

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY L. WILKERSON,	§
	§ No. 68, 2005
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr. ID No. 9603005035
	§
Plaintiff Below-	§
Appellee.	§

Submitted: January 13, 2006  
Decided: March 28, 2006

Before **HOLLAND, JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 28<sup>th</sup> day of March 2006, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Gary L. Wilkerson, filed an appeal from the Superior Court's January 11, 2005 order denying his motion for sentence modification. We find no merit to the appeal. Accordingly, we AFFIRM.

(2) In March 1996, Wilkerson was charged with Unlawful Sexual Intercourse in the First Degree, Unlawful Sexual Penetration in the Third Degree, and two counts of Unlawful Sexual Contact in the Second Degree.

On July 3, 1996, Wilkerson pleaded guilty<sup>1</sup> to one count of Unlawful Sexual Intercourse in the Second Degree. On the same date, Wilkerson was sentenced to 20 years incarceration at Level V, to be suspended after 10 years for 4 years of probation. The Superior Court's sentencing order did not expressly require that Wilkerson register as a sex offender upon his release from prison and the judge did not mention the requirement at the sentencing hearing.

(3) In late November 2004, prior to Wilkerson's release date of January 2005, officials from the Delaware Department of Correction informed Wilkerson that he was required to register as a sex offender. Wilkerson objected on the ground that he had never been notified of that requirement. However, Wilkerson finally did register as a Tier III sex offender so as not to jeopardize his timely release from prison.

(4) In this appeal, Wilkerson claims that: a) the Superior Court abused its discretion by not assigning him to a Tier II sex offender designation, in accordance with the statute in effect at the time he was sentenced; b) the sentencing judge improperly failed to notify him that he was required to register as a sex offender; and c) the Superior Court violated

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<sup>1</sup> Super. Ct. Crim. R. 11(e) (1) (C).

his due process rights by failing to hold an evidentiary hearing on his Tier III sex offender designation.

(5) Under Delaware's sex offender registration statute, Del. Code Ann. tit. 11, § 4120 et seq.,<sup>2</sup> any person convicted of an offense designated in Section 4121(a) (4) is required to register as a sex offender upon his release from a Level V or Level IV facility. There are three "Risk Assessment Tiers," each of which has a particular set of registration requirements. Under Section 4121(e), the offender is to be assigned to one of the tiers in accordance with the offense of which he has been convicted without regard to the facts or circumstances of the particular case.<sup>3</sup> There is no right to a prior hearing on the eligibility determination.<sup>4</sup> Pursuant to Section 4122(a), offenders convicted after June 21, 1996 and before March 1, 1999 are subject to the provisions of Section 4121.<sup>5</sup> Under Section 4121(e), which sets out the Risk Assessment Tiers, Unlawful Sexual Intercourse in the Second Degree is classified within Tier III.<sup>6</sup>

(6) Wilkerson's first claim is that he should have been designated a Tier II sex offender. Under Section 4122(a) of the amended sex offender

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<sup>2</sup> The statute was amended in July 1998, with an effective date of March 1, 1999.

<sup>3</sup> *Helman v. State*, 784 A.2d 1058, 1066 (Del. 2001).

<sup>4</sup> *Id.*

<sup>5</sup> Wilkerson, who pleaded guilty on July 3, 1996, falls within that category of offenders.

<sup>6</sup> Among other things, the Tier III designation requires registration by the offender every 90 days for the rest of his life. Del. Code Ann. tit. 11, §§ 4120, 4121, and 4336.

statute, Wilkerson, having been convicted after June 21, 1996 and before March 1, 1999, is subject to Section 4121(e), which assigns those convicted of Unlawful Sexual Intercourse in the Second Degree to Tier III. This Court has held that the assignment of sex offenders such as Wilkerson to Tier III in accordance with the amended statute does not constitute an ex post facto violation.<sup>7</sup> The Superior Court, thus, correctly relied upon the amended sex offender statute, rather than the version in effect at the time Wilkerson was convicted, to assign Wilkerson to Tier III.

(7) Wilkerson's second claim is that the sentencing judge improperly failed to inform him that he had to register as a sex offender. While the amended statute states requires the sentencing judge to hold a hearing to designate a defendant as a sex offender and assign him to a tier,<sup>8</sup> the sentencing judge has no discretion in determining whether the defendant is a sex offender and to what tier he will be assigned once the defendant has been convicted.<sup>9</sup> Thus, even assuming that the required hearing was not held in this case, we conclude that any such error was harmless. Once Wilkerson was convicted of Unlawful Sexual Intercourse in the Second Degree, he was required by statute to be assigned to Tier III.

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<sup>7</sup> *Helman v. State*, 784 A.2d at 1075-78.

<sup>8</sup> Del. Code Ann. tit. 11, § 4121(c).

<sup>9</sup> *Helman v. State*, 784 A.2d at 1066.

(8) Wilkerson’s third claim is that he should have been afforded an evidentiary hearing to determine his tier assignment. There is no right to such a hearing under the Delaware sex offender registration statute. The statute provides for mandatory tier assignments based solely upon the charge of which the sex offender was convicted without regard to the facts and circumstances of a particular case. Moreover, this Court previously has ruled that this “compulsory approach” to sex offender registration and community notification does not implicate any state or federal constitutional liberty or privacy interest and does not constitute a violation of either due process or equal protection.<sup>10</sup>

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice

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<sup>10</sup> Id. at 1069-76.