

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-19-1213

Appellee

Trial Court No. CR0201901226

v.

Cody Wright

DECISION AND JUDGMENT

Appellant

Decided: January 29, 2021

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Alyssa Breyman, Assistant Prosecuting Attorney, for appellee.

Autumn D. Adams, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Cody Wright, appeals the July 17, 2019 decision by the Lucas County Court of Common Pleas finding appellant guilty of one charge of attempt to commit aggravated arson and which required appellant to register for his lifetime with the Arson Offender Registry. For the following reasons, we affirm.

{¶ 2} On July 6, 2011, appellant set fire to the lower level of a duplex on McKinley Avenue. Appellant would later admit to police that he rented the unit and that he set the fire in an effort to recover money from an insurance policy on the unit. Appellant would eventually receive a payment for the loss of the duplex from the insurance company.

{¶ 3} On February 8, 2019, appellant was indicted with one count of aggravated arson in violation of R.C. 2909.02(A)(3), (B)(1), and (B)(2), a felony of the first degree and one count of aggravated arson in violation of R.C. 2909.02(A)(3), (B)(1), and (B)(3), a felony of the second degree. Appellant would later enter a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to one count of attempt to commit aggravated arson in violation of R.C. 2923.02 and R.C. 2909.02(A)(2), (B)(1), and (b)(3), a felony of the third degree, a lesser included charge to the second count of aggravated arson. The first count of aggravated arson was dismissed as part of this agreement. Appellant was sentenced to one year of community control with a reserved sentence of nine months. Over appellant's objections, appellant was required by the trial court to register for the rest of his life with the Arson Offender Registry.

{¶ 4} Appellant brings forth two assignments of error for our review:

I. The Arson Offender Registry violates the Retroactivity Clause of the Ohio Constitution.

II. The Arson Offender Registry is an unconstitutional encroachment upon the judicial branch.

Arson Offender Registry

{¶ 5} In 2012, the Ohio General Assembly passed a statewide registration scheme intended to track arson offenders in 2012 Am.Sub.S.B. 70. The statutes became effective on July 1, 2013.

{¶ 6} Under the scheme, all “arson offenders” must register with the sheriff in the county in which the offender resides on an annual basis. An “arson offender” is a person “on or after the effective date of [the] section is convicted of or pleads guilty to an arson-related offense,” “[a] person who on the effective date of this section has been convicted of or pleaded guilty to an arson-related offense and is confined,” or “[a] person who on or after the effective date of this section is charged with committing, attempting to commit, conspiring to commit, or complicity in committing a violation of section 2909.02 or 2909.03 of the Revised Code.” R.C. 2909.13(B).

{¶ 7} An arson offender is required to register within ten days of their release from confinement or after they receive notice of their duty to register. The registration includes the offender’s name, aliases, address, social security number, driver’s license number, the name of their employer or school, their license plate number, and any description of distinguishing marks of the offender such as tattoos or scars. R.C. 2909.15(C)(2). The arson offender must also provide finger and palm prints as well as a photo each year when they register. R.C. 2909.15(C)(3). The arson offenders must pay an original fee of 50 dollars and then 25 dollars every year after. R.C. 2909.15(F).

{¶ 8} The registration lasts the lifetime of the arson offender except a “judge may limit an arson offender’s duty to reregister at an arson offender’s sentencing hearing to not less than ten years if the judge receives a request from the prosecutor and the investigating law enforcement agency to consider limited the arson offender’s registration period.” R.C. 2909.15(D)(2)(b). “Whoever fails to register or reregister as required by this section is guilty of a felony of the fifth degree” and the failure to register serves as a violation of a community control sanction, parole, or post-release control. R.C. 2909.15(H).

**The Arson Offender Registry is not unconstitutional
despite its retroactive application.**

{¶ 9} Analysis under Ohio’s Retroactivity Clause is distinct from that required under the Ex Post Facto Clause of the United States Constitution. *State v. Caldwell*, 2014-Ohio-3566, 18 N.E.3d 467, ¶ 14 (1st Dist.), citing *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534. “Ohio’s Retroactivity Clause broadly prohibits retroactive legislation impairing substantial rights, while the federal Ex Post Facto Clause applies only to criminal statutes. (Citations omitted). *Id.* As appellant does not claim that the arson offender registration requirements violate the Ex Post Facto Clause, our review is limited to any constraints imposed upon the General Assembly by the Ohio Constitution.

{¶ 10} The Retroactivity Clause of the Ohio Constitution provides “The general assembly shall have no power to pass retroactive laws * * *.” Art. II, § 28. A two-tiered

framework to address concerns brought on by retroactive legislation has been developed. *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 10.

{¶ 11} First, R.C. 1.48 provides “A statute is presumed to be prospective in its operation unless expressly made retrospective.” Thus, the first task is to determine whether the legislature expressed a clear intent that a statute be applied retroactively. *Id.*, citing *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 106, 522 N.E.2d 489 (1988). “The presumption that statutes apply prospectively may be overcome only upon a “clearly expressed legislative intent” that they apply retroactively.” *Id.*, citing *Walls* at ¶ 10. Here, the legislature clearly expressed legislative intent that the statute would apply retroactively. R.C. 2909.13(B) specifies that the registration requirements apply to any arson offender, including a person who was convicted of or pleaded guilty to an arson-related offense or a person who is serving a term of confinement on the date the statute became effective. The legislature therefore intended the statute to apply to those persons who were previously convicted of an arson-related offense because the statute includes those who were already serving a term of confinement on the effective date. This necessarily incorporates criminal conduct that occurred prior to the effective date. *See Caldwell* at ¶ 20.

