

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 11AP-618
 : (M.C. No. 2006 CRB 16699)
 Aaron K. Richey, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 14, 2012

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, Chief Prosecutor, and *Melanie R. Tobias*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Municipal Court.

BROWN, P.J.

{¶ 1} This is an appeal by defendant-appellant, Aaron K. Richey, from a judgment of the Franklin County Municipal Court, denying appellant's motion to withdraw a no contest plea and ordering reinstatement of appellant's classification as a sexually oriented offender.

{¶ 2} On July 2, 2006, appellant was charged with one count of sexual imposition, in violation of R.C. 2907.06(A)(1), a third-degree misdemeanor. On September 28, 2006, appellant entered a no contest plea to the charge. The trial court

accepted the plea and entered a finding of guilt; the court sentenced appellant to 60 days incarceration, and imposed a \$500 fine.

{¶ 3} On September 5, 2008, appellant, through representation by the public defender's office, filed a motion to set aside his judgment of conviction and to withdraw his no contest plea pursuant to Crim.R. 32.1. By decision and entry filed October 16, 2008, the trial court denied appellant's motion.

{¶ 4} Appellant filed an appeal with this court from the trial court's denial of his motion, raising three assignments of error. Specifically, appellant argued that the trial court erred in: (1) finding that appellant knowingly, voluntarily, and intelligently waived his right to counsel, (2) determining that his plea was intelligently entered, and (3) holding that the enhancements and increases of Am.Sub.S.B. No. 10 ("S.B. No. 10") did not require plea withdrawal. In *State v. Richey*, 10th Dist. No. 08AP-923, 2009-Ohio-2988 ("*Richey I*"), this court overruled all three assignments of error and affirmed the judgment of the trial court.

{¶ 5} Appellant filed an appeal with the Supreme Court of Ohio, raising the following four propositions of law:

Proposition of Law I:

Unilateral removal of appointed counsel because of an indigent criminal defendant's purported non-compliance with financial verification requirements, without a hearing and without judicial instruction as to the potential consequences of non-compliance, violates the defendant's right to assistance of counsel.

Proposition of Law II:

When presented with information suggesting that a criminal defendant may be indigent, the trial court has an independent, affirmative constitutional duty to inquire into the ability of the defendant to afford counsel.

Proposition of Law III:

A trial court that elects to expand the scope of its plea colloquy to include additional information beyond that required by Criminal Rule 11 violates the due process rights of the criminal

defendant if it misleads the defendant as to his rights or the potential consequences of a no contest plea.

Proposition of Law IV:

Legislative enactments that impose new collateral sanctions for conviction of a misdemeanor, including felony consequences for non-compliance with the sanctions, where such consequences and sanctions are greater and more serious than those applicable at the time of the no contest plea, constitute manifest injustice sufficient to justify withdrawal of a no contest plea.

{¶ 6} On November 18, 2009, the Supreme Court accepted a discretionary appeal with respect to proposition of law No. IV. *See State v. Richey*, 123 Ohio St.3d 1492, 2009-Ohio-6015. On August 17, 2010, the Supreme Court vacated this court's decision and remanded the matter to the trial court for further proceedings consistent with the Supreme Court's decision in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424. *See In re Sexual Offender Reclassification Cases*, 126 Ohio St.3d 322, 2010-Ohio-3753, ¶ 132.

{¶ 7} On August 20, 2010, the state of Ohio, plaintiff-appellee, filed a motion with the trial court to set the case for "miscellaneous hearing" based upon the Supreme Court's remand. On April 19, 2011, appellant filed a memorandum contra the state's motion, as well as a new motion to withdraw his no contest plea. On June 24, 2011, the trial court issued a decision and entry denying appellant's motion to withdraw his no contest plea and reinstating appellant's classification as a sexually oriented offender, effective October 31, 2006.

{¶ 8} On appeal, appellant sets forth the following assignment of error for this court's review:

The trial court erred in failing to vacate Appellant's guilty plea on remand from the Ohio Supreme Court.

{¶ 9} Under his single assignment of error, appellant argues that the trial court erred in failing to vacate his guilty plea following the Supreme Court's remand order. As noted under the facts, the Supreme Court vacated this court's judgment and remanded the matter to the trial court "for further proceedings consistent with *State v. Bodyke*." *In re Sexual Offender Reclassification Cases* at ¶ 131.

{¶ 10} Appellant argues that, in 2006, at the time he entered his plea to a charge of gross sexual imposition, he became a "sexually oriented offender" by operation of law; however, following the passage of S.B. No. 10, appellant received notification by the Ohio Attorney General that he had been reclassified as a "Tier I offender," subject to new (more stringent) reporting obligations. Appellant contends that, in light of legislative changes resulting in increased sanctions, the trial court's failure to fully advise him of the consequences of his plea in 2006 created a manifest injustice warranting the withdrawal of that plea. Appellant maintains that, although the Supreme Court did not issue a written decision with its remand order in the present case, the court's order to vacate was not limited in scope, nor was the remand order limited to returning appellant to his prior status under Megan's Law. We disagree.

