[Cite as *State v. Battistelli*, 2009-Ohio-4796.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	
STATE OF OHIO		C. A. No. 09CA009536
Appellee		
v.		APPEAL FROM JUDGMENT ENTERED IN THE
ALBERT G. BATTISTELLI, IV		OBERLIN MUNICIPAL COURT COUNTY OF LORAIN, OHIO
Appellant		CASE No. 08CRB00508

DECISION AND JOURNAL ENTRY

Dated: September 14, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} Albert G. Battistelli pleaded no contest to two counts of unlawful sexual conduct with a minor. Mr. Battistelli acknowledged that, at a time when he was at least 18 years old, he engaged in sexual conduct with a person who was 13, 14, or 15 years old, but who was less than four years younger than he was. The trial court found him guilty and, in accordance with a plea agreement, sentenced him to five years of community control.

{¶2} Lack of consent is not an element of the crime Mr. Battistelli committed. Under Ohio's Adam Walsh Act, however, a person convicted of that crime is a "sex offender," who must register as such, if the sexual conduct was non-consensual. R.C. 2950.01(E)(1)(b). If the sexual conduct was consensual, that person is not a "sex offender" and does not have to register. *Id*.

{¶3} The State moved the trial court to notify Mr. Battistelli that he is required to register as a sex offender and, in that motion, suggested that a hearing be held to determine whether the person with whom Mr. Battistelli engaged in sexual conduct had consented to that conduct. The trial court determined that, while under Ohio's Adam Walsh Act a finding of lack of consent is a prerequisite to a duty to register, the act does not include "any directive as to how and when a determination is to be made regarding the issue of consent." According to the trial court, the legislature included a crime among the sexual offenses for which registration is required that does not exist in Ohio: "the crime of Unlawful Sexual Conduct with a Minor with an element of 'lack of consent.'" It concluded that, since lack of consent is not an element of the crime Mr. Battistelli committed, he "is not subject to the registration requirements under the law as written."

{¶4} The State has appealed and argued that the trial court erred by not determining whether the other person consented to the sexual conduct as a prerequisite to a determination of whether to notify Mr. Battistelli that he is required to register as a sex offender. When a factual determination is necessary for a court to carry out duties assigned it by the legislature, conducting an evidentiary hearing to make that factual determination is within the court's inherent authority. Accordingly, we reverse and remand for the trial court to conduct a hearing on the issue of consent.

SECTION 2907.04 OF THE OHIO REVISED CODE

{¶5} Mr. Battistelli pleaded no contest to violating Section 2907.04 of the Ohio Revised Code. Under that section, it is a crime for a person 18 years old or older to engage in sexual conduct with someone to whom he or she is not married when the offender knows that the other person is at least 13 years old but less than 16 years old or is reckless regarding the

other person's age. With certain exceptions, a violation of Section 2907.04 is a felony of the fourth degree. One of the exceptions is that, if the offender is less than four years older than the other person, a violation is a misdemeanor of the first degree. R.C. 2907.04(B)(2). The indictment against Mr. Battistelli charged him with two first degree misdemeanors, and each count included a specific allegation that he was less than four years older than the other person.

REGISTRATION OF CONVICTED SEX OFFENDERS

{¶6} Since 1994, the federal government has used its spending power to encourage states to adopt legislation requiring registration of convicted sex offenders and, in some cases, community notification of their presence. Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy,* 6 Ohio St. J. Crim. L. 51, 52 (2008). Congress adopted the latest form of this encouragement, the Adam Walsh Act, in 2006. *Id.* In order to avoid losing part of its allocation of funds under the Edward Byrne Memorial State and Local Law Enforcement Assistance Programs and to qualify for an "early" compliance bonus, Ohio adopted its version of the Adam Walsh Act in 2007. *Id.* at 98. It became effective on January 1, 2008.

