

[Cite as *In re A.R.R.*, 2009-Ohio-7067.]

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

IN THE MATTER OF: :

A.R.R. : Case No. 09CA3105

:

ADJUDICATED DELINQUENT CHILD. : DECISION AND JUDGMENT ENTRY

:

APPEARANCES:

COUNSEL FOR APPELLANT: Timothy Young, Ohio Public Defender, and Amanda J. Powell, Assistant Ohio Public Defender, 250 East Broad Street, Ste. 1400, Columbus, Ohio 43215¹

COUNSEL FOR APPELLEE: Michael M. Ater, Ross County Prosecuting Attorney, and Robert C. Hess, Ross County Assistant Prosecuting Attorney, 72 North Paint Street, Chillicothe, Ohio 45701

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-28-09

ABELE, J.

{¶ 1} This is an appeal from a Ross County Common Pleas Court, Juvenile Division, judgment that adjudicated A.R.R. a Tier III sex offender. Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT

¹ Different counsel represented A.R.R. during the trial court proceedings.

FOUND THAT [A.R.R.'s] CLASSIFICATION AS A TIER III JUVENILE SEX OFFENDER REGISTRANT WAS OFFENSE BASED IN VIOLATION OF R.C. 2950.01 (E)-(G)."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT APPLIED SENATE BILL 10 TO [A.R.R.] AS THE APPLICATION OF SENATE BILL [10] TO [A.R.R.] VIOLATES HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION."

THIRD ASSIGNMENT OF ERROR:

"THE RETROACTIVE APPLICATION OF S.B. 10 TO [A.R.R.] VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION AND THE RETROACTIVITY CLAUSE OF SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT APPLIED SENATE BILL 10 TO [A.R.R.] 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."

FIFTH ASSIGNMENT OF ERROR:

"[A.R.R.] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."

{¶ 2} A.R.R. was previously adjudicated a delinquent child for having committed

a sexually oriented offense.² At the March 16, 2009 hearing, the magistrate recommended that appellant be classified a Tier III sex offender. Two days later, the Court agreed and found “the child is required to be classified as a Tier III Juvenile Sex Offender Registrant pursuant to O.R.C. 2152.83(A).” (Emphasis added.) This appeal followed.

I

{¶ 3} A.R.R.'s first assignment of error involves the trial court's decision to classify him a Tier III sexual offender. He contends that although such classification lies in the court's discretion, the court's March 18, 2009 judgment indicates that it actually believed that it was required to classify him as such an offender. Thus, appellant reasons, the trial court erred by not exercising its discretion.

{¶ 4} Our analysis begins with the acknowledgment that this issue was not raised in the trial court. The record contains no objection to the magistrate's decision, nor any indication that this issue was brought to the court's attention before final judgment. Usually, this scenario results in a waiver of the issue for purposes of appeal. See Juv.R. 40(D)(3)(a)(iv); State v. Baer, Harrison App. No. 07HA8, 2009-Ohio-3248, at ¶18 (appellate court need not consider error that was not brought to the trial court's attention when the error could have been corrected). We believe,

² The record does not contain original papers or transcripts that precede his sexual offender classification. Thus, we have no information concerning the precise nature or specific facts of the offense, other than the statutory provision. See R.C. 2907.02(A)(1). We, however, need not concern ourselves with those details to resolve the issues now before us.

however, that the interests of justice are best served by considering this issue.³ Here, it appears that all parties and the court were under the impression that the Tier III classification was required. Additionally, a review of recent case law reveals that this has been a recurring issue in juvenile sentencing. Accordingly, in this particular instance we will not follow the strict confines of the waiver doctrine and will consider the merits of the issue.⁴

{¶ 5} This case involves the provisions enacted as part of the 2007 Adam Walsh Child Protection and Safety Act (AWA). See Am.Sub.S.B. 10, 2007 Ohio Laws, File No. 10. The classification of a juvenile sex offender pursuant to this legislation involves a two step procedure. First, a juvenile court must determine whether the juvenile is a Juvenile Offender Registrant (JOR). Then, the court must determine whether to classify the juvenile as a Tier I, II or III offender. Although admittedly unclear, it appears from the magistrate's decision and the Juvenile Court's judgment that these two steps were conflated.

{¶ 6} In the case sub judice, the March 18, 2009 judgment finds that A.R.R. was sixteen or seventeen at the time the offense was committed. He does not challenge that finding. Thus, both the Magistrate and the Juvenile Court correctly found that appellant was required to be classified as a JOR. See R.C. 2152.83(A). The Juvenile

³Although the Juvenile Rules of Procedure make no specific provision for recognition of plain error, as in adult criminal cases the same principle applies. See e.g. In re J.F., 178 Ohio App.3d 702, 900 N.E.2d 204, 2008-Ohio-4325, at ¶84.

⁴ We emphasize that nothing in this opinion should be construed as criticism for either the trial court or defense counsel. The various sentencing and sex offender classification statutes are overly complex and have caused unending problems.

Court then also concluded that A.R.R. was “required to be classified as a Tier III” offender, again, because he was “16 or 17 at the time of the offense.” (Emphasis added). We believe that this determination is problematic.

{¶ 7} Courts have discretion to determine whether to classify a JOR as either a Tier I, Tier II or Tier III offender. In re J.M., Pike App. No. 08CA782, 2009-Ohio-4574, at ¶71; In re G.E.S., Summit App. No. 24079, 2008-Ohio-4076, at ¶37. In the case sub judice, by using the word “required” in classifying A.R.R. as a Tier III offender, and by citing his age at the time of the offense, it appears that the trial court interpreted the statute as requiring both a Tier III classification and a JOR designation.

{¶ 8} Appellee argues that the trial court made the Tier III classification on the basis of facts rather than a misapplication of the statute. We disagree. In the same sentence that the trial court classified A.R.R. a Tier III offender, it also (1) cited his age that, although a pertinent consideration under R.C. 2152.83(A), has no bearing on tier classification, and (2) used the word “required,” thus suggesting that Ohio law compelled the court to make that classification. We find nothing in this sentence to suggest that the trial court based its decision on the facts and circumstances of the case, but rather based on a misapplication of the admittedly complex statutory scheme. If the trial court believes, however, that such classification is warranted based on the evidence in this case, it may re-impose such classification on remand. The important point, however, is that the trial court does possess the discretion to make this determination.

{¶ 9} For these reasons, we hereby sustain appellant's first assignment of error. Having sustained appellant's first assignment of error, the remaining assignments of

error have been rendered moot and will be disregarded. See App.R. 12(A)(1)(c).

Therefore, the judgment adjudicating A.R.R. as a Tier III sexual offender is hereby reversed and the case remanded for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND
CASE REMANDED FOR
FURTHER PROCEEDINGS
CONSISTENT WITH THIS
OPINION.⁵

JUDGMENT ENTRY

It is ordered that the judgment be reversed and the case remanded for further proceedings consistent with this opinion. Appellant shall recover of appellee the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

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

Kline, P.J.: Concurs in Judgment Only
Harsha, J.: Concurs in Judgment & Opinion

For the Court

⁵ We emphasize that this opinion should not be construed to take any position on the issue of whether A.R.R. should have been classified as a Tier III sex offender. Rather, we simply conclude that the trial court erred only to the extent that it believed it did not have discretion to decide the matter.

BY: _____
Peter B. Abele, 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.