

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 04AP-316
Plaintiff-Appellant,	:	(C.P.C. No. 02CR-10-6221)
v.	:	
	:	(REGULAR CALENDAR)
Darryl L. Small,	:	
	:	
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on July 28, 2005

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

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

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ON MOTION TO CERTIFY A CONFLICT.

PETREE, J.

{¶1} Pursuant to App.R. 25, defendant-appellee, Darryl L. Small, moves this court for an order to certify a conflict between our decision in *State v. Small*, Franklin App. No. 04AP-316, 2005-Ohio-2291, and decisions in *State v. Barksdale*, Montgomery App. No. 19294, 2003-Ohio-43 (Young, J., dissenting), cause dismissed, 99 Ohio St.3d 1549, 2003-Ohio-4781; *State v. Reine*, Montgomery App. No. 19157, 2003-Ohio-50 (Young, J., dissenting), cause dismissed, 99 Ohio St.3d 1549, 2003-Ohio-4781; *State v. Young*, Montgomery App. No. 19472, 2003-Ohio-2205 (Young, J., filing a concurring opinion),

cross-appeal dismissed, 99 Ohio St.3d 1529, 2003-Ohio-4445, appeal not allowed, 99 Ohio St.3d 1549, 2003-Ohio-4781, and appeal not allowed, 101 Ohio St.3d 1491, 2004-Ohio-1293; *State v. Washington* (Nov. 14, 2001), Lake App. No. 99-L-015; *State v. Hickman*, Portage App. No. 2003-P-0087, 2004-Ohio-3929; and *State v. Gooden*, Cuyahoga App. No. 82681, 2004-Ohio-2699, at ¶¶64-68. For the reasons set forth below, we deny defendant's motion to certify.

{¶2} Motions seeking an order to certify a conflict are governed by Section 3(B)(4), Article IV of the Ohio Constitution, which provides:

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

See, also, *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, syllabus, rehearing denied by, *Whitelock v. Cleveland Clinic Found.* (1993), 67 Ohio St.3d 1420; App.R. 25; and S.Ct.Prac.R. IV.

{¶3} Before and during the certification of a case to the Supreme Court of Ohio, pursuant to Section 3(B)(4), Article IV, Ohio Constitution, three conditions must be met.

*Whitelock*, at 596. The *Whitelock* court instructed:

\* \* \* First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law – not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. \* \* \*

Id. at 596.

{¶4} Defendant proposes this question for certification:

Does classification of an individual convicted of a non-sexually motivated kidnapping involving a victim under the age of eighteen as a sexually oriented offender under former R.C. 2950.01(D)(1)(b)(i) violate the Due Process Clauses of the state and federal Constitutions?

(Motion to Certify a Conflict, at 2.)

{¶5} In 1997, Darryl L. Small was found guilty of kidnapping, a violation of R.C. 2905.01, related to his kidnapping of a minor. Defendant was sentenced to a five-year prison sentence. In 2002, by indictment, defendant was charged with violations of R.C. 2950.05, which required a sex offender to provide notice of change of address, and R.C. 2950.06, which required a sex offender to verify his or her current address. Defendant pled not guilty to these charges. Thereafter, defendant moved the trial court to dismiss the indictment, claiming that: (1) the state's prosecution violated due process and equal protection under both state and federal constitutions as applied to defendant; and (2) defendant was never declared to be a sexually oriented offender by a sentencing court, thus making registration unnecessary. Finding a violation of substantive due process as applied to defendant under both state and federal constitutions, the trial court granted defendant's motion to dismiss. The state appealed from the trial court's judgment. On appeal, we determined that R.C. Chapter 2950 did not implicate a fundamental constitutional right and, absent any infringement of a fundamental constitutional right, we concluded that the trial court erred by finding a substantive due process violation. We therefore reversed the trial court and remanded the cause with an instruction to the trial court to consider defendant's equal protection claim.

{¶6} Subsequently, claiming that this court's decision was lacking because it failed to address whether there was a rational basis for denominating defendant as a sexually oriented offender absent a sexual motivation, defendant moved this court to reconsider our decision. The state agreed that reconsideration was needed. Upon reconsideration, finding that the "sexually oriented offender" classification as applied to defendant with its requisite registration and verification requirements violated substantive due process as applied to defendant, we affirmed the trial court's judgment.

