[Cite as *State v. Day*, 2009-Ohio-3755.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

State of Ohio,	:	
Plaintiff-Appellee,	:	Case Nos. 08CA865 08CA866
v.	:	
Jonathon Day,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	File-stamped date: 7-24-09

APPEARANCES:

Timothy Young, State Public Defender, and Claire R. Cahoon, Assistant State Public Defender, Columbus, Ohio, for appellant.

Aaron E. Haslam, Adams County Prosecutor, West Union, Ohio, for appellee.

Kline, P.J.:

{¶1} Jonathon Day (hereinafter "Day") appeals the judgment of the Adams County Court of Common Pleas. The trial court found Day guilty of Aggravated Assault in violation of R.C. 2903.12(A)(1) and Gross Sexual Imposition in violation of R.C. 2907.05(A)(1). On appeal, Day contends that his five-year prison sentence for violating R.C. 2907.05(A)(1) is contrary to law. Because eighteen months in prison is the maximum sentence for a fourth degree felony, we agree and find plain error. Next, Day contends that he received ineffective assistance of counsel. Because Day pled no contest to both charges and cannot demonstrate that he would have gone to trial but for his attorney's error, we disagree. Day further contends that the trial court erred in subjecting Day to the

community notification requirements of R.C. 2950.11. Because Tier I Sex Offenders as a matter of law are not subject to community notification, we agree. Finally, Day contends that Senate Bill 10 (hereinafter "S.B. 10") violates both the United States and Ohio Constitutions. Because Ohio courts, including this court, have repeatedly denied Day's various constitutional challenges, we disagree. Accordingly, we affirm, in part, and reverse, in part, the judgment of the trial court. We vacate Day's sentence for gross sexual imposition and remand this cause for re-sentencing as to that offense. We further instruct the trial court to vacate the part of its judgment that subjected Day to community notification.

I.

{¶2} On September 28, 2007, an Adams County Grand Jury indicted Day for Felonious Assault in violation of R.C. 2903.11(A)(1). Subsequently, in a case arising from a separate incident, Day was charged by way of Bill of Information with Gross Sexual Imposition in violation of R.C. 2907.05(A)(1). The Bill of Information improperly states that a violation of R.C. 2907.05(A)(1) is a third degree felony. The trial court handled the two cases together, and the same public defender represented Day in both cases. We have sua sponte consolidated these cases on appeal.

{¶3} Day authorized his public defender to enter into plea negotiations on the two separate charges. At a February 6, 2008 change of plea hearing, the trial court judge informed Day of his rights and the potential penalties Day faced for pleading guilty. In relevant part, the trial court judge wrongly said that a violation of R.C. 2907.05(A)(1) is a third degree felony with a maximum prison

sentence of five years. At the conclusion of the hearing, Day was prepared to plead guilty to the Felonious Assault charge. However, the trial court would not accept the guilty plea because Day said that he was too intoxicated at the time of the assault to remember anything about it. As a result, the trial court declared that the entire plea agreement was "for naught."

{¶4} At a March 24, 2008 change of plea hearing, the trial court judge again informed Day that a violation of R.C. 2907.05(A)(1) is a third degree felony with a maximum prison sentence of five years. At this hearing, Day pled no contest to an amended charge of Aggravated Assault in violation of R.C. 2903.12(A)(1). He also pled no contest to the Gross Sexual Imposition charge. Accordingly, the trial court found Day guilty of both charges.

{¶5} At an April 11, 2008 hearing, the trial court sentenced Day to eighteen months in prison on the Aggravated Assault charge and five years in prison on the Gross Sexual Imposition charge, to be served consecutively for a total prison term of six-and-a-half years. Day's public defender did not object to the five-year prison sentence for violation of R.C. 2907.05(A)(1). The trial court also classified Day as a Tier I Sex Offender and made him subject to the community notification requirements of R.C. 2950.11.

