IN THE SUPREME COURT OF OHIO

DISCRETIONARY APPEAL FROM THE
FRANKLIN COUNTY COURT OF APPEALS,
TENTH APPELLATE DISTRICT,
CASE NOS. 17AP-251 AND 17AP-252

HARMON LINGLE & MARK GROSSER,
Plaintiffs-Appellants,

v.

STATE OF OHIO, ET AL.
Defendant-Appellee.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS HARMON LINGLE AND MARK GROSSER

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APPENDIX:

THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC AND GREAT GENERAL INTEREST

I. Introduction

The Tenth District's decision in this case expressly and directly conflicts with the decisions of the First, Fifth, and Eighth Districts. The question is whether Ohio statute requires people convicted of out-of-state offenses to register as "sexual predators" in Ohio even though they don't meet the statutory definition of "sexual predator." The Tenth District reached its unique decision by not including the statutory definition of "sexual predator" in its review of the process for deciding whether a person with an out-of-state conviction is a sexual predator. R.C. 2950.01(E); 2950.09(F).[1]

This Court should accept jurisdiction, and instead of looking at only one Ohio Revised Code section in isolation, this Court should give meaning to both R.C. 2950.01 and R.C. 2950.09 and reverse the Tenth District's holding that prohibits the trial court from considering the statutory definition of "sexual predator" when deciding whether a person is a "sexual predator."

[1] Because their offenses occurred before January 1, 2008, the version of Megan's Law applicable to them immediately before that date applies to this case. *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108 (2011), paragraph one of the syllabus. All statutory references in this memorandum are to that version of the statute.

II. Discussion

The Tenth District's opinion in this case directly and expressly conflicts with the decisions of *State v. Pasqua*, 157 Ohio App.3d 427, 2004-Ohio-2992 (1st Dist.); *State v. Forsythe*, 5th Dist. Stark No. 2012CA00225, 2013-Ohio-3301, ¶ 20; and *State v. McMullen*, 8th Dist. Cuyahoga No. 97475, 2012-Ohio-2629, ¶ 21. The Tenth District alone held that in a proceeding pursuant to R.C. 2950.09(F)(2) to determine whether another state's lifetime-registration requirement can be "substantially similar" to an Ohio classification as a "sexual predator," the person has no ability to prove that he is unlikely to reoffend.

The Tenth District's opinion expressly rejects the holdings of the First, Fifth, and Eighth Appellate Districts on the dispositive issue in this case, finding that those courts "effectively inserted words into R.C. 2950.09(F) which are not present in that statutory action." Opinion at ¶ 31. The Tenth District also noted that the First, Fifth, and Eighth Districts' decisions were consistent with each other. It held that the Fifth Appellate District was "following" *Pasqua*, and that the Eighth Appellate District did the "same." Opinion at ¶ 29, citing *State v. Forsythe*, 5th Dist. Stark No. 2012CA00225, 2013-Ohio-3301, ¶ 20; and *State v. McMullen*, 8th Dist. Cuyahoga No. 97475, 2012-Ohio-2629, ¶ 21.

The issue is important. Under the State's theory, Mr. Lingle and Mr. Grosser must register as sexual predators in Ohio for life even if they can prove by clear and convincing evidence that they are unlikely to commit another sex offense. Under the trial court's decision and the holdings of the First, Fifth, and Eighth Appellate Districts,

Mr. Lingle and Mr. Grosser are entitled to an evidentiary hearing where they can produce evidence that they are not a threat.

As a result of this conflict, people who live in Franklin County can be required to register for life as a "sexual predator" even if they could prove to a judge that they are unlikely to reoffend. But people who live across the border in the Fifth District's Licking or Delaware Counties are not treated as "sexual predators" unless they meet the statutory definition of the term. R.C. 2950.01(E). The difference also creates an opportunity for forum shopping because a person need only be "temporarily … domiciled" in a county to file a challenge to their predator status, so they could check into a hotel, wait a few days, and then file. R.C. 2950.09(F)(1).

Ohio has a statewide sex offender registration system. One county should not base its system on only one part of Chapter 2950 while the rest of the state bases its system on the entire chapter. This Court should take this case.

STATEMENT OF THE CASE AND THE FACTS

The facts come from the allegations in the pleadings.

