

[Cite as *State v. Jackson*, 2010-Ohio-5844.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94460

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

GAGAN JACKSON

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-498640

BEFORE: Celebrezze, J., Kilbane, P.J., and Jones, J.

RELEASED AND JOURNALIZED: December 2, 2010

ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor
BY: Daniel T. Van
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Robert Tobik
Cuyahoga County Public Defender
BY: Cullen Sweeney
Assistant Public Defender
310 Lakeside Avenue
Suite 200
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} The state of Ohio appeals the trial court's nunc pro tunc entry correcting Gagan Jackson's sex offender classification. Based on our review of the record and relevant case law, we affirm.

{¶ 2} Based on events that took place in May 2007, Jackson was charged in a three-count indictment for rape, attempted rape, and kidnapping. All charges carried one- and three-year firearm specifications and sexually violent predator specifications; the kidnapping charge also carried a sexual motivation specification. On October 15, 2007, as a result of a plea deal, appellant pled guilty to an amended indictment. Count 1, rape,

was amended to gross sexual imposition, and all specifications were deleted. Count 3, kidnapping, was amended to abduction with a sexual motivation specification. Count 2, attempted rape, was nulled. The trial court sentenced appellant to two years of community control sanctions and labeled him a Tier II sex offender pursuant to Ohio's version of the Adam Walsh Act. R.C. 2950.01, et seq.

{¶ 3} On September 4, 2009, Jackson and the state filed a joint motion requesting the trial court to correct its sentencing entry so that it would constitute a final, appealable order.¹ The same day, Jackson filed a motion to correct his sex offender classification claiming the court mistakenly classified him as a Tier II offender when, by operation of law, he could only be classified as a Tier I offender. On December 4, 2009, the trial judge issued a nunc pro tunc sentencing entry that addressed Count 2 and all of the specifications contained in the original indictment and also classified appellant as a Tier I sex offender.

{¶ 4} The state filed this timely appeal arguing that a nunc pro tunc entry was not the proper mechanism through which to correct appellant's sex offender classification and that the trial court lacked jurisdiction to consider Jackson's motion to correct his sex offender classification.

Law and Analysis

¹ This motion was based on the trial court's failure to dispose of all specifications contained in the original indictment and its failure to address Count 2 in the sentencing entry.

{¶ 5} In its first assignment of error, the state argues that because a nunc pro tunc order can only be used to memorialize what the trial court did at an earlier point, such an order could not properly be used to correct Jackson's sex offender classification. We must first determine whether Jackson was, in fact, misclassified.

{¶ 6} The basis for Jackson's Tier II classification was his conviction for abduction with a sexual motivation specification. The record reflects, however, that Jackson committed the alleged crimes in May 2007. The previous version of R.C. 2905.02, Ohio's abduction statute, did not provide for a sexual motivation specification. Similarly, R.C. 2941.147, Ohio's sexual motivation specification statute, makes no mention of R.C. 2905.02 as a crime to which a sexual motivation specification may attach. R.C. 2905.02 was amended by Am. Sub. S.B. 10, 2007 Ohio Laws 10, which became effective January 1, 2008 and permitted a sexual motivation specification in abduction cases. Because Jackson's crime was committed before this amendment took effect, however, such a specification could not accompany his conviction. This means that Jackson could only be classified as a sex offender based on his conviction for gross sexual imposition in violation of R.C. 2907.05.

{¶ 7} R.C. 2950.01(E)(1)(c) provides that an individual should be labeled a Tier I sex offender if he violates R.C. 2907.05(A)(1), (2), (3), or (5). Although the trial judge did not specify which subsection Jackson was pleading guilty to, she did state that Jackson's gross sexual imposition

conviction was a fourth-degree felony. Pursuant to R.C. 2907.05(C), a violation of subsections (A)(1), (2), (3), or (5) constitutes a fourth-degree felony, whereas a violation of subsection (A)(4) is a felony of the third degree. Based on this analysis, Jackson should have been labeled a Tier I sex offender.

{¶ 8} Crim.R. 36 provides that “[c]lerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time.” The state argues that the trial court’s mistake in classifying Jackson as a Tier II offender was not a mere clerical error, and therefore the use of a nunc pro tunc order was improper.

{¶ 9} The state neglects to recognize that the nunc pro tunc order at issue did more than merely address appellant’s mistaken sex offender classification. The order was issued based on a joint request by the state and the defense seeking a final, appealable order. Before addressing Jackson’s sex offender classification, the nunc pro tunc order indicated that Count 2 was nolle and disposed of all specifications contained in the original indictment. Both of these issues were addressed at the sentencing hearing and could properly be corrected using a nunc pro tunc order. Because the correction of Jackson’s sex offender classification was merely bootstrapped onto what was undisputably a proper nunc pro tunc order, and the court was conducting the ministerial task of properly classifying Jackson as a Tier I sex

offender as mandated by statute, we need not determine whether such an order was the proper mechanism through which to correct his sex offender classification.

{¶ 10} The state also argues that the trial court lacked jurisdiction to decide Jackson's motion to correct his improper sex offender classification. In making this argument, the state relies on *State v. Dobrski*, Lorain App. No. 06CA008925, 2007-Ohio-3121, in which the court heard only the appellant's assignments of error related to his sex offender classification "because the trial court's sexual predator determination is an order that affected a substantial right made in a special proceeding[.]" *Id.* at ¶1.

{¶ 11} This case differs significantly from *Dobrski*. For example, *Dobrski* was decided before Ohio's enactment of the Adam Walsh Act, which removed all discretion from the sex offender classification process and converted it to a ministerial function of the trial court. *State v. Harris*, Franklin App. No. 09AP-1111, 2010-Ohio-4127, ¶11 (sex offender classifications operate as a matter of law and a trial judge has no discretion in this determination). Also in *Dobrski*, the appellant had already filed his direct appeal and because the alleged error affected a substantial right, the court found his sex offender classification to be final and appealable. The state urges us to extend this proposition to Jackson's case and hold that Jackson should have challenged his sex offender classification in a direct appeal.

{¶ 12} Jackson's counsel filed his motion to correct Jackson's sex offender classification on the same day that the state and the defense filed a joint motion requesting a final, appealable order. Jackson's counsel logically assumed that he could not directly appeal Jackson's sex offender classification until a final, appealable order was obtained. To require an offender to directly appeal his sex offender classification despite the fact that the sentencing order was not final and appealable would do nothing more than invite piecemeal appeals. Such a conclusion is absurd and illogical and will not be supported by this court. The state's first and second assignments of error are overruled.

Conclusion

{¶ 13} When asked to issue a nunc pro tunc entry in order to create a final, appealable order, a trial court may also use such an order to properly correct issues involving ministerial functions, such as a sex offender classification. Similarly, although an offender's sex offender classification affects a substantial right and may be addressed on appeal despite the lack of a final, appealable order, an offender is not required to directly appeal his sex offender classification when that classification can be addressed in a properly issued nunc pro tunc order.

Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution.

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

FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, P.J., and
LARRY A. JONES, J., CONCUR