

[Cite as *State v. Owens*, 2010-Ohio-4923.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO

:

Plaintiff-Appellee

:
C.A. CASE NO.
23820

v.

: T.C. NO.
09CR644

JIMMY LEWIS OWENS

:

(Criminal appeal from
Common Pleas Court)

Defendant-Appellant

:

:

.....

OPINION

Rendered on the 8th day of October, 2010.

.....

JOHNNA M. SHIA, Atty. Reg. No. 0067685, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

MARK J. KELLER, Atty. Reg. No. 0078469, 333 West First Street, Suite 445, Dayton, Ohio 45402
Attorney for Defendant-Appellant

.....

DONOVAN, P.J.

{¶ 1} Defendant-appellant Jimmy Lewis Owens appeals his conviction and sentence for one count of failure to verify, in violation of R.C. 2950.06(A) and (F). Owens filed a

timely notice of appeal with this Court on January 13, 2010.

I

{¶ 2} On March 5, 2009, Owens was indicted for one count of failure to verify his address with the Montgomery County Sheriff's Office (MCSO) in February of 2009. Owens' duty to verify stemmed from convictions for four counts of rape and one count of gross sexual imposition on September 17, 1998. As a result of his convictions, Owens was sentenced to an aggregate prison term of four years, and he was classified as a sexually oriented offender, requiring him to verify his registration information annually for a period of ten years.

{¶ 3} Owens was released from prison on September 13, 2002. On September 19, 2002, Owens registered with the MCSO for the first time. In January of 2008, the Ohio Attorney General notified Owens that pursuant to S.B. 10, Ohio's new sexual offender registration law, that he would be reclassified as a Tier III sex offender as of January 1, 2008. The revised Tier III classification required Owens to register every 90 days for life. Throughout 2008, Owens registered with MCSO every 90 days pursuant to S.B. 10.

{¶ 4} At the end of next 90 day period on February 14, 2009, however, Owens failed to appear at the MCSO and provide his registration information. In response, the MCSO mailed a warning letter to Owens at his last known address, but the letter was returned as "undeliverable as addressed." Owens was subsequently arrested and charged with failure to verify his registration information.

{¶ 5} At his arraignment on March 19, 2009, Owens pled not guilty. Owens filed a motion to dismiss the indictment on April 20, 2009. The trial court denied his motion to dismiss in a judgment entry filed on June 3, 2009. Owens plead no contest to failure to verify

his address on November 5, 2009. On December 15, 2009, the trial court sentenced to three years in prison. The court, however, allowed Owens to remain out on bond pending the outcome of his appeal.

{¶ 6} It is from this judgment that Owens now appeals.

II

{¶ 7} Owens' first assignment of error is as follows:

{¶ 8} "OWENS' RECLASSIFICATION AS A TIER III SEX OFFENDER VIOLATES THE SEPARATION OF POWERS DOCTRINE AND IS THEREFORE UNCONSTITUTIONAL."

{¶ 9} We recently discussed the same argument in *State v. Hill*, Montgomery App. No. 23171, 2010-Ohio-2834, in which we stated the following:

{¶ 10} "By way of background, in 2006, Congress passed the Adam Walsh Child Protection and Safety Act ('A.W.A.') which created national standards for sex-offender registration, community notification, and classification. In 2007, the Ohio General Assembly enacted Senate Bill 10 ('S.B.10') in response to the A.W.A. S.B. 10 repealed former legislation, replacing it with a retroactive scheme that includes a three-tiered system dividing sex offenders into three categories. S.B. 10 abolished the previous classifications of sexually oriented offender, habitual sex offender, and sexual predator, and it required the attorney general to reclassify offenders instead as Tier I, Tier II, or Tier III sex offenders, based upon the offender's offense. S.B.10 required the attorney general to send official notification to existing offenders regarding their new tier classification and attendant duties.

