[Cite as *State v. Stansell*, 2010-Ohio-5756.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23630
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-4925
v.	:	
	:	(Criminal Appeal from
GREGORY J. STANSELL	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 24th day of November, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Gregory Stansell appeals from his conviction and sentence, following a jury trial, for Failure to Notify under R.C. 2950.05.

{¶ 2} Stansell contends that the indictment is legally defective because it fails to allege a culpability or *mens rea* element of recklessness. Stansell also maintains that the trial court erred by using a visiting judge for the trial without a valid

transfer order having been filed in the trial court.

{¶ 3} We conclude that the indictment is not defective. R.C. 2950.05 imposes strict liability, and a *mens rea* element is not required. We also conclude that Stansell waived any error regarding the use of a visiting judge, because he failed to object to the assignment during the trial court proceedings.

{¶ 4} Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 5} Gregory Stansell was convicted in September 2004, of the offense of unlawful sexual conduct with a minor. Stansell was sentenced to one year in prison, and was also designated as a sexually oriented offender, with a requirement of registering as a sex offender under R.C. 2950.03 and R.C. 2950.04. At the time, this required annual registration for ten years. In January 2008, Stansell was convicted of Failure to Notify, and was sentenced to community control sanctions. After community control was revoked, Stansell was sent to prison. He was then released from prison on December 20, 2008.

{¶ 6} Due to the passage of Am.Sub.S.B. 10 in 2007, Stansell was re-classified as a Tier II sex offender, which means that he is required to register every 180 days for 25 years. See August 10, 2009 Trial Transcript, p. 127. After being released from prison, Stansell registered his address on December 23, 2008, with the Montgomery County Sheriff's Department. His listed address was the Dixie Tourist Motel, located at 3115 North Dixie Drive, in Harrison Township, Ohio.

{¶ 7} Officer Burghardt of the Montgomery County Sheriff's Office visited the

Dixie Tourist Motel on December 26, 2008, but was unable to verify that Stansell lived there. Burghardt conveyed this information to Detective Kellar, who investigated further on December 29, 2008, by speaking to the manager of the Dixie Tourist Motel and to Stansell's relative, Phil Hoskins, who resided at the motel. Based on the information that he received, Kellar went on the same day to 3009 Beulah Street in Kettering, Ohio, where another of Stansell's relatives lived. When Kellar was admitted to the residence, he saw Stansell sitting on a couch. Stansell told Kellar that he was living at his Uncle Steve's home, on Beulah Street. Stansell then accompanied Kellar to the Sheriff's Office to register his address. After being questioned by police, Stansell was indicted for Failure to Notify, with a special finding that he had previously been convicted of Failure to Notify. Stansell's first trial resulted in a mistrial, because the jury was unable to reach a verdict. On re-trial before another jury, Stansell was convicted of Failure to Notify, and was sentenced to a mandatory term of three years in prison. Stansell now appeals from the judgment of conviction and sentence.

II

{¶ 8} Stansell's First Assignment of Error is as follows:

{¶ 9} "THE INDICTMENT WAS LEGALLY DEFICIENT BECAUSE IT FAILED TO ALLEGE A NECESSARY ELEMENT, THE MENS REA ELEMENT OF RECKLESSNESS. THE TRIAL COURT ERRED BY ACCEPTING A JURY VERDICT BASED ON A LEGALLY DEFICIENT INDICTMENT."

{¶ 10} Under this assignment of error, Stansell contends that the indictment is

legally defective because it does not contain a culpability or *mens rea* element. Stansell acknowledges that R.C. 2950.05 does not specify a mental element. He argues, however, that an element of recklessness should be used, because the General Assembly has not plainly indicated within the statutory language that R.C. 2950.05(F)(1) should be a strict liability offense.

{¶ 11} Stansell was indicted for having violated R.C. 2950.05(A) and (F)(1), which state in pertinent part, as follows:

{¶ 12} "(A) If an offender * * * is required to register pursuant to division (A)(2), (3), or (4) of section 2950.04 or 2950.041 of the Revised Code, * * * the offender * * * shall provide notice of any change of residence, school, institution of higher education, or place of employment address, to the sheriff with whom the offender * * * most recently registered the address under division (A)(2), (3), or (4) of section 2950.04 or 2950.041 of the Revised Code or under division (B) of this section. A written notice of a change of school, institution of higher education, or place of employment address also shall include the name of the new school, institution of higher education, or place of employment. The * * * offender * * * shall provide the written notice at least twenty days prior to changing the address of the residence, school, or institution of higher education and not later than three days after changing the address of the place of employment.

