

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

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| IN THE MATTER OF: J.A.D., II, DELINQUENT CHILD | : | OPINION |
| | : | CASE NO. 2012-P-0006 |
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Appeal from the Portage County Court of Common Pleas, Juvenile Division, Case No. 2011 JCA 00698.

Judgment: Reversed and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Theresa M. Scahill*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Appellee-State of Ohio).

Timothy Young, Ohio Public Defender, and *Charlyn Bohland*, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, OH 43215 (For Appellant-J.A.D., II, Minor).

CYNTHIA WESTCOTT RICE, J.

{¶1} After appellant, J.A.D., II, admitted to one charge of rape, the juvenile court accepted appellant’s admission and adjudicated him delinquent. Appellant was committed to the Ohio Department of Youth Services (“DYS”) and the juvenile court classified him a Tier III juvenile offender registrant. Appellant now appeals the juvenile court’s classification entry. For the reasons discussed in this opinion, we reverse the trial court’s judgment and remand the matter for further proceedings.

{¶2} On August 4, 2011, a two-count complaint was filed in the Portage County Juvenile Court alleging appellant was delinquent on one count of rape, in violation of R.C. 2907.02(A)(1)(b), a first-degree felony if committed by an adult; appellant was also charged with gross sexual imposition, in violation of R.C. 2907.05(A)(4), a third-degree felony if committed by an adult. The alleged incidents occurred when appellant was 17 years old. Appellant admitted the rape charge and the trial court accepted the admission. The juvenile court subsequently adjudicated appellant delinquent of rape. At the dispositional hearing, the juvenile court committed appellant to the custody of DYS for not less than two years and no longer than the date of his 21st birthday. The court further classified appellant a tier III sex offender.

{¶3} On appeal, appellant assigns five errors for this court's review. For his first assignment of error, appellant asserts:

{¶4} "The trial court erred when it classified [appellant] as a juvenile offender registrant because it did not make that determination upon his release from the secure facility, in violation of R.C. 2152.83(A)(1)."

{¶5} R.C. 2152.83(A)(1) governs when a court is required to classify, for purposes of registration, a first-time juvenile sex offender that is 16 or 17 at the time the offense was committed. It provides:

{¶6} (A)(1) The court that adjudicates a child a delinquent child shall issue as part of the dispositional order or, if the court commits the child for the delinquent act to the custody of a secure facility, shall issue at the time of the child's release from the secure facility, an order that classifies the child a juvenile offender registrant and

specifies that the child has a duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code if all of the following apply:

- {¶7} (a) The act for which the child is or was adjudicated a delinquent child is a sexually oriented offense or a child-victim oriented offense that the child committed on or after January 1, 2002.
- {¶8} (b) The child was sixteen or seventeen years of age at the time of committing the offense.
- {¶9} (c) The court was not required to classify the child a juvenile offender registrant under section 2152.82 of the Revised Code or as both a juvenile offender registrant and a public registry-qualified juvenile offender registrant under section 2152.86 of the Revised Code.

{¶10} Because he was a first-time offender, was 17 years old at the time the offense was committed, and was committed to a secured facility, appellant maintains the juvenile court did not have the authority to classify him a tier III offender at the dispositional hearing. Instead, pursuant to the letter of the statute, appellant asserts his circumstances mandate that a juvenile court wait until the juvenile offender is released from the facility before it enters its classification. Thus, appellant argues, the juvenile court erred as a matter of law when it entered its classification as part of its dispositional order.

{¶11} Alternatively, the state contends the trial court possessed the discretion to either classify appellant at the disposition hearing or upon release. In support, the state

analogizes R.C. 2152.83(A)(1) with R.C. 2152.83(B)(1), the subsection addressing the classification of 14 and 15 year old juvenile sex offenders. Under subsection (B)(1), the juvenile court has the discretion to classify a child sex offender at either the dispositional stage or upon release from a secured facility. The state proposes this court read subsection (A)(1) in the same fashion as subsection (B)(1). We shall first consider the state's position.

{¶12} R.C. 2152. 83(B)(1) provides, in relevant part:

{¶13} The court that adjudicates a child a delinquent child, on the judge's own motion, may conduct at the time of disposition of the child or, if the court commits the child for the delinquent act to the custody of a secure facility, may conduct at the time of the child's release from the secure facility a hearing for the purposes described in division (B)(2) of this section.

{¶14} This court has, on several occasions, held that hearings prescribed by R.C. 2152.83(B) may occur at any time during the dispositional period, including prior to commitment to DYS or another secure facility. *In re Thrower*, 11th Dist. No. 2008-G-2813, 2009-Ohio-1314, ¶14; *In re B.W.K.*, 11th Dist. No. 2009-P-0058, 2010-Ohio-3050, ¶13; *In re N.Z.*, 11th Dist. Nos. 2010-L-023, 2010-L-035, 2010-L-041, 2011-Ohio-6845, ¶108; *In re B.D.* 11th Dist. No. 2011-P-0078, 2012-Ohio-4463, ¶14. Nevertheless, R.C. 2152.83(B)(1) states the juvenile court *may*, at the time of disposition, or *may*, at the time of the juvenile offender's release from a secure facility, conduct a hearing to determine whether the juvenile offender should be classified pursuant to R.C. 2152.83(B)(2). R.C. 2152.83(A)(1) does not include permissive language affording the

juvenile court discretion as to when to enter its classification. To the contrary, an offender, such as appellant, that is subject to the proceedings defined under R.C. 2152.83(A)(1) may *only* be classified “at the time of [his or her] release from the secure facility” to which he or she was committed at the dispositional hearing.

