

[Cite as *State v. Hollis*, 2009-Ohio-2368.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91467

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

JAMES HOLLIS

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-496476

BEFORE: Rocco, P.J., McMonagle, J., and Sweeney, J.

RELEASED: May 21, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor

BY: Kevin R. Filiatraut
Pamela Bolton
Assistant County Prosecutors
Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Robert Tobik
Chief Public Defender

BY: Cullen Sweeney
Assistant Public Defender
310 Lakeside Avenue
Suite 200
Cleveland, Ohio 44113

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), is filed within ten (10) 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. II, Section 2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Plaintiff-appellant the State of Ohio appeals from the trial court's April 21, 2008 sentencing order that also classified defendant-appellee James Hollis as a sexually oriented offender.

{¶ 2} The state presents one assignment of error, arguing that the trial court lacked statutory authority to ignore the effect of S.B. 10 on R.C. Chapter 2950, otherwise known as the "Adam Walsh Act," ("AWA"), which took effect on January 1, 2008, and, thus, by operation of law, made Hollis a Tier III offender.

{¶ 3} Hollis has filed a motion to dismiss this appeal pursuant to R.C. 2505.02; the motion has been referred to the merit panel for decision. Hollis claims the trial court's order was not final and appealable because the trial court expressly "reserved the right to re-classify" him "upon a determination by the Supreme Court of Ohio retroactively as to provisions of the Adam Walsh Act."

{¶ 4} Since this court granted the state leave to appeal the trial court's order, the trial court does not determine jurisdiction of an appellate issue, and the trial court's order is contrary to law, Hollis's motion to dismiss this appeal is

denied. By the same token, the state's assignment of error has merit, and is, therefore, sustained.

{¶ 5} The trial court's order is reversed and vacated, and this case is remanded for further proceedings consistent with this opinion.

{¶ 6} Hollis originally was indicted in this case on May 24, 2007 for offenses that were alleged to have occurred on November 30, 2005. The indictment charged him with one count of rape, R.C. 2907.02(A)(2), and one count of kidnapping, R.C. 2905.01, with a sexual motivation specification.

{¶ 7} On February 21, 2008, Hollis entered into a plea agreement with the state, whereby he would plead guilty to an amended count one, i.e., a charge of sexual battery, in exchange for the dismissal of count two. In discussing this change on the record, the trial court asked Hollis if he understood that "the law currently in the State of Ohio will require you to be declared a Tier III sex offender ***."

{¶ 8} The trial court thus referred to the fact that the AWA took effect on January 1, 2008. R.C. 2950.01(A) includes sexual battery in the list of offenses subject to the AWA.

{¶ 9} Hollis acknowledged his understanding, but his defense counsel requested the court to "stay any consideration of that" in light of the potential for a supreme court decision on the retroactivity of the AWA. After a careful and

thorough colloquy with Hollis, the trial court accepted his plea, found him guilty of sexual battery in violation of R.C. 2907.03(A)(2), and dismissed count two.

{¶ 10} On April 21, 2008, when the court called Hollis's case for sentencing, defense counsel renewed his request. He urged the trial court to consider that, since Hollis's offense occurred in November 2005, "he would be a sexually oriented offender" under the old version of the law. In the alternative, defense counsel asked the court to hold a decision on the issue "in abeyance until such time as there is an instruction from the Ohio Supreme Court on this."

{¶ 11} After ascertaining that Hollis stipulated to the fact that, due to his conviction, he was "a sexually oriented offender," the trial court labeled him as such, and informed him of the reporting requirements under the former law. The state objected.

{¶ 12} The court then stated it was "making a determination that the Defendant is a sexually oriented offender based upon the *** fact [that] that designation has to be given to a Defendant prior to the time of sentence imposed." The court went on to assert, "However, the Court does reserve the right to readdress the Defendant's classification once the Supreme Court of Ohio has given us proper guidance with respect to the law."

{¶ 13} The trial court sentenced Hollis to three years of community control sanctions. In its journal entry of sentence, the court indicated that while Hollis

was classified as a “sexually oriented offender, the court reserve[d] the right to re-classify the defendant as a Tier III sex offender upon a determination by the Supreme Court of Ohio retroactively as to provisions of the Adam Walsh Act.”

