

[Cite as *State v. Smith*, 2010-Ohio-2880.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92550

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

ALLEN SMITH

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509799

BEFORE: Rocco, P.J., Kilbane, J., and Dyke, J.

RELEASED: June 24, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Allen Smith appeals from his conviction after the trial court found him guilty of failure to verify his current residence, in violation of R.C. 2950.06(F).

{¶ 2} Smith presents six assignments of error, challenging his conviction on the grounds that it is based upon insufficient evidence, that it is against the manifest weight of the evidence, that it is based upon a faulty indictment, and that the current version of the statutory scheme, commonly referred to as the Adam Walsh Act (“AWA”) is unconstitutional as applied to him.

{¶ 3} In light of the Ohio Supreme Court’s decision in *State v. Bodyke*, Slip Op. No. 2010-Ohio-2424, Smith’s last challenge is both persuasive and dispositive of his appeal. His conviction is reversed, and this case is remanded for further proceedings consistent with *Bodyke*.

{¶ 4} The record reflects that in 1988, Smith originally was convicted in CR-225337 of the crimes of rape, kidnapping, and gross sexual imposition. In 2001, Smith completed his sentence in that case and was released from prison. Pursuant to the version of R.C. Chapter 2950 then in effect, commonly referred to

as “Megan’s Law,” Smith “automatically” was classified as a sexually oriented offender.¹

{¶ 5} Smith’s classification as a sexually oriented offender required him to register his current address annually in May with the Cuyahoga County Sheriff’s office. Smith fully complied with his duties. On May 7, 2007, he verified his address as “1772 Wheeler Avenue, East Cleveland, Ohio.” The sheriff’s office notified him that his next “expected return date to the sex offender’s unit to register” his address was “5-15-2008.”

{¶ 6} The AWA went into effect in January 2008. Pursuant to that legislation, specifically, R.C. 2950.031 and 2950.032, the Ohio Attorney General (“OAG”) reclassified Smith according to his convictions; Smith became a “Tier III” sex offender. *State v. Blanchard*, Cuyahoga App. No. 90935, 2009-Ohio-1357. The AWA requires Tier III sex offenders to register their current address with the sheriff’s office every 90 days for life. *State v. Omiecinski*, Cuyahoga App. No. 90510, 2009-Ohio-1066.

{¶ 7} According to the testimony presented at Smith’s trial in this case by sheriff’s Det. Susan DeChant, “beginning * * * sometime in November” 2007, the OAG sent a certified letter to each registered sex offender; these letters notified them of the new law and informed them “they were to contact the sheriff’s

¹See, *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-1169, ¶15, 773 N.E.2d 502.

department,” and also “let them know when they were to come in and register” under the AWA. DeChant testified that although she did not know exactly when the OAG sent the certified letter to Smith, she knew the letter gave Smith a new date to register, viz., January 9, 2008.

{¶ 8} DeChant indicated that the OAG’s office sent the certified letter to the address Smith provided to the sheriff’s department when he last had registered on May 7, 2007. She further indicated that she began investigating Smith because “[o]n the State website that we work off of, there is what we call a dashboard. And, it lists all our offenders, when they were due in.” DeChant stated that when she became aware that Smith failed to report to her office on January 9, 2008, she obtained copies of both the certified letter and its envelope. In this way, she found the letter had been returned to the OAG unsigned.²

{¶ 9} DeChant testified that, upon becoming aware that Smith did not receive the OAG’s certified letter, she sent one from her office to Smith’s registered address. She stated, “It’s a generic letter generated from the State website. But, it inputs the date and the letter would state, you know, that he was supposed to register by January 9th [, 2008]. * * * . It would give him the next day

²Unfortunately, none of the exhibits admitted into evidence by the trial court are included in the record on appeal. The information the exhibits apparently contain is gleaned, therefore, from only the trial transcript.

to come in, sort of like an extension to report.” DeChant neglected to indicate the date on which she sent this letter.

{¶ 10} DeChant further stated that the sheriff’s office’s letter to Smith “was returned by the post office” to the sheriff’s department in April 2008; someone had written on it “moved,” and the post office stamp indicated “return to sender, attempted, not known, unable to forward.”

{¶ 11} Sheriff’s deputy Martin Lutz testified he received an assignment from DeChant to proceed to the address Smith provided. On February 22, 2008, Lutz went to 1772 Wheeler Avenue in East Cleveland.

