P.J., concurs.

Waite, J., concurs.