

[Cite as *State v. Smith*, 2011-Ohio-6669.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Respondent-Appellant,	:	
	:	No. 11AP-311
v.	:	(C.P.C. No. 97CR-10-5535)
	:	
Abraham Smith,	:	(REGULAR CALENDAR)
	:	
Petitioner-Appellee.	:	

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D E C I S I O N

Rendered on December 22, 2011

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*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

*Yeura R. Venters*, Public Defender, and *Allen V. Adair*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Respondent-appellant, the state of Ohio ("the state"), appeals the judgment of the Franklin County Court of Common Pleas, which granted a petition filed by petitioner-appellee, Abraham Smith ("appellee"), challenging his reclassification as a Tier III sex offender. For the following reasons, we affirm.

## **I. BACKGROUND**

{¶2} In 1997, appellee pleaded guilty to three counts of gross sexual imposition, and the trial court sentenced him to six years imprisonment. The court noted in a "SENTENCING SHEET" that appellee was a sexual predator pursuant to the sex offender classification law in effect at that time, but it mentioned no sex offender classification in the sentencing entry. S.B. 10 thereafter amended the sex offender classification law in response to the federal Adam Walsh Act. S.B. 10 established three tiers of classifications, and it directed the attorney general to reclassify sex offenders who had already been classified under prior law. The attorney general classified appellee a Tier III sex offender, and appellee filed a petition to contest the new classification. He argued that it was unconstitutional and that his classification under prior law should be reinstated. He claimed that he was a sexually oriented offender under prior law due to the trial court's failure to specify any classification in the sentencing entry.

{¶3} The trial court granted appellee's petition. In an entry journalizing its decision, the court held that appellee's "reclassification as a Tier III sex offender is VACATED, and his prior classification as a sexually oriented offender is REINSTATED and he is required to comply with all registration requirements in effect prior to January 1, 2008."

## **II. ASSIGNMENTS OF ERROR**

{¶4} The state appeals, raising three assignments of error:

[I.] THE COMMON PLEAS COURT ERRED IN GRANTING RELIEF ON THE BASIS OF A PETITION THAT WAS FILED PURSUANT TO A SPECIAL STATUTORY PROCEEDING

THAT HAS NOW BEEN SEVERED IN ITS ENTIRETY BY THE OHIO SUPREME COURT.

[II.] THE COMMON PLEAS COURT ERRED IN DECLARING THAT [APPELLEE] "IS REQUIRED TO COMPLY WITH ALL REGISTRATION REQUIREMENTS IN EFFECT PRIOR TO JANUARY 1, 2008."

[III.] THE COURT ERRED IN "REINSTATING" [APPELLEE] AS A "SEXUALLY ORIENTED OFFENDER," AS THE ONLY JUDICIAL CLASSIFICATION WAS A SEXUAL PREDATOR.

### III. DISCUSSION

#### A. First and Third Assignments of Error

{¶5} In its first and third assignments of error, the state argues that the trial court erred by vacating appellee's Tier III sex offender classification and reinstating him as a sexually oriented offender. We disagree.

{¶6} S.B. 10, through R.C. 2950.031 and 2950.032, directed the attorney general to reclassify sex offenders who had been classified under prior law. R.C. 2950.032 applied to an offender in prison for a sex-related crime. R.C. 2950.031 applied to an offender who had registered an address for his residence, school or employment. According to the Supreme Court of Ohio, however, those statutes violate the separation-of-powers doctrine in the state constitution because they enabled the executive branch to reopen and review past classifications made by the judicial branch. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, paragraphs two and three of the syllabus. Consequently, the court severed R.C. 2950.031 and 2950.032 from S.B. 10. *Id.* at ¶66.

{¶7} The state asserts that the severance of those statutes meant that the trial court had no authority to consider appellee's petition contesting his reclassification

because it was filed pursuant to the same statutes. In *State v. Johnson*, 10th Dist. No. 10AP-932, 2011-Ohio-2009, ¶¶6-9, we rejected that argument given our consistent precedent that, pursuant to *Bodyke*, a sex offender who was improperly reclassified by the attorney general under S.B. 10 is entitled to have his reclassification vacated and his classification from prior law reinstated.