{¶ 11} "The Ohio Supreme Court recently determined that R.C. 2950.031 and 2950.032 violate the separation of powers doctrine, and the Court severed those sections from

the statutory scheme. *State v. Bodyke*, [126 Ohio St.3d 266], Slip Opinion No. 2010-Ohio-2424, ¶ 66. Those sections governed the reclassification by the attorney general of sex offenders already classified by judges under a prior version of R.C. Chapter 2950.

{¶ 12} “According to *Bodyke*, ‘Our Constitution and case law make undeniably clear that the judicial power resides exclusively in the judicial branch. (Citation omitted). The judicial power of the state is vested exclusively in the courts. (Citation omitted). The power to review and affirm, modify, or reverse other court’s judgments is strictly limited to appellate courts. (Citation omitted). The AWA intrudes on that exclusive role and thus violates the separation-of-powers doctrine.

{¶ 13} “ ‘Moreover, once the final judgment has been opened, the AWA requires that the attorney general “shall determine” the new classifications of offenders * * * who were classified by judges under the former statutes. R.C. 2950.031(A)(1); 2950.032(A)(1)(a) and (b). In doing so, it violates a second prohibition by assigning to the executive branch the authority to revisit a judicial determination.

{¶ 14} “ ‘Thus, we conclude that R.C. 2950.031 and 2950.032, which require the attorney general to reclassify sex offenders who have already been classified by court order under former law, impermissibly instruct the executive branch to review past decisions of the judicial branch and thereby violate the separation-of-powers doctrine.

{¶ 15} “ ‘We further conclude that R.C. 2950.031 and 2950.032, which require the attorney general to reclassify sex offenders whose classifications have already been adjudicated by a court and made the subject of a final order, violate the separation-of-powers doctrine by requiring the opening of final judgments.’ *Id.*, at ¶ 58- 61.

{¶ 16} “The Supreme Court concluded that ‘severance of R.C. 2950.031 and

2950.032, the reclassification provisions in the AWA, is the proper remedy. By excising the unconstitutional component, we do not “detract from the overriding objectives of the General Assembly,” i.e., to better protect the public from the recidivism of sex offenders, and the remainder of the AWA, “which is capable of being read and of standing alone, is left in place.” (Citation omitted). We therefore hold that R.C. 2950.031 and 2950.032 are severed and, that after severance, they may not be enforced. R.C. 2950.031 and 2950.032 may not be applied to offenders previously adjudicated by judges * * * , and the classifications and community-notification and registration orders imposed previously by judges are reinstated.’ *Id.*, at ¶ 66.” *Hill*, at paragraphs 11-17.

{¶ 17} *Bodyke* is dispositive of Owens’ arguments addressed to his reclassification; R.C. 2950.031 and 2950.032 have been excised from the statutory scheme. Accordingly, Owens’ reclassification as a Tier III sex offender by the Attorney General was unconstitutional, and Owens’ conviction for failure to verify his address every 90 days pursuant to the excised portions of S.B. 10 cannot be enforced. Thus, the classification and registration order originally imposed by the trial judge in 1998 is reinstated; to wit: Owens is classified as a sexually oriented offender, requiring him to verify his registration information annually for a period of ten years from his release from prison for the underlying offenses until September of 2012. We note that the State concedes Owens’ argument in this regard as set forth in his first assignment of error.

{¶ 18} Owens’ first assignment of error is sustained.

III

{¶ 19} Owens’ second and third assignments of error are as follows:

{¶ 20} “OWENS SUBSTANTIALLY COMPLIED WITH THE REQUIREMENTS

OF R.C. 2950.06 WHEN HE COMPLIED WITH R.C. 2950.05.”

{¶ 21} “OWENS’ CONVICTION IS IMPROPER AS HE DID NOT RECEIVE NOTICE OF THE 7-DAY WARNING LETTER.”

{¶ 22} In light of our disposition regarding Owens’ first assignment, his remaining assignments of error are rendered moot.

IV

{¶ 23} Owens’ first assignment of error having been sustained, his conviction for failure to verify is reversed and vacated.

.....

FAIN, J. and GRADY, J., concur.

Copies mailed to:

- Johnna M. Shia
- Mark J. Keller
- Hon. Timothy N. O’Connell