

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Ron O'Brien, Prosecuting Attorney, Franklin County, Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 10AP-1198
	:	(C.P.C. No. 09 CV-01-1330)
Steven D. McGraw,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	
	:	

D E C I S I O N

Rendered on August 4, 2011

Ron O'Brien, Prosecuting Attorney, and *R. Matthew Colon*,
for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Defendant-appellant, Steven D. McGraw, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court both denied his motion for

summary judgment and issued a permanent injunction banning him from residing at his current residence. For the following reasons, we affirm the decision of the trial court.

{¶2} Appellant assigns two errors for our consideration:

[I.] THE TRIAL COURT ERRED IN FAILING TO FIND THAT OHIO'S RESIDENCY RESTRICTIONS VIOLATE THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE 1 OF THE OHIO CONSTITUTION.

[II.] THE TRIAL COURT ERRED WHEN IT ENTERED AN ORDER PERMANENTLY ENJOINING THE DEFENDANT FROM RESIDING AT THE PREMISES OF 1492 KINGRY STREET BECAUSE R.C. 2950.034 ONLY AUTHORIZES THE COURT TO ENJOIN THE DEFENDANT FROM RESIDING AT A LOCATION FOR AS LONG AS A SCHOOL, PRESCHOOL, OR DAY-CARE CENTER IS OPERATING WITHIN ONE THOUSAND FEET OF THE RESIDENCE.

{¶3} In a previous case, McGraw was convicted of a misdemeanor sex offense, and was therefore classified as a sexually oriented offender. (R. 28, ¶2.) At some point in the past, McGraw took up residence at 1492 Kingry Street in Columbus, Ohio ("residence"). (R. at ¶3.) Less than one thousand feet away, located at 1380 Cleveland Avenue in Columbus, Ohio, is Mother's Helper Childcare ("Mother's Helper"), a day-care center. (R. 66, at 9; R. 46, Exhibit B.)

{¶4} On January 29, 2009, appellee, Ron O'Brien, Prosecutor for Franklin County ("O'Brien"), filed a complaint against McGraw seeking injunctive relief under R.C. 2950.034, a statute that limits where sexual offenders are permitted to reside. On June 30, 2009, McGraw filed an answer, as well as two motions for summary judgment. On November 5, 2009, O'Brien moved for summary judgment. On June 2, 2010,

Magistrate Petrucci denied both of McGraw's motions, while granting, in part, and denying, in part, O'Brien's. Magistrate Petrucci found that R.C. 2950.034 was constitutional, that the residence was within one thousand feet of Mother's Helper, and that there was a question of material fact as to if Mother's Helper properly posted required signage. On August 20, 2010, the trial court adopted Magistrate Petrucci's holding.

{¶5} Magistrate Petrucci held a bench trial on November 1, 2010, in order to determine if Mother's Helper in fact had the required signage. Issuing a decision on November 2, 2010, Magistrate Petrucci concluded that the sign was properly visible as required under R.C. 2950.034. While McGraw timely raised an objection, the trial court adopted Magistrate Petrucci's holding on December 1, 2010, and permanently enjoined McGraw from the residence. On December 28, 2010, McGraw appealed this decision.

{¶6} By his first assignment of error, McGraw alleges that the trial court erred when it denied his motion for summary judgment in deciding that the residency restrictions of R.C. 2950.034 did not violate the Due Process Clause to the United States Constitution as well as did not violate Section 16, Article I, Ohio Constitution.

The legal standard for appellate review of a motion for summary judgment is a de novo review. *State of Ohio, Crime Victims Reparations Fund v. Pryor*, 10th Dist. No. 07AP-90, 2007-Ohio-4275; *Duncan v. Capitol S. Community Urban Redevelopment Corp.*, 10th Dist. No. 02AP-653, 2003-Ohio-1273. As a de novo review, the court may grant summary judgment when: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, that being adverse to the non-moving party. Civ.R. 56; *Bostic*

v. Connor (1988), 37 Ohio St.3d 144; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶7} McGraw argues that restricting where a sexual offender may reside is a violation of said offender's due process rights under both the state and federal constitutions. McGraw bases this argument on the belief that a residence of one's own choosing is a fundamental right or interest.