{¶7} Accordingly, we now consider whether our holding in our decision on reconsideration conflicts with the judgments of *Washington*, *Barksdale*, *Reine*, *Young*, *Hickman*, and *Gooden*.

{¶8} In *Washington*, based upon charges arising from a domestic dispute between the defendant and his former girlfriend, the defendant pled guilty to one count of abduction of his former girlfriend and one count of abduction of his minor daughter. The trial court reluctantly classified the defendant as a sexually oriented offender, even though the defendant's abduction of his minor daughter was not motivated by any sexual purpose. On appeal, the defendant argued that former R.C. 2950.09 had been unconstitutionally applied to him. Agreeing with the defendant, the *Washington* court held:

\* \* \* [T]hat unless there is evidence of sexual motivation, there is no rational basis for categorizing an abduction of a victim who is less than eighteen years old as being a sexually oriented offense. Rather, in such instances, a trial court should have some discretion in determining whether a defendant is a sexually oriented offender. Absent a showing that the abduction was motivated for a sexual purpose, appellant's classification as a sexually oriented offender cannot stand. \* \* \*

{¶9} In *Barksdale*, the defendant pled guilty to four counts of kidnapping that involved minors as victims. The parties stipulated that the offenses were committed without any sexual motivation or purpose. Thereafter, the trial court classified the defendant as a sexually oriented offender. On appeal, Barksdale asserted a violation of due process and a violation of equal protection under the state and federal constitutions.

The Second District Court of Appeals found:

\* \* \* [T]hat the requirement that [the defendant] be classified as a sexually oriented offender, and that he comply with the registration and reporting requirements pertaining to sexually oriented offenders, bears no rational relationship to the purposes of the statute and is unreasonable and arbitrary, we agree with [the defendant] that the requirement violates the Due Process clauses of the Ohio Constitution and of the Fourteenth Amendment to the United States Constitution. \* \* \*

Id at ¶3.

{¶10} In *Reine*, the defendant pled guilty to four counts of kidnapping that involved minors as victims. The parties stipulated that the offenses were committed without any sexual motivation or purpose. Thereafter, the trial court classified the defendant as a sexually oriented offender. On appeal, the defendant asserted a violation of due process under state and federal constitutions. Employing language and reasoning that was nearly identical to its decision in *Barksdale*, which was decided on the same day, the Second District Court of Appeals concluded that the requirement that the defendant should be classified as a sexually oriented offender and the mandatory registration and reporting requirements under R.C. Chapter 2950 as applied to him violated due process under state and federal constitutions.

{¶11} In *Young*, after a jury trial, the defendant was convicted of two counts of abduction, one count of aggravated burglary, and two counts of felonious assault. The

charges against the defendant arose, in part, from an indictment concerning the abduction of two minor boys. Finding that the abduction offenses were not motivated by a sexual purpose, the trial court held that no rational relationship existed between the governmental goal of protecting the public from sexually oriented offenders and the facts of the case. *Young*, at ¶40. On cross-appeal, the state argued before the Second District Court of Appeals that its prior decisions in *Barksdale* and *Reine* were erroneous and should be reconsidered. *Id.* at ¶41. The *Young* court disagreed, stating that "[w]e thoroughly considered the issues in *Barksdale* and *Reine* and see no reason to depart from our opinions in those cases." *Id.* at ¶42.

{¶12} In *Hickman*, the defendant pled guilty to two counts of abduction. Thereafter, the defendant moved to withdraw his written guilty plea, and the trial court denied his motion. Finding defendant guilty of two counts of abduction, the trial court sentenced defendant accordingly. Several years later, in April 2003, the defendant filed a motion to preclude or stay, or both, his designation as a sexually oriented offender pending resolution of *State v. Reine*, 99 Ohio St.3d 1434, 2003-Ohio-2902, and *State v. Barksdale*, 99 Ohio St.3d 1434, 2003-Ohio-2902, which were then pending before the Supreme Court of Ohio.<sup>1</sup> Relying upon *Washington*, *supra*, the trial court granted defendant's motion and the state appealed.

{¶13} In its appeal, the state argued that one of the abduction counts for which the defendant was convicted involved a child under eighteen years of age. Therefore, the state reasoned that under R.C. 2950.01(D)(1)(b)(i) and *State v. Hayden* (2002), 96 Ohio

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<sup>1</sup> The Supreme Court later dismissed these appeals. *State v. Reine*, 99 Ohio St.3d 1549, 2003-Ohio-4781, and *State v. Barksdale*, 99 Ohio St.3d 1549, 2003-Ohio-4781.