{¶ 14} On May 21, 2008, this court granted the state’s motion for leave to appeal the trial court’s journal entry of sentence. The state filed its appeal on the basis that the trial court’s order is contrary to law. Pursuant to R.C. 2945.67, a prosecuting attorney may appeal “by leave of the court to which the appeal is taken any other decision *** of the trial court in a criminal case ***.” See, e.g., *State v. Bouman*, Cuyahoga App. No. 88021, 2007-Ohio-824; cf., *State v. Selinka*, Cuyahoga App. No. 89120, 2007-Ohio-5435.

{¶ 15} Although the trial court purported to reserve jurisdiction, the trial court is not the judge of whether an order is final and appealable; rather, Article IV, Section 3(B)(2) of the Ohio Constitution and R.C. 2505.02 grant authority to the appellate court to make that determination.

{¶ 16} This court, as do other Ohio courts of appeals, permits appeals from such a determination. See, e.g., *State v. Pumerano*, Cuyahoga App. No. 85146, 2005-Ohio-2833, ¶9; see, also, *State v. Cook*, Miami App. No. 2008 CA 19, 2008-Ohio-6543; cf., *State v. Graves*, 179 Ohio App.3d 107, 2008-Ohio-5763.

{¶ 17} Accordingly, Hollis’s motion to dismiss this appeal is denied.

{¶ 18} The state presents the following assignment of error:

{¶ 19} “The trial court acted without authority in holding a sexual predator classification hearing under former R.C. 2950.09, and its finding Hollis to be a sexually oriented offender is void.”

{¶ 20} The state asserts the trial court lacked any legal basis upon which to refuse to apply the AWA to Hollis, since his February 21, 2008 conviction for sexual battery falls under that act. This assertion has merit.

{¶ 21} As this court recently has observed:

{¶ 22} “It is clear that the Adam Walsh Act applies retrospectively to offenders whose crimes were committed before the Act took effect. As the Ohio Supreme Court noted in [*State v.*] *Ferguson* [120 Ohio St.3d 7, 2008-Ohio-4824] in connection with a prior version of Chapter 2950, the Adam Walsh Act clearly states that it applies to offenders whose crimes were committed before the act took effect. See, e.g., R.C. 2950.04(A)(2) (“Regardless of when the sexually oriented offense was committed, each offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a sexually oriented offense shall comply with the following registration requirements ***.”); R.C. 2950.041(A)(2) (“Regardless of when the child-victim oriented offense was committed, each offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a child-victim oriented offense shall comply with all of the following registration requirements *** .”). Like the court in *Ferguson*, we

must assume that the legislature was aware of the court's holding in [*State v. Cook* [83 Ohio St.3d 404, 1998-Ohio-291], and intended that the Adam Walsh Act would also apply retrospectively." *State v. Blanchard*, Cuyahoga App. No. 90935, 2009-Ohio-1357. (Emphasis added.)

{¶ 23} Furthermore, "the statute requires the trial court to classify an offender based solely upon his or her conviction. *** The tiers dictate what the registration and notification requirements are. *** See R.C. 2950.07." *State v. Omiecinski*, Cuyahoga App. No. 90510, 2009-Ohio-1066, ¶29. (Emphasis added.)

{¶ 24} The trial court in this case thus had no option but to apply the AWA, in spite of the date of Hollis's offense. See, e.g., *State v. Christian*, Franklin App. No. 08AP-170, 2008-Ohio-6304, ¶9; *State v. Bower*, Ross App. No. 08CA3047, 2009-Ohio-201; *State v. Blanchard*, supra; cf., *State v. Williams*, Warren App. No. CA2008-02-029, 2008-Ohio-6195; *State v. Cook*, supra.

{¶ 25} Since the trial court in this case was not authorized to disregard the provisions set forth in R.C. Chapter 2950 as modified by S.B. 10, the state's assignment of error is sustained.

{¶ 26} The trial court's order purporting to classify Hollis as a "sexually oriented offender" is reversed and vacated.

{¶ 27} This case is remanded for further proceedings consistent with this opinion.

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 be sent to said court to carry this judgment into execution.

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

CHRISTINE T. McMONAGLE, J., and
JAMES J. SWEENEY, J., CONCUR IN
JUDGMENT ONLY