{¶8} The legal standard for reviewing an alleged violation of due process is a determination of which test applies, either rational basis or strict scrutiny. A rational basis test applies only if there is no interference with a fundamental right, while a strict scrutiny test applies when either a fundamental right is interfered with or the law itself disadvantages an inherently suspect class. *New Orleans v. Dukes* (1976), 427 U.S. 297, 303, 96 S.Ct. 2513; *Zablocki v. Redhail* (1978), 434 U.S. 374, 386, 98 S.Ct. 673. Under the strict scrutiny test, the law in question must be narrowly tailored to promote a compelling governmental interest in order to be constitutional. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334. Under the rational basis test, the law simply must be rationally related to a legitimate governmental interest in order to be constitutional. *Heller v. Doe* (1993), 509 U.S. 312, 320, 113 S.Ct. 2637.

{¶9} It is well established that sexual offenders are not a protected class. *United States v. LeMay* (C.A.9, 2001), 260 F.3d 1018, 1030; *State v. Williams*, 88 Ohio St.3d 513, 530, 2000-Ohio-428. As such, the only argument for strict scrutiny upon which McGraw can rely is that he has a fundamental right to live at a location of his choosing. Ohio law, in cases with almost identical facts, has made it quite clear that there is no

fundamental right violated by the law's residency restriction: "the residency restriction [of R.C. 2950.034] is not subject to a strict scrutiny challenge, but to rational basis review." *State ex rel. O'Brien v. Messina*, 10th Dist. No. 10AP-37, 2010-Ohio-4741, ¶25; *State ex rel. O'Brien v. Heimlich*, 10th Dist. No. 08AP-521, 2009-Ohio-1550; *Franklin Cty. Prosecuting Atty. O'Brien v. Smith*, 10th Dist. No. 10AP-52, 2010-Ohio-3748.

{¶10} As there is no fundamental right interfered with, or protected class disadvantaged by the law, a rational basis test applies. As McGraw does not contest that the government has a rational basis for creating this residency restriction, there is no contention that the law fails the constitutional requirement.

{¶11} For these reasons, we conclude that McGraw has failed to demonstrate that there is a genuine issue of material fact and that he was entitled to summary judgment as a matter of law.

{¶12} Accordingly, the first assignment of error is overruled.

{¶13} By his second assignment of error, McGraw alleges that the trial court erred in granting a permanent injunction banning him from residing at the residence.

{¶14} McGraw bases his argument on various stipulations and hypotheticals, all of which relate to the possibility of Mother's Helper moving and/or closing at some point in the indefinite future. While he concedes that as long as Mother's Helper continues to operate at its current location, he is banned from the residence, he argues that the court should have taken these issues into account before issuing their injunction. McGraw believes that the injunction should be worded such that it only applies up until the point

that Mother's Helper is either no longer located within one thousand feet or is no longer a day-care center.

{¶15} This error is not ripe for review because hypothetical and stipulatory arguments are not ripe for appellate review. "Ripeness concerns whether the legal issue at the time presented in a court is sufficiently concrete for decision." *U.S. ex rel. Ricketts v. Lightcap* (C.A.3, 1977), 567 F.2d 1226. This prevents courts from conducting appellate hearings on premature claims. *Johnson v. Ferguson-Ramos*, 107 Ohio St.3d 1410, 2005-Ohio-5859. In the present case, there is absolutely nothing concrete in the possible scenarios that McGraw is presenting to the court. This court cannot speculate on the future, nor can it assume that a current situation is likely to change.

{¶16} For these reasons, we conclude that McGraw failed to present concrete arguments that were ripe for review.

{¶17} Accordingly, the second assignment of error is overruled.

{¶18} For the foregoing reasons, the first and second assignments of error are overruled. We therefore affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and KLATT, J., concur.