{¶8} The state next challenges the trial court's reinstatement of appellee as a sexually oriented offender. The state claims that the court's "SENTENCING SHEET" from 1997 establishes that appellee was a sexual predator under prior law. Under former R.C. 2950.09(B)(3), however, the court must specify the sexual predator classification in the sentencing entry. See also *State v. Haynes*, 10th Dist. No. 03AP-574, 2004-Ohio-591, ¶9 (recognizing that a court speaks through its judgment entries). The state notes that the sentencing entry does not mention the sexual predator classification, but it contends that the court should have added the information through a nunc pro tunc order. We need not disturb the trial court's sentencing entry, however, for the following reasons.

{¶9} A nunc pro tunc order corrects a judicial entry that contains error in the recordation of a court's decision. *State v. Jama*, 189 Ohio App.3d 687, 2010-Ohio-4739, ¶14. It corrects errors that are merely clerical and involve no legal determinations. *Id.* Here, the record does not contain a transcript of the sex offender classification proceedings held at the time of appellee's conviction. We decline to speculate from the incomplete record that the trial court merely committed clerical error in 1997 by failing to state in the sentencing entry that it designated appellee a sexual predator. See *State v. Chatman*, 10th Dist. No. 08AP-803, 2009-Ohio-2504, ¶55

(recognizing that this court does not speculate on matters not in the record). In any event, *res judicata* bars the state from challenging the sentencing entry now, given that it could have previously filed an appeal when the entry was issued 14 years ago. See *Haynes* at ¶8-10.

{¶10} Because the 1997 sentencing entry does not indicate that appellee is a sexual predator, that classification did not attach pursuant to former R.C. 2950.09(B)(3). Rather, by operation of law under the sex offender statutes predating S.B. 10, appellee is a sexually oriented offender. See *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, paragraph two of the syllabus (stating that, if the offender "is neither a habitual sex offender nor a sexual predator, the sexually oriented offender designation attaches as a matter of law").

{¶11} Nevertheless, the state argues that appellee is not entitled to relief under *Bodyke* because his sexually oriented offender classification arose as a matter of law, rather than through a judicial determination. But this court has previously held that "offenders whose pre-Adam Walsh Act classification arose purely as a matter of law still must receive the benefit of the *Bodyke* remedy returning those offenders to their pre-Adam Walsh Act classifications." *Johnson* at ¶15.

{¶12} Appellee is also entitled to relief under the Supreme Court of Ohio's recent decision in *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374. In *Williams*, the court held that the application of S.B. 10 to those, like appellee, who committed a sex offense prior to its enactment violates the prohibition against retroactive laws in Section 28, Article II of the Ohio Constitution. *Id.* at ¶21.

{¶13} For all these reasons, the trial court did not err by vacating appellee's Tier III sex offender classification and reinstating his original classification as a sexually oriented offender. We overrule the state's first and third assignments of error.

#### **B. Second Assignment of Error**

{¶14} In its second assignment of error, the state argues that the trial court erred by holding that none of the provisions in S.B. 10 apply to appellee. We disagree.

{¶15} In *State v. Gingell*, 128 Ohio St.3d 444, 2011-Ohio-1481, ¶8, the Supreme Court of Ohio concluded that when a sex offender's pre-S.B. 10 classification is reinstated, the orders associated with that classification are also reinstated. Consequently, this court recognized that, based on *Gingell*, none of the provisions in S.B. 10 apply to a sex offender whose classification under prior law has been reinstated. See *Johnson* at ¶19. The state's claim also fails given the recent holding in *Williams* that S.B. 10 cannot be applied retroactively. *Id.* at ¶21-23. Therefore, the trial court correctly indicated that appellee was not bound by any of the provisions in S.B. 10. We overrule the state's second assignment of error.

#### **IV. CONCLUSION**

{¶16} In summary, we overrule the state's three assignments of error. We affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BRYANT, P.J., and CONNOR, J., concur.

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