{¶7} The direct predecessor of the Adam Walsh Act was Megan's Law. As with the Adam Walsh Act, Congress used a threat to reduce Byrne funds to encourage states to adopt legislation implementing Megan's Law. Under Megan's Law, states were given a choice of two methods of classifying sex offenders. They could either set up a system placing particular sex offenders into different classifications based upon the specific crime they had committed, or they could set up a system placing particular sex offenders into different classifications based on an individualized assessment of the risk that the particular offender would re-offend. Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy,* 6 Ohio St. J.

Crim. L. 51, 71 (2008). Ohio chose to place sex offenders into classifications based on an individualized risk assessment. In its version of Megan's Law, which it adopted in 1999, it established three categories of sex offenders, starting with the category least likely to reoffend: (1) sexually oriented offenders, (2) habitual sex offenders, and (3) sexual predators. *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, at ¶12. Former Section 2950.09 of the Ohio Revised Code specifically authorized trial courts to hold a hearing to determine whether a defendant convicted of a sexually-oriented offense was likely to re-offend and, therefore, should be classified as a sexual predator. R.C. 2950.09(B)(1)(a) (2005). (An offender with a previous conviction for committing a sexually-oriented offense was classified as, at least, a habitual sex offender. R.C. 2950.01(B) (2005).)

{¶8} The general scheme of the federal Adam Walsh Act is to require classification of sex offenders based on the specific crime they committed (a "conviction-based" classification method) rather than based on an individualized assessment of the likelihood that they will re-offend (a "risk-based" classification method). Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 Ohio St. J. Crim. L. 51, 77 (2008). With its adoption of its version of the Adam Walsh Act, Ohio moved from the "risk-based" classification method it had followed under Megan's Law to the now mandated "conviction-based" method.

{¶9} The federal Adam Walsh Act defines a "sex offender" as someone who has been convicted of a "sex offense" and further defines a "sex offense" as, among other things, a crime that has an element "involving a sexual act or sexual contact with another." 42 U.S.C. § 16911(1), (5). It then requires classification of sex offenders as Tier I, Tier II, or Tier III sex offenders based upon the specific sex offense they committed. The particular tier into which a sex offender must be placed is determined by the specific conduct covered by the crime he or

she was convicted of committing and whether that crime carries a possible incarceration of more or less than one year. 42 U.S.C. § 16911(2)-(4).

{¶10} As discussed above, Mr. Battistelli was convicted of violating Section 2907.04 of the Ohio Revised Code by engaging in unlawful sexual conduct with someone 13, 14, or 15 years old. Section 2907.04 was a "sexually oriented offense" under Ohio's version of Megan's Law. R.C. 2950.01(D) (2005). Under that law, therefore, he would have at least been classified as a sexually-oriented offender and, depending upon an assessment of the likelihood he would re-offend, could have been classified as a sexual predator.

{¶11} The federal Adam Walsh Act, however, specifically excludes from the definition of sex offense "[a]n offense involving consensual sexual conduct . . . if the victim was at least 13 years old and the offender was not more than 4 years older than the victim." In turn, under Ohio's version of the Adam Walsh Act, when, as in this case, a defendant is less than four years older than the other person, a violation of Section 2907.04 of the Ohio Revised Code is not a "[s]exually oriented offense" unless the other person did not consent to the sexual conduct. R.C. 2950.01(A)(2). Similarly, the definition of "[s]ex offender" under Ohio's Adam Walsh Act specifically excludes a person convicted of a "sexually oriented offense" involving consensual sexual conduct if "[t]he victim of the offense was thirteen years of age or older, and the person who is convicted of . . . committing the sexually oriented offense is not more than four years older than the victim." R.C. 2950.01(A)(2), (B)(2). Finally, although some defendants who violate Section 2907.04 are classified as "Tier I sex offenders" under Section 2950.01(E)(1)(b) of the Ohio Revised Code, defendants who are less than four years older than the person with whom they engaged in sexual conduct are excluded from classification if that other person consented to the sexual conduct. Whether Mr. Battistelli committed a "sexually

oriented offense," is a "sex offender," and must register as a "Tier I sex offender," therefore, depends on whether the other person consented to the sexual conduct.