{¶ 11} The trial court, following the Supreme Court's remand, addressed and rejected appellant's argument that this court's entire judgment was vacated by virtue of the Supreme Court's decision. The court noted that the Supreme Court accepted jurisdiction only with respect to appellant's fourth proposition of law, relating to his third assignment of error presented before this court in *Richey I*. Further, the trial court observed, "[n]ot considered by the Ohio Supreme Court were the issues of whether Defendant waived his right to counsel and entered the plea knowingly and intelligently, which relate to the first three Propositions of Law set forth in Defendant's Memorandum in Support of Jurisdiction to the Ohio Supreme Court." (Trial Court Decision, 2.) The trial court deemed it "hard to imagine that the Ohio Supreme Court meant to vacate a decision involving issues it did not undertake to review," and concluded that "the Ohio Supreme Court's order vacating the Court of Appeals judgment applies only to the Third Assignment of Error determination in the appellate Court." (Trial Court Decision, 2.)

{¶ 12} The trial court further held that, "because the sexual offender reclassification was determined in *Bodyke* * * * to be unenforceable, the argument presented by Defendant that it constitutes manifest injustice requiring that the plea be vacated is now moot." Applying the holding in *Bodyke*, the trial court determined that, "[p]ursuant to *Bodyke*, the sexual offender reclassification previously attempted is considered void, *ab initio*, and the original classification of the Defendant as a 'sexually

oriented offender' should be re-imposed, effective October 31, 2006, pursuant to the Entry journalized that day." (Trial Court Decision, 3.)

{¶ 13} Upon review, we find no error with the trial court's determination. In *Richey I*, this court previously held, in addressing appellant's second assignment of error, that the trial court "did not abuse its discretion in finding that the trial court's statements regarding the sex offender registration requirements at the time appellant entered his plea did not constitute a manifest injustice requiring that appellant be allowed to withdraw that plea." *Richey I* at ¶ 18. As noted by the state, the Supreme Court specifically declined to accept that issue (raised under his third proposition of law) for review. Rather, the Supreme Court only accepted review of the fourth proposition of law, in which appellant argued that, based upon the passage of S.B. No. 10, he was now subject to felony consequences for failure to comply with sanctions that had been retroactively attached to his misdemeanor conviction.

{¶ 14} The issue presented by appellant's fourth proposition of law arose out of this court's disposition of appellant's third assignment of error in *Richey I*. Specifically, this court overruled appellant's third assignment of error, holding in part that "the provisions of R.C. Chapter 2950 have generally been recognized as remedial in nature, and thus not unconstitutionally retroactive." *Richey I* at ¶ 20. However, subsequent to this court's decision in *Richey I*, the Supreme Court rendered its decision in *Bodyke*, in which the court held that the provisions of R.C. 2950.031 and 2950.021, requiring the attorney general to reclassify sex offenders who had already been classified by court order under former R.C. 2950 (i.e., Ohio's version of "Megan's Law") were unconstitutional as violating the separation-of-powers doctrine. The court in *Bodyke* thus concluded that "R.C. 2950.031 and 2950.032 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." *Bodyke* at ¶ 66.

{¶ 15} In a related decision rendered subsequent to *Richey I*, the Supreme Court relied upon *Bodyke* in holding that an offender who had originally been classified as a sexually oriented offender and ordered to register annually for ten years under Megan's Law could not be prosecuted for failing to comply with more restrictive registration requirements after being reclassified as a Tier III sex offender under S.B. No. 10. *State v.*

Gingell, 128 Ohio St.3d 444, 2011-Ohio-1481, ¶ 8. In that case, the Supreme Court noted that *Gingell* "remained accountable for the yearly reporting requirement under Megan's Law." *Id.*

{¶ 16} In the present case, we conclude that the trial court properly determined that the remand order, pursuant to *Bodyke*, was limited to the reinstatement of appellant's previous sex offender classification and registration requirements. Further, because appellant is not subject to the registration requirements of a Tier I offender under S.B. No. 10, we agree with the trial court that appellant's "manifest injustice" argument (i.e., that the increased consequences imposed upon appellant by S.B. No. 10 warrant withdrawal of his plea) is moot. Thus, the trial court did not err in holding that, under *Bodyke*, appellant's original classification as a sexually oriented offender should be reinstated, nor did the court err in denying appellant's renewed motion to withdraw his no contest plea.

{¶ 17} Based upon the foregoing, appellant's single assignment of error is overruled, and the judgment of the Franklin County Municipal Court is hereby affirmed.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.