St.3d 211, the defendant was properly denominated as a sexually oriented offender by operation of law.

{¶14} The *Hickman* court found the state's reliance upon former R.C. 2950.01(D)(1)(b)(i) and *Hayden* was misplaced. The court found that former R.C. 2950.01(D)(1)(b)(vi), not former R.C. 2950.01(D)(1)(b)(i), was controlling. According to the court, former R.C. 2950.01(D)(1)(b)(vi) provided that abduction was a sexually oriented offense " 'when the victim of the offense is under eighteen years of age *and the offense is committed with a sexual motivation.*' " *Hickman*, at ¶17. (Emphasis sic.) Because there was no evidence that the defendant had committed the abduction with a sexual motivation, the court concluded that abduction was not a sexually oriented offense based upon the facts of the case. *Id.* The court also found *Hayden* distinguishable because it concerned a defendant who pled guilty to attempted rape, which constituted a crime that was sexual in nature. *Id.* at ¶18. The *Hickman* court therefore affirmed the trial court's judgment. *Id.* at ¶19.

{¶15} In *Gooden*, the defendant was convicted of, among other things, kidnapping a fourteen year old in violation of R.C. 2905.01, and the trial court classified defendant as a sexually oriented offender. *Id.* at ¶65. Upon appeal, the defendant asserted the trial court improperly denominated him as a sexually oriented offender. *Id.* at ¶64.

{¶16} In its decision, the *Gooden* court recognized that the trial court applied the applicable version of R.C. 2950.01(D)(1) as written, which did not require anything more than the kidnapping of a minor. *Id.* at ¶66. Finding the Second District's reasoning in *Barksdale* and *Reine* was persuasive, the *Gooden* court stated:

We agree with the Second District and find that application of the statutory requirement that Gooden be classified as a sexually oriented offender, in a case in which there was no evidence that the offense was committed with any sexual motivation or purpose, is unreasonable and arbitrary, bears no rational relationship to the purposes of the statute, and, thus, offends the Due Process Clauses of both the Ohio and United States Constitutions.

Id. at ¶67.

{¶17} Thereupon, the *Gooden* court vacated the order of the trial court that designated the defendant as a sexually oriented offender and imposed registration and reporting requirements. Id. at ¶68.

{¶18} In the present case, we acknowledge that this case is factually distinguishable from *Barksdale*, *Reine*, *Washington*, and *Gooden*. The defendants in *Barksdale*, *Reine*, *Washington*, and *Gooden* in direct appeals challenged judgments that classified them as sex offenders. Here, defendant did not challenge his classification as a sexually oriented offender in a direct appeal following his kidnapping conviction in 1997. Rather, defendant challenged his classification as a sexually oriented offender in a motion to dismiss a subsequent indictment for violations of R.C. 2950.05 and 2950.06. However, because the 1997 judgment finding defendant guilty of kidnapping failed to provide a judicial determination of defendant's classification as a sexually oriented offender, we previously found that defendant's challenge of his classification as a sexually oriented offender was timely and proper.

{¶19} In our decision on reconsideration, we held that the "sexually oriented offender" classification as applied to defendant with its requisite registration and verification responsibilities violated substantive due process as applied to defendant.

Having so held, we now find that our judgment in our decision on reconsideration does not conflict with the judgments in *Washington*, *Barksdale*, *Reine*, and *Gooden*, wherein these courts found "as applied" substantive due process violations. Moreover, we find that the case herein is distinguishable from *Hickman*, wherein the court did not find an "as applied" substantive due process violation, and from *Young*, wherein the court declined an invitation to reconsider its previous decisions in *Barksdale* and *Reine*.

{¶20} Accordingly, having determined that our decision does not conflict with the decisions in *Washington*, *Barksdale*, *Reine*, and *Gooden*, and having found that our decision on reconsideration is distinguishable from *Young* and *Hickman*, we deny defendant's motion to certify a conflict, pursuant to App.R. 25.

*Motion to certify denied.*

KLATT and DESHLER, JJ., concur.

DESHLER, J., retired, of the Tenth Appellate District,  
assigned to active duty under authority of Section 6(C),  
Article IV, Ohio Constitution.

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