{¶6} Day appeals the trial court's judgments, asserting the following four assignments of error: I. "The trial court committed plain error by convicting and sentencing Mr. Day to a five-year prison sentence, when his conviction under R.C. 2907.05(A)(1) was a felony of the fourth degree. The sentence is contrary to law under R.C. 2907.05(C)(1) and 2929.14(A)." II. "Trial counsel provided

ineffective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution when she failed to object to a sentence outside the statutory range." III. "The trial court erred in sentencing Mr. Day to community notification under R.C. 2950.11(F)(2), as he was adjudicated to be a Tier I sexually oriented offender, a classification which does not require community notification under R.C. 2950.11(A)." And, IV. "The retroactive application of Senate Bill 10 violates the Ex Post Facto, Due Process, and Double Jeopardy Clauses of the United Sates Constitution and the Retroactivity Clause of Section 28, Article II of the Ohio Constitution. Fifth, Eighth, and Fourteenth Amendments to the United States Constitution; Section 10, Article I of the United States Constitution; and Sections 10 and 28, Articles I and II, respectively, of the Ohio Constitution."

II.

{¶7} In his first assignment of error, Day contends that the trial court committed plain error by sentencing him to five years in prison for violating R.C. 2907.05(A)(1). A violation of R.C. 2907.05(A)(1) is a fourth degree felony. The maximum prison sentence for a fourth degree felony is just eighteen months. As a result, Day argues that his five-year prison sentence is contrary to law.

{¶8} Day did not object to the five-year prison sentence at the trial court level. Thus, he has forfeited all but plain error. See *State v. Johnson*, Washington App. No. 03CA11, 2004-Ohio-2236, at ¶8 (using a plain error analysis to determine whether a sentence was contrary to law); but, cf., *State v. Boice*, Washington App. No. 08CA24, 2009-Ohio-1755, at ¶4 (stating that

"despite Appellant's failure to object to the alleged sentencing error during his sentencing hearing, he has not waived the issue on appeal").

{¶9} Pursuant to Crim.R. 52(B), we may notice plain errors or defects affecting substantial rights. "Inherent in the rule are three limits placed on reviewing courts for correcting plain error." *State v. Payne* (2007), 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶15. "First, there must be an error, *i.e.,* a deviation from the legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." Id. at ¶16, quoting *State v. Barnes* (2002), 94 Ohio St.3d 21, 27 (omissions in original). We will notice plain error "only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of syllabus. And "[r]eversal is warranted only if the outcome of the trial clearly would have been different absent the error." *State v. Hill* (2001), 92 Ohio St.3d 191, 203.

{¶10} "Appellate courts 'apply a two-step approach [to review a sentence]. First, [we] must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard.'" *State v. Smith*, Pickaway App. No. 08CA6, 2009-Ohio-716, at ¶8, quoting *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶4 (alterations in original).

{¶11} Here, we find that Day's five-year prison sentence is clearly and convincingly contrary to law. See R.C. 2953.08(G)(2). After Day entered his no contest plea, the trial court found him guilty of Gross Sexual Imposition under R.C. 2907.05(A)(1). R.C. 2907.05(C)(1) provides: "Except as otherwise provided in this section, gross sexual imposition committed in violation of division (A)(1), (2), (3), or (5) of this section is a felony of the fourth degree." Pursuant to R.C. 2929.14(A)(4), "[f]or a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months." Therefore, Day's five-year prison sentence is clearly contrary to R.C 2929.14(A)(4). The trial court "lacked the authority to impose the sentence that it ultimately handed down." *State v. Barnett* (1999), 131 Ohio App.3d 137, 142. And "[a]ny attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." *State v. Beasley* (1984), 14 Ohio St.3d 74, 75.

{¶12} Further, we choose to correct the aforementioned plain error for the following reasons. First, "[a]n action of a trial court that exceeds its authority qualifies as an instance of plain error in that it affects [Day's] substantial right * * * to have judicial proceedings conducted according to law." *Barnett*, 131 Ohio App.3d at 142, citing *State v. Richter* (1993), 92 Ohio App.3d 395, 399. And second, it would be a manifest miscarriage of justice for Day to serve five years in prison when the Ohio General Assembly determined that eighteen months is the maximum penalty for violating R.C. 2907.05(A)(1). Clearly, Day's sentence

would have been different if the trial court had not exceeded its authority and, instead, had followed R.C. 2929.14(A)(4).