{¶ 12} Lutz “attempted to knock on the door and attempted to speak with occupants, maybe the subject or other people there that would vouch that that person lived there * * *.” Lutz testified he observed Smith’s name did not appear on the mailbox. Lutz also indicated he neither spoke to nor found anyone who could tell him Smith lived at that address; however, Lutz “was able to learn that the person no longer lived there.”

{¶ 13} On April 29, 2008, Smith was indicted in this case on two counts. Count 1 charged him with failure to verify his current address, in violation of R.C. 2950.06(F), Count 2 charged him with failure to provide a change of address, in violation of R.C. 2950.05(E)(1). The date of these offenses was set forth as January 9, 2008.

{¶ 14} Smith was arrested on these charges in May 2008, when he arrived at the sheriff's office for his previously-scheduled verification. He pleaded not guilty at his arraignment.

{¶ 15} Smith eventually signed a waiver of his right to a jury trial in this case. After the prosecution presented its evidence, the trial court requested the parties to discuss whether the decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, applied to the indictment. The trial court subsequently determined the statute “imposes a strict liability standard” that did not require a specific mens rea.

{¶ 16} Ultimately, although the trial court denied Smith's motions for acquittal on the charges, the court found Smith not guilty on Count 2. Based upon its reasoning that R.C. 2950.06 “appears to have been construed to set forth a strict liability standard, whether Mr. Smith actually knew or not of his duty, he was expected to and must pay the consequence for failing to provide notification or verification of his address, under the standards of the amended act,” the trial court found Smith guilty on Count 1.

{¶ 17} The trial court sentenced Smith to a year of community control sanctions, in spite of the fact that his conviction is a first-degree felony.

{¶ 18} In this appeal of his conviction, Smith presents six assignments of error.

{¶ 19} “I. Appellant’s conviction for failing to register on January 9, 2008 violates state and federal due process when he lacked notice that he had a duty to register on that date.

{¶ 20} “II. Appellant’s conviction for failing to register is against the manifest weight of the evidence because he is not guilty by virtue of the defense of entrapment by estoppel.

{¶ 21} “III. Appellant’s conviction for failure to register 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 failed to prove the defense of entrapment by estoppel.

{¶ 22} “IV. Appellant’s conviction for failure to register is not supported by sufficient evidence as required by the Due Process Clauses of the United States and Ohio Constitutions.

{¶ 23} “V. Appellant’s conviction violates his constitutional rights to due process and a grand jury indictment because the mens rea was omitted from his indictment.

{¶ 24} “VI. Appellant’s conviction must be vacated because the law on which it is based, Ohio’s Adam Walsh Act, is unconstitutional as applied to appellant.”

{¶ 25} Smith presents several challenges to his conviction in this appeal. In light of the Ohio Supreme Court’s decision in *State v. Bodyke*, supra, this court need only address his last. At paragraphs two and three of the syllabus, the supreme court held as follows:

{¶ 26} “2. R.C. 2950.031 and 2950.032, which require the attorney general to reclassify sex offenders who have already been classified by court order under former law, impermissibly instruct the executive branch to review past decisions of the judicial branch and thereby violate the [constitutional] separation-of-powers doctrine.

{¶ 27} “3. R.C. 2950.031 and 2950.032, which require the attorney general to reclassify sex offenders whose classifications have already been adjudicated by a court and made the subject of a final order, violate the separation of powers doctrine by requiring the reopening of final judgment.”

{¶ 28} A review of the facts of this case reveals the attorney general reclassified Smith based upon sections of the law that the Ohio Supreme Court has declared unconstitutional. The supreme court stated that these statutes “may not be applied to offenders previously adjudicated by judges under Megan’s Law, and the classifications and community-notification and registration orders imposed previously by judges are reinstated.” *Id.*, ¶66.

{¶ 29} Thus, Smith’s reclassification was unlawful, and cannot serve as the predicate for the crime for which he was indicted and convicted.

{¶ 30} Under these circumstances, Smith's sixth assignment of error is sustained.

{¶ 31} Smith's remaining assignments of error are, therefore, moot. App.R. 12(A)(1)(c).

{¶ 32} Smith's conviction is reversed. This case is remanded for further proceedings consistent with *Bodyke*, supra.

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 issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for further proceedings.

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

KENNETH A. ROCCO, PRESIDING JUDGE
MARY EILEEN KILBANE, J., and
ANN DYKE, J., CONCUR