{¶ 12} The next question becomes whether the application of the registration statutes is permissible under the Ohio Constitution by analyzing whether the statute is remedial or substantive. *Walls* at ¶ 10. Retroactive laws are not always forbidden in Ohio. *White* at ¶ 31, quoting *Bielat v. Bielat*, 87 Ohio St.3d 350, 353, 721 N.E.2d 28

(2000). “Ohio courts have long recognized that there is a crucial distinction between statutes that merely apply retroactively * * * and those that do so in a manner that offends our Constitution.” *Bielat* at 353. As such a remedial statute does not violate the constitution even when it is applied retroactively. *Id.* at 354. On the other hand, a substantive statute, or one that “impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction” may not be applied retroactively. *Id.*

{¶ 13} The Supreme Court has recognized, however, that not every past occurrence results in a blanket prohibition against future legislation. Indeed, the following principle frequently has been employed by the Ohio Supreme Court: “a later enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, unless the past transaction or consideration, if it did not create a vested right, created at least a reasonable expectation of finality.” “Repeatedly, the court has held that the “commission of a felony” is not a “past transaction” creating a reasonable expectation of finality: “Except with regard to constitutional protections against *ex post facto* laws * * *, felons have no reasonable right to expect that their conduct will never thereafter, be made the subject of legislation.” (Citations omitted). *Caldwell* at ¶ 22.

{¶ 14} Further,

[A] statute is unconstitutionally retroactive under Section 28, Article

II ‘if it impairs vested rights, affects an accrued substantive right, or

imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction.’ On the other hand, a statute that is “‘purely remedial’” does not violate Section 28, Article II. We have defined ‘remedial’ as those laws affecting merely “‘the methods and procedure[s] by which *rights are recognized, protected and enforced, not * * * the rights themselves.*’”

Walls at ¶ 15, quoting *Bielat* at 354.

{¶ 15} The Arson Offender Registry does not increase the punishment for arson-related offenses. *See White* at ¶ 32-33. “Classification as an arson offender ‘is a collateral consequence of the offender’s criminal acts rather than a form of punishment per se.’” *Caldwell* at ¶ 31, quoting *Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 100, ¶ 34. The only additional penalty an offender could face is the penalty from the commission of a new crime, the failure to register. *Id.*, citing *State v. Cook*, 83 Ohio St.3d 404, 421, 700 N.E.2d 570 (1998). With the exception of prohibition against ex post facto laws, the commission of a felony does not provide felons a “‘a reasonable, right to expect that their conduct will never thereafter be made the subject of legislation.’” *Id.* at ¶ 32, quoting *White* at ¶ 43. “Registration programs have ‘long been a valid regulation technique with a remedial purpose.’” *Id.* at ¶ 35, citing *Cook* at 418.

{¶ 16} By comparison, sex offender registry requirements are more in depth and when additions were made to the registry requirements, the Supreme Court found the requirements were so extensive that the requirements became punitive. *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108. Those who must register under

the sex offender registry are restricted where they are permitted to live and failing to register could subject the offender to up to a first-degree felony. *Caldwell* at ¶ 34. Further, registrants under that scheme may be required to reregister as much as every 90 days. *Id.*

{¶ 17} Registration programs have long been held to be a “valid regulation technique with a remedial purpose.” *Id.* at ¶ 35, quoting *Cook* at 418. In this matter, we do not find that the legislation is clearly incompatible with the Ohio Constitution because appellant had no expectation of finality with regards to his duty to register and he does not have a substantive right in this regard. The statutory scheme is remedial in nature and therefore the General Assembly may retroactively impose the statute’s provisions without violating the Retroactivity Clause of the Ohio Constitution. As such, the statute is not unconstitutional and appellant’s first assignment of error is not well-taken.

Appellant failed to raise the separation of powers issue before the trial court.

{¶ 18} Appellant next argues that the provision of the arson offender registration statute that permits a trial court to reduce the length of time an arson offender must register is an unconstitutional encroachment on the judicial branch that must be stricken from the statute.

{¶ 19} Appellee also argues that appellant waived his ability to bring forth this issue on appeal because he did not argue this specific constitutional challenge at the sentencing hearing. At the sentencing hearing, appellant’s trial counsel objected to his inclusion in the Arson Offender Registry and the trial court acknowledged that there

would be a need to appoint appellate counsel on the issue of the retroactivity of the registration requirements. Trial counsel however failed to object to the particular issue of separation of powers.

{¶ 20} The Ohio Supreme Court has held that the “[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from the state’s orderly procedure, and therefore need not be heard for the first time on appeal.” *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus. However, a court has the right consider constitutional challenges in its discretion, even if the argument was waived “in specific cases of plain error where the rights and interests involved may warrant it.” *See In re M.S.*, 38 Ohio St.3d 149, 527 N.E.2d 286 (1988), syllabus.

{¶ 21} Here, appellant failed to argue before the trial court that this statute was unconstitutional or that it violated the separation of powers doctrine. We therefore decline to hear this argument for the first time on appeal and find that appellant waived this argument before us. As such, appellant’s second assignment of error is overruled.

{¶ 22} As such, we affirm the judgment of the Lucas County Court of Common Pleas. Appellant to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Christine E. Mayle, J.

JUDGE

Gene A. Zmuda, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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