

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-10-014

Appellee

Trial Court No. 2009-CR-329

v.

Richard R. Cantu

DECISION AND JUDGMENT

Appellant

Decided: December 17, 2010

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Troy A. Murphy, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas, in which the trial court found appellant, Richard R. Cantu, guilty of one count of gross sexual imposition and one count of menacing by stalking with sexual motivation,

sentenced appellant to serve an aggregate of 36 months in prison, and classified him as a tier III sex offender. On appeal, appellant sets forth the following assignments of error:

{¶ 2} "First Assignment of Error:

{¶ 3} "The trial court erred when it classified appellant as a tier III sex offender.

{¶ 4} "Second Assignment of error:

{¶ 5} "Appellant was the recipient of ineffective assistance of counsel as trial counsel failed to properly investigate and present evidence that appellant should not be classified as a tier III sex offender."

{¶ 6} On August 12, 2009, appellant was indicted by the Erie County Grand Jury on one count of felonious sexual penetration, in violation of R.C. 2907.12(A)(2), and one count of menacing by stalking with sexual motivation, in violation of R.C. 2903.211(A)(1) and (A)(3). On December 11, 2009, a plea hearing was held at which appellant entered a plea of guilty to one count of gross sexual imposition, and the one count of menacing by stalking with sexual motivation. Appellant's plea agreement also stated that appellant was to be classified as a tier III sex offender.

{¶ 7} At the sentencing hearing, held on March 5, 2010, the trial court discussed the terms of the plea with appellant, after which appellant stated he was aware of the "potential" for a tier III classification, but he did not agree to the tier III classification as part of his plea. The trial court, the prosecutor and defense counsel all explained to appellant that the tier III classification was "automatic" in his case, since an earlier conviction in Perrysburg Municipal Court (case No. CRB0600533) for attempted

voyeurism, a tier II offense under then-existing Ohio law¹, would result in appellant automatically being classified as a tier III sex offender² in this case. Appellant did not ask to revoke his plea, and the hearing continued.

{¶ 8} A judgment of sentencing was issued by the trial court on March 9, 2010, in which appellant was found guilty of gross sexual imposition and menacing by stalking, and was sentenced to serve a total of 36 months in prison. Pursuant to the plea agreement, appellant was classified as a tier III sex offender. A timely notice of appeal was filed on March 18, 2010.

{¶ 9} In support of his first assignment of error, appellant argues that he did not agree to a tier III classification as part of his plea. He further argues that the Perrysburg

¹At the time of appellant's conviction for attempted voyeurism, he was classified as a habitual sex offender pursuant to former R.C. 2950.09. In 2007, the Ohio General Assembly enacted R.C. 2950.031 and R.C. 2950.032, which required the automatic reclassification of existing sex offenders into three classifications: tier I, tier II, and tier III.

²R.C. 2950.01(G) states, in relevant part, that a tier III sex offender is:

"(1) A sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any of the following sexually oriented offenses:

"* * *

"(i) Any sexually oriented offense that is committed after the sex offender previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for committing any sexually oriented offense or child-victim oriented offense for which the offender was classified a tier II sex offender/child-victim offender or a tier III sex offender/child-victim offender."

Municipal Court's classification as a habitual sex offender was "improperly applied" in that case; it should not have been used to support a tier III classification in this case.

{¶ 10} We note initially that appellant did not appeal his conviction or sentence in Perrysburg Municipal Court case No. CRB0600533. Accordingly, consideration of the issue of whether appellant was correctly designated a habitual sex offender in that case is barred by the doctrine of res judicata. *State v. Graggs*, 10th Dist. No. 10AP-249, 2010-Ohio-5716, ¶ 20. However, we must also address, sua sponte, the issue of whether appellant could be "automatically" classified as a tier III sex offender in this case.

{¶ 11} In *State v. Bodyke*, 112 Ohio St.3d 266, 2010-Ohio-2424, decided on June 3, 2010, the Supreme Court of Ohio held that R.C. 2950.031 and 2950.032, which required the reclassification of sex offenders into tier I, tier II and tier III designations, violate the separation of power doctrine and are, therefore, unconstitutional. *Id.* at ¶ 55. Accordingly, those statutory provisions "may not be applied to offenders previously adjudicated by judges under [prior] law, and the classifications and community-notification and registration orders imposed previously by judges are reinstated." *Id.* at ¶ 66. As a remedy, those provisions were severed from R.C. Chapter 2950. *Id.*

{¶ 12} On consideration of the foregoing, we find that the trial court's "automatic" classification of appellant as a tier III sex offender was based on statutory provisions which have since been found unconstitutional and is, therefore, erroneous. *State v. Bodyke*, supra. Appellant's first assignment of error is well-taken and is granted.

Appellant's second assignment of error, in which he claims to have received ineffective assistance of counsel at the time of sentencing, is moot and is not well-taken.

{¶ 13} The judgment of the Erie County Court of Common Pleas is reversed.

Appellant's classification as a tier III sex offender is vacated, and the case is remanded to the trial court for further proceedings consistent with this decision. Appellee, the state of Ohio, is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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