OHIO'S LEGISLATIVE INTENT

{¶12} Mr. Battistelli has suggested that Ohio's legislative intent in adopting its version of the Adam Walsh Act, "as evidenced by the statute itself, is to follow the federal government's direction." There is no doubt that that is true. It should be noted, however, that the federal Adam Walsh Act only sets minimum requirements with which a state must comply in order to continue receiving its full share of Byrne funds. "[T]he Act generally constitutes a set of *minimum* national standards and sets a floor, not a ceiling, for jurisdictions' programs. Hence, for example, a jurisdiction may have a system that requires registration by broader classes of convicted offenders than those identified in [the federal Adam Walsh Act] . . . ." The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,046 (July 2, 2008). While federal law allows Ohio to exclude from registration 18-year-old defendants convicted of sexual conduct with persons less than four years younger than they are when the conduct is consensual, therefore, it does not require that exclusion. Ohio could require all defendants convicted of violating Section 2907.04 to register as sex offenders without losing federal funds. Rather than doing that, however, it carved out an exception, consistent with the exception permitted by federal law, for defendants convicted of violating Section 2907.04 when the defendant is less that four years older than the other person and the sexual conduct is consensual.

INHERENT AUTHORITY

{¶13} As noted by the trial court, while Ohio's Megan's Law specifically provided for hearings to determine whether a particular sexually oriented offender should be classified

as a sexual predator, Ohio's Adam Walsh Act does not provide for hearings to determine whether a particular defendant convicted of violating Section 2907.04 must register as a Tier I sex offender. By Section 2950.03(A)(2) of the Ohio Revised Code, however, the General Assembly imposed upon trial courts a duty to notify defendants they sentence after January 1, 2008, who have a duty to register as sex offenders of that duty. In order to determine whether Mr. Battistelli has a duty to register, the trial court had to determine whether the person with whom Mr. Battistelli engaged in sexual conduct consented to that conduct.

{¶14} Courts have inherent powers beyond those specifically given them by constitutions and statutes. "The [inherent powers] doctrine provides that when a constitution or statute gives a general power, or enjoins a duty, it also grants by implication every particular power necessary for the exercise of the one or the performance of the other. The doctrine may be utilized to fill in the gaps of the express provisions of law. It helps the courts respond to practical problems that the express provisions of the constitution, legislative acts, and court rules do not contemplate; and it assists each department of government in carrying out those responsibilities that naturally fall within the scope of its authority." Roger A. Silver, *The Inherent Power of the Florida Courts*, 39 U. Miami L. Rev. 257, 289 (1985). See *Hale v. State*, 55 Ohio St. 210, 213 (1896). By assigning the trial court the duty to determine whether the person with whom Mr. Battistelli engaged in sexual conduct consented to that conduct, the General Assembly implicitly authorized it to conduct a hearing to determine that question.

{¶15} Mr. Battistelli has suggested that holding a hearing on the issue of consent will deny him due process because an allegation of lack of consent was not included in his indictment. Lack of consent, however, is not an element of a violation of Section 2907.04,

and, therefore, there was no requirement that it be alleged in the indictment. See *State v. Colon*, 118 Ohio St. 3d 26, 2008-Ohio-1624, at ¶44.

{¶16} Once the trial court convicted Mr. Battistelli of violating Section 2907.04, it had a duty to determine whether he was a sex offender. In order to carry out that duty, it must, after providing notice, hold a hearing to determine the issue of consent. That notice, coupled with Mr. Battistelli's opportunity to present evidence at the hearing, will afford him due process. See *Ohio Valley Radiology Assocs. Inc. v. Ohio Valley Hosp. Ass'n*, 28 Ohio St. 3d 118, 124-25 (1986).

