

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	No. 09AP-956
	:	(C.P.C. No. 95CR-5474)
v.	:	No. 09AP-957
	:	(C.P.C. No. 09CR-3152)
Paul E. Palmer,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 1, 2010

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellee.

APPEALS from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, State of Ohio, appeals from judgments of the Franklin County Court of Common Pleas in case Nos. 09AP-956 and 09AP-957 that granted the motion to dismiss of defendant-appellee, Paul E. Palmer, and concluded defendant's 1995 conviction did not subject defendant to the provisions of R.C. Chapter 2950,

including any statutory duty to register or to verify his current address. Because the trial court erred (1) in granting defendant's motion to dismiss, and (2) in concluding defendant is not subject to the provisions of R.C. Chapter 2950, we reverse.

I. Procedural History

{¶2} On September 25, 1995, defendant was indicted for one count each of attempted rape, aggravated burglary, aggravated robbery, robbery, and kidnapping, each with a specification alleging defendant was convicted of robbery on May 27, 1988. On December 11, 1995, defendant entered a guilty plea to the stipulated lesser included offense of the first count of the indictment, sexual battery in violation of R.C. 2907.04, a felony of the third degree, without specification; on the state's request, the court entered a nolle prosequi on the remaining counts. The trial court sentenced defendant to one and one-half years of incarceration, granting 112 days of credit. A judgment entry memorializing the trial court's proceedings was filed January 8, 1996; a corrected entry was filed on April 23, 1996.

{¶3} On March 6, 2008, defendant filed a "Petition to Contest Reclassification and Application of R.C. 2950.01, et seq." in case No. 09AP-956. According to the petition, defendant became aware that, pursuant to Ohio's Adam Walsh Child Protection and Safety Act of 2006, as enacted in R.C. 2950.01 et seq. ("AWA"), the Ohio Attorney General reclassified defendant as a Tier III Sex Offender based on his 1995 conviction. The petition notes that, as a result of his reclassification, defendant was required to register with the local sheriff's office every 90 days for life and was subject to the community notification provisions of R.C. 2950.11. Defendant's petition contested his reclassification and challenged the constitutionality of the AWA.

{¶4} On the same day, defendant filed a motion to stay enforcement of the community notification provisions in R.C. 2950.11 pending a determination of his petition contesting his reclassification. Although the state opposed both defendant's motion for stay and his petition contesting his reclassification, the trial court in March 2008 granted defendant's motion to stay enforcement.

{¶5} On May 28, 2009, defendant was indicted in case No. 09AP-957 on one count each of failure to provide notice of change of address in violation of R.C. 2950.05 and failure to verify current address in violation of R.C. 2950.06, both felonies of the third degree. Defendant responded with a motion to dismiss, filed July 15, 2009. Due to defendant's indictment in case No. 09AP-957 for violations of R.C. 2950.05 and 2950.06, defendant filed on June 23, 2009 a motion for immediate disposition of his petition challenging his reclassification in case No. 09AP-956.

{¶6} The state on July 28, 2009 responded in case No. 09AP-957 to defendant's motion to dismiss. The state initially asserted defendant's motion in effect asked the court to grant summary judgment, a mechanism not permitted in criminal cases. It further contended the AWA, by its clear terms, applied to defendant and made him subject to the notification and registration sections of the AWA, an argument that spilled over into the issues contested in case No. 09AP-956.

{¶7} On September 16, 2009, the trial court held a hearing on defendant's petition in case No. 09AP-956 in which it considered primarily the arguments the state raised in its memorandum opposing defendant's motion to dismiss in case No. 09AP-957. The trial court filed an entry the same day, granted the relief defendant requested in paragraph 20 of the petition and declared "that Defendant-Petitioner cannot properly be

classified under the Adam Walsh Act, and thus shall be free from all registration and notification requirements pursuant thereto." Accordingly, the court held "defendant is not under any statutory duty to verify his current address or to register as required by R.C. 2950.04 through 2950.06." Lastly, the trial court ordered defendant's name removed from all lists of sexually oriented offenders that the local, state, or federal governments maintain.

