

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case Nos. 10-CA-61; 10-CA-62
	:	& 10-CA-63
MARK A. MITCHELL	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of
Common Pleas Case Nos. 97-CR-I-12-
0473; 98-CR-I-05-0161; 98-CR-I-10-0347

JUDGMENT: AFFIRMED IN PART; REVERSED IN
PART AND ORIGINAL CLASSIFICATION
REINSTATED

DATE OF JUDGMENT ENTRY: April 20, 2011

APPEARANCES:

For Plaintiff-Appellee:

CAROL O'BRIEN
Delaware County Prosecuting Attorney
140 N. Sandusky St.
Delaware, Ohio 43015

MARIANNE HEMMETER 0068896
Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

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P.O.Box 248
Galena, Ohio 43021-2718

Delaney, J.

{¶1} Defendant-Appellant Mark A. Mitchell appeals the judgment of the Delaware County Court of Common Pleas, who, at a resentencing hearing on July 19, 2010, imposed a Tier III sexual offender reclassification on him, informed him of mandatory post release control, and affirmed his original sentence that was imposed in 1998. The State of Ohio is the Plaintiff-Appellee.

{¶2} On December 8, 1997, Appellant was indicted in Delaware County in Case Number 97-CR-I-12-0473. On May 22, 1998, Appellant entered a guilty plea and was convicted of one count of Gross Sexual Imposition, a felony of the third degree, in violation of R.C. 2907.05(A)(4).

{¶3} On May 29, 1998, Appellant was indicted on case number 98-CR-I-05-0161. He pled guilty to one count of rape, in violation of R.C. 2907.02, a felony of the first degree.

{¶4} On October 22, 1998, the Delaware County Prosecutor filed a Bill of Information in case number 98-CR-I-10-347, charging Appellant with two counts of sexual battery in violation of R.C. 2907.03(A)(9). On October 23, 1998, Appellant waived his right to be prosecuted by indictment and entered a guilty plea to both counts as set forth in the Bill of Information.

{¶5} On October 23, 1998, the trial court held a sex offender classification hearing and found Appellant to be a sexual predator. The court also held a sentencing hearing and imposed four years imprisonment in case number 97-CR-I-12-0473 to run consecutive to the sentences imposed in case numbers 98-CR-I-05-0161 of eight years and 98-CR-I-10-0347, also an eight year sentence.

{¶6} On June 18, 2010, the trial court scheduled a resentencing hearing and ordered Appellant to be transported for the hearing. The resentencing hearing was held because the trial court had originally omitted to advise Appellant that he was subject to five years of mandatory post-release control.

{¶7} On July 19, 2010, the trial court held the hearing and imposed the same original sentence. The trial court also reclassified Appellant as a Tier III sex offender under the Adam Walsh Act pursuant to R.C. 2950.01 et seq.

{¶8} Appellant now appeals the resentencing, raising two Assignments of Error:

{¶9} “I. APPELLANT’S SEXUAL OFFENDER CLASSIFICATION UNDER THE TIER SYSTEM WAS UNCONSTITUTIONAL AS DETERMINED BY THE OHIO SUPREME COURT IN *STATE V. BODYKE* (2010), 128 Ohio St.3d 266, 2010-Ohio-2424.

{¶10} “II. THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE SENTENCES.”

I.

{¶11} In his first assignment of error, Appellant argues that the trial court erred by reclassifying Appellant as a Tier III sex offender during his resentencing on July 19, 2010. Pursuant to *State v. Bodyke*, 128 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, and *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio- 6238, 942 N.E.2d 332, Appellant is correct. Appellee concedes that Appellant’s Tier III sex offender designation needs to be vacated.

{¶2} Appellant's first assignment of error is sustained and that part of the entry from which this appeal is taken that reclassified Appellant as a Trier III sex offender is reversed, and his original status as a sexual predator is reinstated.

II.

{¶3} In Appellant's second assignment of error, he argues that the trial court erred in sentencing him to consecutive sentences in 1998.

{¶4} Appellant's claims are without merit. The Ohio Supreme Court, in *State v. Fischer*, supra, stated that "(1) when a judge fails to impose statutorily mandated post-release control as part of a defendant's sentence, that part of the sentence that was void must be set aside, and,

{¶5} "(2) defendant's remaining claims, which did not involve a void sentence or judgment, were barred by res judicata; overruling *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332.

{¶6} Accordingly, Appellant is precluded from contesting his consecutive sentences that were imposed in 1998.

{¶7} Appellant's second assignment of error is overruled.

{¶8} For the foregoing reasons, the judgment of the Delaware County Court of Common Pleas is reversed with respect to Appellant's first assignment of error and Appellant's original sexual predator classification is reinstated. The second assignment of error is overruled.

By: Delaney, J.

Farmer, P.J. and

Edwards, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MARK A. MITCHELL	:	
	:	
Defendant-Appellant	:	Case No. 10-CA-61
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed in part and reversed in part as to Appellant's reclassification as a Tier III sex offender and his original sexual predator classification is reinstated. Costs assessed equally to Appellant and Appellee.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MARK A. MITCHELL	:	
	:	
Defendant-Appellant	:	Case No. 10-CA-62
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed in part and reversed in part as to Appellant's reclassification as a Tier III sex offender and his original sexual predator classification is reinstated. Costs assessed equally to Appellant and Appellee.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MARK A. MITCHELL	:	
	:	
Defendant-Appellant	:	Case No. 10-CA-63
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed in part and reversed in part as to Appellant's reclassification as a Tier III sex offender and his original sexual predator classification is reinstated. Costs assessed equally to Appellant and Appellee.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JULIE A. EDWARDS