{¶ 13} " * * *

{¶ 14} "(F)(1) No person who is required to notify a sheriff of a change of address pursuant to division (A) of this section or a change in vehicle information or identifiers pursuant to division (D) of this section shall fail to notify the appropriate

sheriff in accordance with that division."

{¶ 15} R.C. 2905.05 does not specify a particular mental state required for the commission of the offense. Under established Ohio law, an offender's mental state is part of every criminal offense, except where strict liability is plainly imposed for the offense. *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, ¶ 18, citing R.C. 2901.21(A). Situations involving strict liability and statutes that do not discuss culpability are addressed in R.C. 2901.21(B), which states that:

{¶ 16} "When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."

{¶ 17} A number of Ohio appellate districts, including our own, have concluded that R.C. 2950.05 imposes strict liability, and does not require a *mens rea* element. See *State v. Finn*, Montgomery App. No. 22914, 2009-Ohio-4949. ¶ 29-30; *State v. Blanton,* 184 Ohio App.3d 611, 2009-Ohio-5334, ¶ 26; *State v. Ramsey*, Hamilton App. No. C-090076, 2010-Ohio-2456, ¶ 10; *State v. Robinson*, Erie App. No. E-07-020, 2009-Ohio-2921, ¶ 16-17, *State v. Hardy*, Summit App. No. 21015, 2002-Ohio-6457, ¶ 22; and *State v. Beasley* (Sept. 27, 2001), Cuyahoga App. No. 77761 (cases from the Second, Tenth, First, Sixth, Ninth, and Eighth District Courts of Appeals, respectively).

{¶ 18} In *Finn*, we observed that:

{¶ 19} " 'Generally, strict liability attaches to criminal offenses which are regulatory in nature and which are designed to protect the health, safety, and well-being of the community. * * * Furthermore, when a statute reads "no person shall" engage in proscribed conduct, absent any reference to a culpable mental state, the statute indicates a legislative intent to impose strict liability.'

{¶ 20} "Sexual offender registration laws are 'mala prohibita,' acts made unlawful for the good of the public welfare regardless of the accused's state of mind, and therefore the failure to register is a strict liability offense. * * * In *State v. Cook*, 83 Ohio St.3d 404, 420, 700 N.E.2d 570, 1998-Ohio-291, the Supreme Court of Ohio found that failing to register under R.C. 2950.04 does not require a culpable mental state: 'The act of failing to register alone, without more, is sufficient to trigger criminal punishment provided in R.C. 2950.99.' Failure to register as a sex offender per R.C. 2950.04 is a strict liability offense that does not require proof of intent or a culpable mental state on Defendant's part." *Finn*, 2009-Ohio-4949, ¶ 29-30 (citations omitted). But, see *State v. Collins* (2000), 89 Ohio St.3d 524, 530, in which the Supreme Court of Ohio seems to say that an intent to impose criminal liability without proof of mental culpability must be "plainly indicate[d] * * * in the language of the statute."

{¶ 21} Accordingly, the indictment in the case before us was not required to include a mental state, and is not defective for having failed to do so.

{¶ 22} Stansell's First Assignment of Error is overruled.

III

{¶ 23} Stansell's Second Assignment of Error is as follows:

{¶ 24} "THE TRIAL COURT PREJUDICIALLY ERRED BY PROCEEDING WITH THE RE-TRIAL USING A VISITING JUDGE WITHOUT A VALID TRANSFER ORDER BEING FILED IN THE DOCKET."

{¶ 25} Under this assignment of error, Stansell contends that the trial court erred by allowing a visiting judge to preside over his jury trial, when the docket fails to reflect a proper referral to the visiting judge.

{¶ 26} Stansell was indicted in January 2009, and the case was referred to a visiting judge in June 2009, for the purpose of conducting a jury trial. The referral entry indicates that the case would be referred back to the assigned judge upon completion of the jury trial. A jury trial was held in June 2006, before a visiting judge, and resulted in a mistrial, because the jury could not reach a verdict. The record and trial transcript do not reveal any objection to the referral to the visiting judge.

{¶ 27} A second jury trial was held in August 2010. The regularly-assigned judge conducted jury selection, and then turned the case over to a visiting judge. Just prior to the opening statements, the visiting judge introduced himself and indicated that he had been appointed by the Supreme Court of Ohio to sit by assignment that week. The judge then stated that he would be trying the case from that point forward. Stansell and his counsel were present and did not make any objection.