{¶8} By entry filed the same day in case No. 09AP-957, the trial court granted defendant's motion to dismiss, concluding defendant "is not under any statutory duty to verify his current address or to register as required by Revised Code Chapter 2950." The court ordered both that defendant's name be removed from all sexually oriented lists that the local, state, or federal governments maintain and that defendant be "released forthwith on this case."

II. Assignments of Error

{¶9} The state appeals both judgments, assigning three errors:

FIRST ASSIGNMENT OF ERROR

THE COMMON PLEAS COURT ERRED IN DISMISSING THE INDICTMENT BY GOING BEYOND THE FACE OF THE INDICTMENT AND CONCLUDING THAT DEFENDANT HAD NO DUTY TO REGISTER.

SECOND ASSIGNMENT OF ERROR

THE COMMON PLEAS COURT ERRED IN DETERMINING THAT R.C. CHAPTER 2950, AS EFFECTIVE JANUARY 1, 2008, HAS NO APPLICATION TO DEFENDANT.

THIRD ASSIGNMENT OF ERROR

THE COMMON PLEAS COURT ERRED IN ORDERING THAT DEFENDANT'S "NAME BE REMOVED FROM ALL

SEXUALLY ORIENTED LISTS MAINTAINED BY THE LOCAL, STATE OR FEDERAL GOVERNMENT," AS THE COURT LACKED JURISDICTION TO AFFORD SUCH BROAD INJUNCTIVE RELIEF.

III. First Assignment of Error—Motion to Dismiss

{¶10} The state's first assignment of error asserts the trial court erred in granting defendant's motion to dismiss the indictment. The state contends Crim.R. 12(C) "only allows a pretrial motion to dismiss if it raises a defense or objection 'capable of determination without the trial of the general issue,' the 'general issue' meaning the defendant's guilt or innocence for the offense charged." (Appellant's brief, 7.) The state contends defendant's motion was impermissible under Crim.R. 12(C) because it prematurely raised the issue to be determined at trial: "whether the State could prove [defendant] had a duty to register, to provide change of address, and to verify current address" under R.C. 2950.05 and 2950.06 as a result of his prior conviction. (Appellant's brief, 7.)

{¶11} "A motion to dismiss tests the sufficiency of the indictment, without regard to the quantity or quality of evidence that may be produced at trial." *State v. Preztak*, 181 Ohio App.3d 106, 2009-Ohio-621, ¶12, citing *State v. Patterson* (1989), 63 Ohio App.3d 91. "The issue as to the legal sufficiency of the evidence is not properly raised by a pretrial motion[.]" *State v. McNamee* (1984), 17 Ohio App.3d 175, 176; *State v. Hood* (Sept. 27, 2001), 10th Dist. No. 01AP-90 (stating that "when a trial court decides on the validity of a charging instrument, it is precluded from considering whether the prosecution could prove the elements of the charged offenses").

{¶12} As a result, "[a] pretrial motion must not involve a determination of the sufficiency of the evidence to support the indictment. If the indictment is valid on its face, a motion to dismiss should not be granted." *Preztak*, citing *State v. Eppinger*, 162 Ohio App.3d 795, 2005-Ohio-4155, citing *State v. Varner* (1991), 81 Ohio App.3d 85, 86 (stating "[t]he Ohio Rules of Criminal Procedure * * * do not allow for 'summary judgment' on an indictment prior to trial"); *Columbus v. Storey*, 10th Dist. No. 03AP-743, 2004-Ohio-3377, ¶7; *State v. Tipton* (1999), 135 Ohio App.3d 227, 228 (noting that "[w]hen a defendant in a criminal action files a motion to dismiss that goes beyond the face of the indictment, he is, essentially, moving for summary judgment").