Because this case was resolved in the trial court based on a motion for judgment on the pleadings, reviewing courts are restricted to the allegations in the pleadings as well as any material incorporated by reference or attached as exhibits to the pleadings. *See, e.g., Curtis v. Ohio Adult Parole Auth.*, 10th Dist. No. 04AP-1214, 2006-Ohio-15, ¶ 24.

Harmon Lingle and Mark Grosser serve their time then move to Ohio from Florida.

Both Harmon Lingle and Mark Grosser moved to Ohio after completing their prison sentences for sex offenses in Florida. The parties agree that the two men are subject to Ohio's Megan's Law, not the Adam Walsh Act.

Mr. Lingle was indicted in 1990 for a "lewd and lascivious act," a second-degree felony. Fla. Stat. § 800.04. He registered in Florida in 1998 after serving a prison term. After living in Missouri for a period, he moved to Delaware County, Ohio, where he was classified as a "sexually oriented offender" by the Delaware County Sheriff's Office. He then moved to Franklin County, where the Franklin County Sheriff's Office told him to register as a "sexual predator."

He filed a civil complaint against the Ohio Attorney General's Office in Franklin County Common Pleas Court arguing that the Franklin County Sheriff's Office incorrectly classified him as a sexual predator and that he should have been classified as a sexually oriented offender, and seeking a declaration that he be removed from Ohio's

sex offender database. In the alternative, he requested a hearing "at which he may present evidence demonstrating that under Ohio law, he would have been adjudicated a sexually oriented offender, and subject to only a ten-year reporting requirement."

Mr. Grosser was convicted of two counts of "solicitation of a child over the internet," both third-degree felonies, Fla. Stat. § 847.0135(3), as well as "transmission of material harmful to minors," a third-degree felony. Fla. St. § 847.0138(2). The crimes occurred between August 31, 2006 and March 24, 2007. After he posted bond in 2007, he moved to Ohio while his case was pending in Florida. He served his Florida prison term, and after November 2008, he returned to Ohio. He initially registered as a Tier I offender in Ohio, but in 2012, the Ohio Attorney General's Office changed his classification to "sexual predator," a label that the Franklin County Sheriff has continued to impose upon him.

He filed a complaint in Franklin County Common Pleas Court seeking the same relief as Mr. Lingle.

After the Ohio Attorney General filed an answer in both cases, Mr. Lingle and Mr. Grosser filed motions for judgment on the pleadings. Due to the similarity of the cases, the trial court consolidated the cases by agreement. The trial court then granted in part the motions Mr. Lingle and Mr. Grosser had filed. Specifically, the trial court found that their initial classification as sexual predators pursuant to their prior convictions

was lawful, but that they were entitled to hearings where they could show that they were not likely to reoffend.

The Tenth District expressly refuses to follow the decisions of the First, Fifth, and Eighth Appellate Districts.

The Attorney General filed a notice of appeal, and the Tenth District reversed. That court, expressly disagreeing with decisions from the First, Fifth, and Eighth Districts, held that whether Mr. Lingle and Mr. Grosser met the statutory definition of "sexual predator" was irrelevant to whether they were "sexual predators" under Ohio law.

Mr. Lingle and Mr. Grosser file this timely discretionary appeal.

ARGUMENT

Proposition of Law:

A person with an out-of-state sex offense conviction cannot be required to register in Ohio as a "sexual predator" if they can show that their home-state registration requirement is not substantially similar to Ohio law because the person is not likely to reoffend, and therefore does not fit the statutory definition of "sexual predator" in R.C. 2950.01(E).

I. Statutory Construction

The Ohio General Assembly has defined a "sexual predator" as a person who has been convicted of a "sexually oriented offense" and who "is likely to engage in the future in one or more sexually oriented offenses." R.C. 2950.01(E). The General Assembly intended for the term to apply to out-of-state offenders because the definition of "sexually oriented offense" includes out-of-state convictions. R.C. 2950.01(D)(1)(f). ("'Sexually oriented offense' [includes a] violation of … any … law of another state …that is or was substantially equivalent" to an Ohio sexually oriented offense.)

The Tenth District's decision in this case fails to give meaning to the General Assembly's decision to include out-of-state offenders in the definition of "sexually oriented offense" and therefor in the definition of "sexual predator." As a result, unlike the First, Fifth, and Eighth Appellate Districts, the Tenth Appellate District denies out-of-state offenders their statutory opportunity to prove that they are not likely to re-offend.