{¶13} Other Ohio courts have noticed plain error in situations similar to the present case. See *City of Cleveland v. Weems*, Cuyahoga App. No. 82752, 2004-Ohio-476, at ¶34 ("We note as plain error that the appellant was sentenced to the maximum sentence for a misdemeanor of the first degree, but was convicted of * * * a misdemeanor of the second degree. A sentence that exceeds the proscribed statutory maximum is void ab initio; therefore, we vacate the imposed sentence and remand this case for resentencing."); *Barnett*, 131 Ohio App.3d at 142 (finding plain error when "the trial court lacked the discretion to impose probation on a matter that the General Assembly has clearly declared to be a nonprobationable offense"); *State v. Burgermeister* (Oct. 25, 1990), Cuyahoga App. No. 57649, unreported (finding plain error when the "sentence imposed by the trial court [was] wrong as a matter of law").

{¶14} Accordingly, we sustain Day's first assignment of error, vacate Day's sentence for violation of R.C. 2907.05(A)(1), and remand this matter to the trial court for resentencing consistent with R.C. 2907.05(A)(1), 2907.05(C)(1), and 2929.14(A)(4). However, we *do not* vacate Day's sentence for violating R.C. 2903.12(A)(1). See, generally, *State v. Saxon* (2007), 109 Ohio St.3d 176, 177-180 (refusing to adopt the "sentencing package" doctrine).

III.

{¶15} In his second assignment of error, Day contends that he received ineffective assistance of counsel. Specifically, Day argues that his attorney

should have objected to the five-year prison sentence that Day received for violating R.C. 2907.05(A)(1). As a result, Day requests that "his conviction be vacated and his case [be] remanded for a resentencing with the effective assistance of counsel[.]" Merit Brief of Defendant-Appellant Jonathon Day at 4.

{¶16} "'In Ohio, a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel's ineffectiveness.'" *State v. Countryman*, Washington App. No. 08CA12, 2008-Ohio-6700, at ¶20, quoting *State v. Wright,* Washington App. No. 00CA39, 2001-Ohio-2473, unreported; *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56, cert. den. *Hamblin v. Ohio* (1988) 488 U.S. 975. To secure reversal for the ineffective assistance of counsel, one must show two things: (1) "that counsel's performance was deficient* * * " which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[;]" and (2) "that the deficient performance prejudiced the defense* * *[,]" which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. See, also, *Countryman* at ¶20.

{¶17} However, courts have modified the *Strickland* test for cases in which the defendant does not actually go to trial. "In the context of a guilty plea, the defendant must demonstrate that there is a reasonable probability that, but for his counsel's error, he would not have pleaded guilty and would have insisted on going to trial." *State v. Barnett*, Portage App. No. 2006-P-0117, 2007-Ohio-4954, at ¶51, citing *Hill v. Lockhart* (1985), 474 U.S. 52, 58-59. This holding is equally

applicable in the context of a no contest plea. *Barnett*, 2007-Ohio-4954, at ¶52; *State v. Bishop* (Nov. 25, 1998), Lorain App. No. 97CA006905, unreported; *State v. Brown* (May 16, 1997), Montgomery App. No. 96-CA-092, unreported.

{¶18} Here, we cannot find ineffective assistance of counsel. Indeed, Day's attorney erred by not objecting to the statutorily improper five-year prison sentence. However, Day cannot demonstrate that he would have insisted on going to trial but for his attorney's error. Day pled no contest to Gross Sexual Imposition under the belief that he could face up to five years in prison. Therefore, it would be illogical to conclude that Day would have gone to trial had he known the actual maximum sentence was just eighteen months. Moreover, we have already vacated Day's five-year prison sentence in our resolution of his first assignment of error.

{¶19} Accordingly, we overrule Day's second assignment of error.

IV.

{¶20} In his third assignment of error, Day contends that the trial court erred by subjecting Day to the community notification requirements of R.C. 2950.11. The trial court subjected Day to community notification after considering the factors in R.C. 2950.11(F)(2).

{¶21} To resolve this issue, we must interpret R.C. 2950.11. Interpreting a statute is a question of law, and "[w]e review questions of law de novo." *State v. Elkins,* Hocking App. No. 07CA1, 2008-Ohio-674, at ¶12, quoting *Cuyahoga Cty. Bd. of Commrs. v. State,* 112 Ohio St.3d 59, 2006-Ohio-6499, at ¶23.

