

[Cite as *State v. Caldwell*, 2009-Ohio-4881.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92219

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

MARCUS CALDWELL, AKA MARCUS BOYLE

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513440

BEFORE: Rocco, J., Gallagher, P.J., and Boyle, J.

RELEASED:

September 17, 2009

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J.:

{¶ 1} The State of Ohio appeals from a common pleas court order dismissing the indictment in this case, which charged defendant-appellee, Marcus Caldwell, aka Marcus Boyle,¹ with failing to notify the county sheriff of a change of address. The state urges that the court erred by dismissing the indictment because it failed to apply the Adam Walsh Act and failed to find that appellee had waived his right to contest his re-classification as a Tier I offender under that Act. We find that the court erred by dismissing the indictment before trial, albeit for reasons different than those cited by the state.

{¶ 2} The indictment in this case charged the appellee with failing to notify the Cuyahoga County sheriff of a change of address, appellee having been convicted of gross sexual imposition, a sexually oriented offense, on February 16, 2003, and “classified as a Tier I Sex Offender on February 16, 2003 [sic].” Appellee moved to dismiss the indictment. He asserted that the court that convicted him of gross sexual imposition specifically determined that he was exempt from registration, that he had no legal duty to register as of July 1, 2007, and that he therefore could not have been reclassified as a Tier I Sex Offender under the Adam Walsh Act (“AWA”). The court held a

¹Although much of the record refers to appellee as “Marcus Boyer,” the indictment names the defendant as “Marcus Caldwell, aka Marcus Boyle.” The indictment was never amended. We refer to appellee by the name listed in the indictment. The state may wish to amend the indictment on remand. See, e.g., *State v. Freed*, Cuyahoga App. No. 90720, 2008-Ohio-5742, ¶4.

hearing on this motion on September 19, 2008. At the conclusion of the hearing, the court granted the motion and dismissed the indictment.

{¶ 3} Upon review, we find that appellee's motion to dismiss was premature. "The Ohio Rules of Criminal Procedure * * * do not allow for 'summary judgment' prior to trial." *State v. Varner* (1991), 81 Ohio App.3d 85, 86. "A motion to dismiss tests the sufficiency of the indictment, without regard to the quantity or quality of evidence that may be produced at trial. * * * A pretrial motion must not involve a determination of the sufficiency of the evidence to support the indictment. If the indictment is valid on its face, a motion to dismiss should not be granted." *State v. Preztak*, 181 Ohio App.3d 106, 2009-Ohio-621, ¶12; also see *State v. Eppinger*, 162 Ohio App.3d 795, 2005-Ohio-4155.

{¶ 4} Appellee's motion to dismiss argued that appellee had no duty to register under the AWA because the common pleas court had previously determined that he was "a sexually oriented offender who is exempt from registration."² Therefore, he claimed he could not be guilty of failing to register as a Tier I sexual offender under the AWA. This motion necessarily

²There is an interesting question whether the court's statement that appellee was exempt from registration was an erroneous determination that the offense was registration-exempt (an error that the state may have waived by failing to appeal) or whether it was only an erroneous notice to appellee that he was not required to register. We need not decide this issue here, however, because we find appellee's motion to dismiss is premature.

questions the state's ability to prove the indictment, which implicitly³ alleged that appellee did have a duty to register. Appellee does not contend that the indictment, on its face, fails to charge an offense, but rather that the state cannot prove that he committed the offense charged. Therefore, the common pleas court erred by dismissing the indictment at this early stage of the proceedings.

{¶ 5} The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR

³The indictment alleges that appellee had a duty to notify the sheriff of a change of address under R.C. 2950.05. R.C. 2950.05 places this duty on offenders who are required to register under, e.g., R.C. 2950.04(A)(2), (3), or (4).