CONCLUSION

{¶17} The State's assignment of error is sustained. This matter is remanded to the trial court for a hearing on the question of whether the person with whom Mr. Battistelli engaged in sexual conduct consented to that conduct.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Oberlin Municipal Court, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶18} I concur in the judgment of the majority because the trial court had inherent authority to hold an evidentiary hearing to determine whether the sexual act engaged in by Mr. Battistelli was consensual.

CARR, J.
DISSENTS, SAYING:

{¶19} I respectfully dissent.

{¶20} Battistelli was charged with two counts unlawful sexual conduct under R.C. 2907.04(A), which states, "No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard." After pleading "no contest" to the charges, Battistelli was found guilty by the trial court. As the majority noted, Battistelli was not charged with, nor convicted of, a crime which brought the issue of consent into question.

{¶21} Under the Adam Walsh Act, a defendant who is convicted of violating R.C. 2907.04 will be classified as a "Tier I sex offender/child-victim offender" when "the offender is less than four years older than the other person with whom the offender engaged in sexual

conduct, *the other person did not consent to the sexual conduct*, and the offender previously has not been convicted of or pleaded guilty to a violation of section 2907.02, 2907.03., or 2907.04 of the Revised Code or a violation of former section 2907.12 of the Revised Code[.]" (Emphasis added). R.C. 2950.01(E)(1)(b). As the trial court noted in its sentencing entry, the language of the statute is inherently problematic. The State does not have to prove lack of consent in order to obtain a conviction under 2907.04(A). However, a defendant convicted under R.C. 2907.04(A) will be classified as a "Tier I sex offender" only when the victim did not consent to the sexual conduct. The statute does not contain a directive to resolve this problem. While there is no dispute that Battistelli is less than four years older than the victim and that he has not been previously convicted of a predicate offense, the fact remains that Battistelli was not charged with an offense which brought the issue of consent into question. Therefore, the trial court had no alternative other than to find that Battistelli was not subject to the registration requirements of R.C. 2950.01(E) as written.

{¶22} As the majority explained, Ohio adopted a version of Megan's Law in 1999 which allowed for sex offenders to be placed into classifications based on individualized risk assessments. Former R.C. 2950.09 authorized trial courts to hold hearings when making a determination on the issue of whether a defendant was likely to re-offend. Ohio's adoption of the Adam Walsh Act in 2007 signified a departure from a risk-based approach and the implementation of a conviction-based classification approach. The Adam Walsh Act does not explicitly authorize trial courts to hold hearings to make a determination on the issue of whether a defendant convicted under R.C. 2907.04(A) engaged in non-consensual sexual conduct and, therefore, must register as a Tier I offender.

{¶23} While I do not dispute that courts possess certain inherent powers in carrying out judicial responsibilities, I reject the notion that R.C. 2950.01(E)(1)(b) implicitly grants trial courts the authority to conduct hearings. The adoption of a conviction-based approach to classifying offenders is designed to minimize the need for individualized, fact-specific determinations by the trial court. Here, lack of consent is not an element of the crime with which Battistelli was charged. When he pled "no contest," he admitted those facts in the indictment as true. Crim.R. 11(B)(2). Holding a hearing to determine the issue of consent opens the door to allow for a re-characterization of Battistelli's conviction. To classify him as a "Tier I sex offender" is tantamount to imposing a sanction on him for a crime for which he was not indicted.

{¶24} Assuming, for the sake of argument, that I were to concur with the majority's holding that the trial court has the authority to inquire into the issue of consent, I would still maintain that a hearing is unnecessary in this case. The victim signed an affidavit stating that the sexual conduct was not consensual. Therefore, if the trial court were to consider the consent issue, a hearing would be unnecessary and would only cause further trauma for the victim.

APPEARANCES:

FRANK S. CARLSON, attorney at law, for appellant.

JACK W. BRADLEY, and MICHAEL STEPANIK, attorneys at law, for appellee.