{¶15} Given the language of each provision, the proceedings defined under R.C. 2152.83(A)(1) cannot be reasonably analogized to the proceedings defined under R.C. 2152.83(B)(1). The state’s argument is without merit.

{¶16} Turning to appellant’s position, we acknowledge that trial counsel did not object to the juvenile court’s classification. We consequently review the trial court’s action using a “plain error” standard. Plain error exists where the error is plain, obvious, and affected the outcome of the proceedings. *In re B.W.K.*, *supra*, at ¶10.

{¶17} R.C. 2152.83(A)(1) mandates that a juvenile court classify the juvenile offender, for sex offender registration purposes, at one of two times, depending on the nature of the court’s order. If the juvenile offender is not committed to the custody of a secure facility, the juvenile court is required to classify the offender as part of its dispositional order. If, as here, the offender is committed to the custody of a secure facility, the court is required to classify the offender at the time of the offender’s release from the secure facility. The clear language of R.C. 2152.83(A)(1) does not give a juvenile court any discretion as to the timing for classifying a juvenile sex offender for registration. Multiple districts in this state have ruled accordingly. *In re P.B.*, 4th Dist. No. 07CA3140, 2007-Ohio-3937, ¶8 (“although a juvenile court has discretion as to the type of disposition it makes, the court apparently does not have discretion to determine *when* the delinquent child can be adjudicated a sexual predator. If a child is committed

to DYS, the legislature has decided that such a determination must wait until the child's release."); *In re Kristopher W.*, 5th Dist. No. 2008 AP 03 0022, 2008-Ohio-6075, ¶18 (where juvenile committed to custody of DYS, his classification "must be made upon his release from a secure facility."); *In re H.P.*, 9th Dist. No. 24239, 2008-Ohio-5848, ¶14 ("[i]n cases where a juvenile is committed to a secure facility, [the juvenile court] must wait to classify the juvenile upon his release from the secure facility.."); *In re T.D.*, 12th Dist. No. CA2010-01-002, 2010-Ohio-6081, ¶28 ("the timing for sex offender classification [under R.C. 2152.83(A)(1)] is dictated by the commitment of the child to a secure facility or the lack thereof.")

{¶18} In the instant matter, the juvenile court issued its classification as part of the dispositional order. In doing so, the court ran afoul of the unambiguous statutory language. We therefore conclude that the juvenile court committed plain error in classifying appellant as part of the dispositional order. As a result, we hold the juvenile court's order must be reversed and vacated.

{¶19} Appellant's first assignment of error has merit.

{¶20} Appellant's second, third, and fourth assignments of error are as follows:

{¶21} "[2.] The juvenile court abused its discretion when it classified [appellant] a tier III juvenile offender registrant when it made that determination based solely on [appellant's] offense and without the understanding that it had discretion to determine his tier level. R.C. 2152.83. (T.pp. 6, 15; A-1).

{¶22} "[3.] The juvenile court erred when it classified [appellant] as a tier III juvenile offender registrant because the application of R.C. 2152.83 to him violates his right to equal protection under the law in violation of the Fourteenth Amendment to the

United States Constitution, and Article I, Section 2 of the Ohio Constitution. (T.pp. 6 15; A-1)

{¶23} “[4.] The application of Senate Bill 10 to a child who is adjudicated delinquent of a sex offense violates R.C. 2151.01(B), R.C. 2152.01(A) and (B), and the child’s right to Due Process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution. (T.pp. 6, 15; A-1).”

{¶24} Appellant’s second, third, and fourth assignments of error each challenge aspects of the classification order entered as part of appellant’s dispositional order. Pursuant to our analysis of appellant’s first assignment of error, the trial court lacked authority to classify appellant via the dispositional order. That order is therefore vacated and appellant’s classification must be postponed until he is released from DYS. Because appellant cannot be classified until his release, any challenge to the substance of the trial court’s erroneous classification or the constitutionality of the scheme is premature and not ripe for review.

{¶25} Appellant’s fifth assignment of error provides:

{¶26} “[Appellant] was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution when counsel failed to object to the timing of [appellant’s] classification hearing, and when counsel failed to argue against a tier III classification. (T.pp. 6, 15; A-1).”

{¶27} Appellant first argues counsel was ineffective for failing to object to the timing of the court’s classification. This argument is moot. Specifically, the court committed plain error when it classified appellant as part of the dispositional order. By

noticing plain error, the prejudice appellant suffered by counsel's failure to object was cured. Appellant's argument on this point is therefore overruled.

{¶28} Appellant next asserts counsel was ineffective for failing to object to the nature of his classification. Pursuant to our resolution of appellant's first assignment of error, however, the trial court's act of classifying appellant as a Tier III offender was a nullity. As discussed above, it did not have authority to so classify appellant when it did and, as a result, that classification must be vacated. Because appellant cannot be classified until his release from DYS, counsel's failure to object to the nature of the classification is inconsequential. Appellant's argument, therefore, lacks merit.

{¶29} Appellant's fifth assignment of error is without merit.

{¶30} For the reasons discussed in this opinion, appellant's fifth assignment of error is overruled; and appellant's second, third, and fourth assignments of error are not yet ripe for resolution. Because, however, the trial court improperly classified appellant, for purposes of registration, in its dispositional order, appellant's first assignment of error is sustained. We therefore conclude the judgment of the Portage County Court of Common Pleas, Juvenile Division, is reversed and vacated. And the matter must be remanded to the lower court for further proceedings consistent with this opinion.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.