Here are the relevant statutory provisions that show that a person cannot be a "sexual predator" in Ohio unless they meet the statutory definition, which applies only to people who are likely to reoffend:

- A "sexual predator" is a person who has been convicted of a "sexually oriented offense" and "is likely to engage in the future in one or more sexually oriented offenses." R.C. 2950.01(E)(1). A "sexually oriented offense" includes sex offenses from another state that are "substantially equivalent" to an Ohio sex offense. R.C. 2950.01(D)(1)(f).

- If a person who had lifetime registration in another state comes to Ohio, that person is automatically classified as a "sexual predator." R.C. 2950.09(A).

- An out-of-state person automatically classified as a "sexual predator" can ask a court to change that status to "sexually oriented offender." R.C. 2950.09(F)(1).

- A court can only hold that the out-of-state person is not a sexual predator if the other state's registration requirements are not "substantially similar" to Ohio's. R.C. 2950.09(F)(2).

- Because the Legislature's definition of "sexual predator" includes the commission of a "sexually oriented offense," R.C. 2950.01(D)(1)(f), and because the definition of "sexually oriented offense" includes out-of-state offenses, R.C. 2950.01(E)(1), the risk-to-reoffend definition of "sexual predator" applies to out-of-state offenders.

Here, the court of appeals, by limiting its analysis to R.C. 2950.09(F), allows Ohio to treat someone as a "sexual predator" even if they don't meet the statutory definition of the term contained in R.C. 2950.01(E). The only way to give effect to R.C. 2950.01(D)(1)(f), 2950.01(E)(1), *and* 2950.09(F)(2), is to hold that another state's lifetime registration requirements are substantially similar to Ohio's only if the person is a risk

to reoffend. Under the Tenth District's rule, a person with an out-of-state sex offense will be forever labeled a sexual predator even if they don't meet the statutory definition of the term.

II. United States and Ohio Constitutions

As the First District correctly held, before a person is declared a sexual predator, a hearing on likelihood of reoffending is constitutionally necessary under the Due Process clause of the Fourteenth Amendment to the United States Constitution as well as Article 1, section 16 of the Ohio Constitution:

> Ohio courts, including this court, have held that R.C. 2950.09(B) and (C) fully comport with procedural due process because both sections give effect to an offender's right to a hearing with notice and an opportunity to be heard. *See State v. Lee*, 128 Ohio App.3d 710, 716, 716 N.E.2d 751 (1st Dist.1998); *State v. Lance*, 1st Dist. Hamilton Nos. C-970301, C-970282, and C-970283, 1998 WL 57359 (Feb. 13, 1998). Both the legislature and the Ohio Supreme Court have determined that this hearing process is necessary because whether an offender is a sexual predator turns upon whether that offender is likely to commit sexually-oriented offenses in the future, which is, in turn, a fact-based determination. *State v. Eppinger*, 91 Ohio St.3d 158, 743 N.E.2d 881 (2001); *State v. Ward*, 130 Ohio App.3d 551, 720 N.E.2d 603 (1999); *State v. Hicks*, 128 Ohio App.3d 647, 650, 716 N.E.2d 279, 280 (1998). Therefore, classifying out-of-state offenders such as Pasqua as sexual predators on the basis of their reporting requirements alone would not advance the stated purpose of R.C. Chapter 2950, which is to label only those offenders who have the greatest likelihood of committing sexually-oriented offenses in the future.

Pasqua at ¶ 18-24. Similarly, under Section 28, Article II of the Ohio Constitution, requiring permanent, quarterly, lifetime registration without a hearing as to a person's

risk of recidivism would be a punishment that cannot be imposed retroactively. *See State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, ¶ 14-17 (2011).

CONCLUSION

A person who does not fit the statutory definition of a "sexual predator" is not a sexual predator. Further, requiring people with out-of-state convictions to register for life without regard to whether they pose a risk would violate the Due Process provisions of the United States Constitution and the Due Process and Retroactivity provisions of the Ohio Constitution.

This Court should accept this appeal and reverse the decision of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically. A copy was forwarded by regular U.S. Mail to Zachary Huffman, Assistant Attorney General, Criminal Justice Section, Corrections Unit, 150 East Gay Street, 16th Floor, Columbus, Ohio 43215; and to Bryan B. Lee, Assistant Franklin County Prosecutor, 373 S. High Street, 13th Floor, Columbus, Ohio 43215 on this 9th day of September, 2019.

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