

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

In the Matter of: : Case No. 09CA24
F.L.S., Jr., : DECISION AND JUDGMENT ENTRY
Adjudicated Delinquent Child. : **Released 12/17/09**

APPEARANCES:

Timothy Young, Ohio Public Defender, and Brooke M. Burns, Ohio Assistant Public Defender, Columbus, Ohio, for appellant.

James E. Schneider, Washington County Prosecuting Attorney, and Alison L. Cauthorn, Washington County Assistant Prosecuting Attorney, Marietta, Ohio, for appellee.

Harsha, J.

{¶1} After entering an admission to delinquency for the offense of attempted rape, F.L.S. appeals his classification as a Tier III juvenile sex offender by the juvenile court in Washington County.

{¶2} First, F.L.S. contends that the trial court committed plain error by classifying him as a juvenile offender registrant at the dispositional hearing after committing him to the Department of Youth Services. F.L.S. argues that the court had to wait until he was released from DYS before classifying him. We agree. R.C. 2152.83(A)(1) allows a court to classify a delinquent child as a juvenile offender registrant at the time of his dispositional hearing only if it does not commit the delinquent child to a secure facility as part of the disposition. If the court commits the juvenile, R.C. 2152.83(A)(1) requires the court to wait until the juvenile has been released from the facility before classifying him. And F.L.S. was prejudiced by the trial

court's premature classification because he lost the opportunity to demonstrate improvement to the court through his time in DYS' custody.

{¶3} In his remaining assignments of error, F.L.S. challenges the propriety and constitutionality of the trial court's finding that he should be classified as a Tier III sexual offender. However, these assignments of error are moot because we are vacating his classification.

I. Statement of Facts

{¶4} A complaint in the Juvenile Division of the Court of Common Pleas in Washington County alleged that F.L.S. was a delinquent child on the basis of the offense of rape, in violation of R.C. 2907.02(A)(1)(b) & (B). The alleged incident took place in February 2009, when F.L.S. was sixteen years old. The State later amended the complaint, changing the offense to attempted rape, a violation of R.C. 2923.02(A) & (E)(1) and 2907.02(A)(1)(b) & (B).

{¶5} The trial court held a change of plea hearing where F.L.S. indicated he intended to admit to the allegations. The court informed F.L.S. of the consequences of making an admission and warned F.L.S. that he could be committed to DYS. The court also notified F.L.S. that this particular charge required him to register as a Tier III sex offender. After F.L.S. acknowledged these admonitions, the court accepted his admission.

{¶6} At the final dispositional hearing, the court committed F.L.S. to a minimum of one year in the custody of DYS. The court also found that F.L.S. should be classified as a Tier III juvenile offender registrant. After these findings were journalized, this appeal followed.

II. Assignments of Error

{¶7} F.L.S. assigns the following errors for our review:

ASSIGNMENT OF ERROR I

The juvenile court committed plain error when it classified [F.L.S. as] a Tier III juvenile offender registrant because it did not make that determination upon his release from a secure facility, in violation of R.C. 2152.83(A)(1). (T.p. 54; A-1).

ASSIGNMENT OF ERROR II

The trial court abused its discretion when it classified [F.L.S.] as a Tier III juvenile offender registrant. (T.p. 54; A-1). R.C. 2950.01(G); *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076.

ASSIGNMENT OF ERROR III

The trial court erred when it found Senate Bill 10 constitutional as applied to [F.L.S.] as the application of Senate Bill to [F.L.S.] violates his right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution. (T.p. 54; A-1).

ASSIGNMENT OF ERROR IV

The trial court erred when it applied Senate Bill 10 to [F.L.S.], as the law violates his right to equal protection under the law. Fourteenth Amendment to the United States Constitution; Article I, Section 2 of the Ohio Constitution (T.p. 54; A-1).

ASSIGNMENT OF ERROR V

The trial court erred when it classified [F.L.S.] as a Tier III juvenile offender registrant, in violation of the prohibition against cruel and unusual punishments. (T.p. 54; A-1). Eighth and Fourteenth Amendments to the United States Constitution; Section 9, Article I of the Ohio Constitution.

ASSIGNMENT OF ERROR VI

[F.L.S.] was denied the effective assistance of counsel when trial counsel failed to object to the imposition of a classification that was unconstitutional and contrary to law. (T.p. 54; A-1). Sixth and Fourteenth Amendments to the United States Constitution; Section 10, Article 1 of the Ohio Constitution.

III. Legal Analysis

A. Assignment of Error 1

{¶8} In his first assignment of error, F.L.S. contends that although his trial counsel failed to object, the trial court committed plain error when it classified him as a Tier III juvenile offender at the time of his disposition. He argues that under R.C. 2152.83(A)(1), if the court committed him to a secure facility, it could only classify him as a juvenile sex offender upon his release from the facility.