{¶22} Initially, we note that "[t]he notification and registration duties imposed on sexual offenders are remedial and civil in nature and are not a part of the sentence." *State v. Blanchard*, Cuyahoga App. No. 90935, 2009-Ohio-1357, at ¶7, citing *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶32. Thus, even though we have vacated Day's sentence for violating R.C. 2907.05(A)(1), we still must address Day's third assignment of error.

{¶23} Here, the trial court found Day guilty of Gross Sexual Imposition under R.C. 2907.05(A)(1). And pursuant to R.C. 2950.01(E)(1)(c), the trial court properly classified Day as a Tier I Sex Offender. But after reviewing R.C. 2950.11, we find that Tier I Sex Offenders are not subject to the community notification requirements of R.C. 2950.11. See, e.g., *State v. Pletcher*, Ross App. No. 08CA3044, 2009-Ohio-1819, at ¶7 (stating that "a Tier I sex offender requires registration once a year for 15 years, with no community notification"); *Gildersleeve v. State*, Cuyahoga App. Nos. 91515, 91519, 91521, 91532, 2009-Ohio-2031, at ¶15 ("The new provisions leave little, if any, discretion to the trial court in classifying an offender. * * * Tier I is the least restrictive tier, requiring a Tier I sex offender to register once annually for 15 years, but there are no community notification requirements."). Rather, only Tier III Sex Offenders are subject to community notification. See R.C. 2950.11(A), (F)(1)(a)-(c); *Pletcher* at ¶7; *Gildersleeve* at ¶15. Therefore, we find that the trial court exceeded its statutory authority by subjecting Day to the community notification requirements of R.C. 2950.11.

{¶24} Accordingly, we sustain Day's third assignment of error and direct the trial court to vacate the community notification requirement from Day's classification as a Sex Offender.

V.

{¶25} In his fourth assignment of error, Day contends that S.B. 10 violates various constitutional provisions. See, generally, *Pletcher* at ¶6-8 (discussing the changes to R.C. Chapter 2950 under S.B. 10).

{¶26} Day's arguments involve the interpretation of various constitutional provisions as they relate to S.B. 10. Hence, Day's arguments are all legal questions that we review de novo. See *State v. Downing,* Franklin App. No. 08AP-48, 2008-Ohio-4463, at ¶6, citing *Stuller v. Price,* Franklin App. No. 03AP-30, 2003-Ohio-6826, at ¶14; *State v. Green,* Lawrence App. No. 07CA33, 2008-Ohio-2284, at ¶7.

{¶27} Statutes enacted in Ohio are "presumed to be constitutional." *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, at ¶12, citing *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.2d 159, 161. This presumption remains until one challenging a statute's constitutionality shows, "beyond reasonable doubt, that the statute is unconstitutional." *Ferguson* at ¶12, citing *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7, 13.

{¶28} This court has already ruled against many of Day's constitutional challenges in numerous cases. We have found that S.B. 10 does not violate (1) the United States Constitution's prohibition on ex post facto laws or the Ohio Constitution's prohibition on retroactive laws; see *State v. Coburn*, Ross. App.

No. 08CA3062, 2009-Ohio-632, at ¶8-13; *State v. Randlett,* Ross App. No. 08CA3046, 2009-Ohio-112, at ¶8-15; *State v. Linville,* Ross App. No. 08CA3051, 2009-Ohio-313, at ¶7-12; *State v. Messer,* Ross App. No. 08CA3050, 2009-Ohio-312, at ¶7-13; (2) the separation of powers doctrine inherent in Ohio's Constitution; see *Coburn* at ¶14-20; *Randlett* at ¶16-23; *Linville* at ¶19-27; *Messer* at ¶20-28;; and (3) the prohibition against double jeopardy. See *Pletcher* at ¶14-16; *Messer* at ¶29-31; *Randlett* at ¶24-27. We find no reason to reassess our determinations at this time.

{¶29} Further, Day argues that the residency restrictions set forth in S.B. 10 violate his right to due process. However, Day has failed to show that he has standing to assert this argument or that this argument is ripe for review.