{¶ 28} Because Stansell did not object to the assignment to the visiting judge, he failed to preserve the error and has waived it for purposes of appellate review. *In*

re J.J., 111 Ohio St.3d 205, 2006-Ohio-5484, ¶ 16. *In re J.J.* involved the validity of a magistrate's order that had transferred the case to a visiting judge. Id. at ¶ 7. The Supreme Court of Ohio held that "In a court that possesses subject-matter jurisdiction, procedural irregularities in the transfer of a case to a visiting judge affect the court's jurisdiction over the particular case and render the judgment voidable, not void." Id. at paragraph one of the syllabus. Accordingly, even though the magistrate's order in the particular case was erroneous, it would not have divested the trial court of jurisdiction. Id. at ¶ 16.

{¶ 29} In the case of *In re J.J.*, The Supreme Court of Ohio also held that the appellant had waived the error, because he failed to object to the magistrate's transfer order at any stage of the trial proceedings. The Supreme Court of Ohio stressed that "[a] party may timely object to the authority of a visiting judge on the basis of an improper case transfer or assignment, but failure to timely enter such an objection waives the procedural error." Id. In the case before us, Stansell waived any alleged error, by failing to object to trial before the visiting judge.

{¶ 30} Stansell's Second Assignment of Error is overruled.

IV

{¶ 31} In its brief, the State raises the potential application of *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, which held R.C. 2950.031 and R.C. 2950.032 unconstitutional, and precluded the application of these statutes to sex offenders whose status has been previously adjudicated under Megan's law. Despite raising the issue, the State argues that Stansell has waived arguments about the

constitutionality of Am.Sub. S.B. 10 (the Adam Walsh Act), because Stansell did not raise the matter in the trial court, and has not assigned error related to this issue on appeal. Stansell did not file a reply brief, and has not responded to the State's argument.

{¶ 32} "Crim. R. 52(B) allows for a reviewing court to consider errors committed at trial, upon which appellant did not object, only if those errors affected the substantial rights of the appellant. A reviewing court should use the utmost caution in taking notice of plain error and should do so only if it is clear that, but for the error, the result in the trial court would have been different. * * * Notice of plain error should be taken only in exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Russell*, Montgomery App. No. 21458, 2008-Ohio-774, ¶ 121 (citations omitted).

{¶ 33} Assuming, for the sake of argument, that the State's potential issue should be considered, no error occurred that would affect Stansell's substantial rights. In *Bodyke*, the Supreme Court of Ohio held that:

{¶ 34} "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." 2010-Ohio-2424, at paragraph two of the syllabus.

{¶ 35} The statutory amendments that were rejected in *Bodyke* became effective on July 1, 2007. Stansell was adjudicated a sexually oriented offender in 2004, prior to the effective date of the amendments. He was also ordered to register

as a sex offender under the statutes that existed at the time.

{¶ 36} In *State v. Huffman*, Montgomery App. No. 23610, 2010-Ohio-4755, we considered whether trial counsel was ineffective for having failed to raise the constitutionality of the reclassification statutes in the trial court. We concluded that trial counsel was not ineffective, because the reclassification statutes had no bearing on the outcome of the defendant's prosecution. Id. at ¶ 22. We noted that:

{¶ 37} "According to *Bodyke*, Huffman's reclassification as a Tier I offender cannot be enforced, and his original classification as a sexually oriented offender will be reinstated. Id. at ¶ 66. However, as stated in Part II above, Huffman was required to register once per year even before his reclassification from a sexually oriented offender to a Tier I offender. He failed to do so and was appropriately prosecuted, convicted and sentenced." *Huffman*, 2010-Ohio-4755, ¶ 22.

{¶ 38} We concluded, therefore, that since the defendant's classification as a sexually oriented offender would be reinstated under *Bodyke*, any claims about the registration requirements under the Adam Walsh Act would be moot. Id. at ¶ 27.

{¶ 39} Similarly to the defendant in *Huffman*, Stansell was required to notify the police of his address upon his release from prison, and upon changing his residence address, and his classification as a Tier II offender is not relevant to this duty. Stansell failed to comply with the notification requirement, and was properly convicted and sentenced for that crime. Stansell's classification as a sexually oriented offender, and the duties attached to that classification would be reinstated pursuant to *Bodyke*, and any potential claims about the registration requirements under the Adam Walsh Act would be moot. Thus, Stansell's substantial rights would

not have been affected by counsel's failure to raise the applicability of Am.Sub. S.B. 10.

V

{¶ 40} All of Stansell's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and BROGAN, J., concur.

Copies mailed to:

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