{¶9} We have previously held that plain error review is available in juvenile delinquency proceedings. See *In re Tabler*, Lawrence App. No. 06CA30, 2007-Ohio-411, at ¶15. An appellate court will take notice of plain error with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. Before we reverse the trial court for plain error, we must find that the error is clearly apparent from the face of the record and is prejudicial to the appellant. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶16.

{¶10} In order to determine whether the court erred in classifying F.L.S. as a juvenile offender registrant at his dispositional hearing, we look to R.C. 2152.83, which provides:

(A)(1) The court that adjudicates a child a delinquent child shall issue as part of the dispositional order or, if the court commits the child for the delinquent act to the custody of a secure facility, shall issue at the time of the child's release from the secure facility an order that classifies the child a juvenile offender registrant and specifies that the child has a duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code if all of the following apply:

(a) The act for which the child is or was adjudicated a delinquent child is a sexually oriented offense or a child-victim oriented offense that the child committed on or after January 1, 2002.

(b) The child was sixteen or seventeen years of age at the time of committing the offense.

* * *

{¶11} We interpreted this statute in *In the Matter of P.B.*, Scioto App. No. 07CA3140, 2007-Ohio-3937. There we held that R.C. 2152.83(A)(1) permitted a court to classify a delinquent child a sexual offender as part of the disposition unless that court committed the child to a secure facility. *Id.* at ¶7. If the child was committed as part of his disposition, R.C. 2152.83(A)(1) required the court to wait until the child's release from the facility before classifying him as a sexual offender. *Id.* But, see, R.C. 2152.83(B)(1), which applies to offenders who are fourteen or fifteen at the time of the offense.

{¶12} Here, the trial court committed F.L.S. to the custody of DYS for a minimum term of one year. F.L.S. was sixteen at the time of the underlying incident, attempted rape, which is a sexually oriented or child-victim offense. Accordingly, the court was precluded from classifying F.L.S. as a sexual offender until his release from a DYS facility.

{¶13} This error is both apparent from the face of the record and prejudicial to F.L.S. The likely rationale behind R.C. 2152.83(A)(1)'s requirement that a court wait until the juvenile offender has been released from custody is to give the offender time to rehabilitate and reform himself. The juvenile offender therefore has an incentive to do well while in DYS custody in order to persuade the court to classify him at a lower tier level. As we have previously held, a judge has discretion in choosing the proper classification tier of a juvenile offender registrant. See *In the Matter of J.M.*, Pike App.

No. 08CA782, 2009-Ohio-4574, at ¶71.¹ Accordingly, F.L.S. was deprived of this potential opportunity when the trial court prematurely classified him.

{¶14} Accordingly, we find plain error and reverse the judgment.

B. Assignments of Error 2 – 6.

{¶15} The remainder of F.L.S.'s assignments of error challenge the propriety and constitutionality of the trial court's finding that F.L.S. should be registered as a Tier III juvenile offender under R.C. 2950.01. Our resolution of F.L.S.'s first assignment of error renders these additional arguments moot. Accordingly, we decline to address their merits. App.R.12(A)(1)(c).

IV. Conclusion

{¶16} We sustain F.L.S.'s first assignment of error, vacate F.L.S.'s classification, and remand this matter to the trial court for a new dispositional hearing.

JUDGMENT REVERSED
AND CAUSE REMANDED.

¹ There we joined with a majority of Ohio courts of appeal holding that trial courts have discretion in classifying the tier of a juvenile offender registrant under R.C. 2950.01. See *In re Antwon C.*, 182 Ohio App.3d 237, 2009-Ohio-2567, 912 N.E.2d 182; *In re C.A.*, Montgomery App. No. 23022, 2009-Ohio-3303; *In re P.M.*, 182 Ohio App.3d 168, 2009-Ohio-1694, 912 N.E.2d 130; *In re G.E.S.*, Summit App. No. 24079, 2008-Ohio-4076; *In re S.R.P.*, Butler App. No. CA2007-11-027, 2009-Ohio-11. But, cf., *In re Smith*, Allen App. No. 1-07-58, 2008-Ohio-3234; *In re P.M.*, Stark App. No. 2008CA00152, 2009-Ohio-1761; *In re Adrian R.*, Licking App. No. 08-CA-17, 2008-Ohio-6581. The Ohio Supreme Court has accepted discretionary jurisdiction in several of these cases. See *In re Smith*, 120 Ohio St.3d 1416, 2008-Ohio-6166; *In re A.R.*, 121 Ohio St.3d 1472, 2009-Ohio-2045; *In re G.E.S.*, 120 Ohio St.3d 1504, 2009-Ohio-361.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing Washington County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Kline, P.J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, 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.