{¶30} Here, the only information from the record regarding Day's current residence is that he is incarcerated by the state of Ohio. "Ohio courts hold that, where the offender does not presently claim to reside 'within 1,000 feet of a school, or that he was forced to move from an area because of his proximity to a school[,]' the offender 'lacks standing to challenge the constitutionality' of the residency restrictions." *Messer* at ¶36, quoting *State v. Peak,* Cuyahoga App. No. 90255, 2008-Ohio-3448, at ¶8-9. See, also, *Linville* at ¶35; State *v. Pierce,* Cuyahoga App. No. 88470, 2007-Ohio-3665, at ¶33; *State v. Amos,* Cuyahoga App. No. 89855, 2008-Ohio-1834, at ¶43; *Coston v. Petro* (S.D.Ohio 2005), 398 F.Supp.2d 878, 882-883.

{¶31} Moreover, because Day is currently in prison, he is not presently subject to the residency restrictions. Therefore, the residency restrictions have

inflicted no actual harm upon Day. *Messer* at ¶37; *State v. Freer,* Cuyahoga App. No. 89392, 2008-Ohio-1257, at ¶29-30. In similar situations, Ohio courts have dismissed due process challenges to the residency restrictions because the issue was not ripe for review. Id. at ¶30; *Messer* at ¶37; *Linville* at ¶36-37.

{¶32} Thus, Day has failed to show that he has standing to assert this argument or that this argument is ripe for review.

{¶33} Day also argues that S.B. 10 violates the United States Constitution's prohibition against excessive and cruel and unusual punishments. This court has not yet addressed these specific challenges to S.B. 10, but other Ohio courts have found that S.B. 10 does not constitute either (1) excessive punishment; see *Holcomb v. State*, Logan App. Nos. 8-08-23, 8-08-24, 8-08-25, 8-08-26, 2009-Ohio-782, at ¶11; *State v. Williams*, Warren App. No. CA2008-02-029, 2008-Ohio-6195, at ¶103-105; *State v. Byers*, Columbiana App. No. 07 CO 39, 2008-Ohio-5051, at ¶75-77; or (2) cruel and unusual punishment. See *Gildersleeve* at ¶41-43; *In re M.E.*, Stark App. No. 2008CA00161, 2009-Ohio-1762, at ¶24; *Montgomery v. Leffler,* Huron App. No. H-08-011, 2008-Ohio-6397, at ¶24; *In re Smith,* Allen App. No. 1-07-58, 2008-Ohio-3234, at ¶37-38. "As long as R.C. Chapter 2950 is viewed as civil, and not criminal-remedial and not punitive-then the period of registration cannot be viewed as punishment. Accordingly, it logically follows that it does not constitute cruel and unusual punishment since the punishment element is lacking." *Byers* at ¶77. We choose to follow *Byers* and all other Ohio courts that have held the same. Therefore, we find that, as

applied to Day, S.B. 10 does not constitute either excessive punishment or cruel and unusual punishment.

{¶34} Accordingly, for the foregoing reasons, we overrule Day's fourth assignment of error.

VI.

{¶35} In conclusion, we find that Day's five-year prison sentence for violating R.C. 2907.05(A)(1) is contrary to law. Therefore, we (1) choose to correct the plain error, (2) vacate Day's sentence for violating R.C. 2907.05(A)(1), and (3) remand this matter to the trial court for resentencing in accordance with R.C. 2907.05(A)(1), 2907.05(C)(1), and 2929.14(A)(4). However, we do not vacate Day's sentence for violating R.C. 2903.12(A)(1). Furthermore, we do not find ineffective assistance of counsel because Day cannot demonstrate that he would have gone to trial but for his attorney's error (failure to object to his five-year prison sentence).

{¶36} Additionally, we find that the trial court exceeded its authority by subjecting Day to the community notification requirements of R.C. 2950.11. Therefore, on remand, we direct the trial court to vacate the community notification requirement from Day's classification as a Sex Offender. And finally, we reject all of Day's constitutional challenges to S.B. 10.

{¶37} Accordingly, we affirm, in part, and reverse, in part, and remand this matter to the trial court for further proceedings consistent with this opinion.

**JUDGMENT AFFIRMED IN PART,
REVERSED IN PART, AND
CAUSE REMANDED.**

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, in part, and REVERSED, in part, and this CAUSE BE REMANDED to the trial court for further proceedings consistent with this opinion. Appellant and Appellee shall split the costs equally.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Court of Common Pleas 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. Exceptions.

Abele, J.: Concurs in Judgment and Opinion.
McFarland, J.: Concurs in Judgment Only.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.