{¶13} The Supreme Court of Ohio carved out an exception to the general rule, noting that a court may consider material outside the face of the indictment if the "motion did not embrace what would be the general issue at trial." *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, ¶18. Crim.R. 12(C), however, does not permit a court to determine a pretrial motion to dismiss if it requires the trial court also to determine the general issue for trial. *Id.*

{¶14} Defendant's motion to dismiss contended "his continuing prosecution [under the noted statutes] is directly contrary to the Ohio Supreme Court's mandate in *State v. Champion*, 106 Ohio St.3d 120, 2005-Ohio-4098." Defendant pointed to the holding in *Champion*, which stated only offenders who were sentenced on or after July 1, 1997, released after that date, or declared a habitual sexual offender immediately prior to that date were subject to the registration and verification requirements of R.C. Chapter 2950. *Id.* at ¶3-6. Defendant compared the chronology of his own 1996 conviction to *Champion*, observing he completed his obligations under that conviction on March 15, 1997.

{¶15} Defendant's motion to dismiss does not challenge the face of the indictment or contend that it fails to assert violations of R.C. 2950.05 and 2950.06. Instead, defendant asserts the state is unable to prove the allegations of the indictment due to the dates of defendant's past conviction. Because defendant's arguments not only draw upon evidence outside the face of the indictment but address the very issue to be determined at trial, the trial court erred in granting defendant's motion to dismiss the indictment.

{¶16} Indeed, the state's first assignment of error presents an issue remarkably similar to *State v. Caldwell*, 8th Dist. No. 92219, 2009-Ohio-4881, where the indictment charged Caldwell with failing to notify the sheriff of a change of address, a duty arising out of his conviction on February 16, 2003 for gross sexual imposition. Caldwell moved to dismiss the indictment, contending the sentencing court specifically determined he had no legal duty to register and therefore could not have been reclassified as a Tier I sex offender under the Adam Walsh Act. In determining the trial court erred when it granted Caldwell's motion, the appellate court observed that the "motion necessarily questions the state's ability to prove the indictment, which implicitly alleged that appellee did have a duty to register." *Id.* at ¶4. Noting Caldwell did not contend the indictment facially failed to charge an offense, "but rather that the state cannot prove that he committed the offense charged," the Eighth District determined the common pleas court erred in dismissing the indictment "at this early stage of the proceedings." *Id.*

{¶17} Because defendant's motion to dismiss did not challenge the face of the indictment, but rather contended the state would not be able to prove defendant violated R.C. 2950.05 or 2950.06 due to the date of defendant's release from imprisonment, defendant's motion exceeded the permissible bounds of a pretrial motion under Crim.R.

12(C). The trial court erred in granting defendant's motion to dismiss. The state's first assignment of error is sustained.

IV. Second and Third Assignments of Error – Duty under S.B. 10

{¶18} The state's second assignment of error contends the trial court erred in concluding the provisions of the AWA do not apply to defendant. The state's third assignment of error, a corollary to the second, contends the trial court erred in ordering defendant's name removed from the lists of sexually oriented offenders the local, state, and federal governments maintain. The parties' arguments do not involve a constitutional challenge to S.B. 10; they instead dispute whether the provisions of the AWA, by their very language, apply to defendant.

{¶19} "The polestar of construction and interpretation of statutory language is legislative intention." *State ex rel. Francis v. Sours* (1944), 143 Ohio St. 120, 124. "In determining the legislative intent of a statute 'it is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used.' " (Emphasis sic.) *Wheeling Steel Corp. v. Porterfield* (1970), 24 Ohio St.2d 24, 28, quoting *Columbus-Suburban Coach Lines v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127.

{¶20} "[C]ourts do not have authority to ignore the plain and unambiguous language under the guise of judicial interpretation, but rather in such situations the courts must give effect to the words used." *In re Burchfield* (1988), 51 Ohio App.3d 148, 152, citing *Dougherty v. Torrence* (1982), 2 Ohio St.3d 69, 70; *Ohio Dental Hygienists Assn. v. Ohio State Dental Bd.* (1986), 21 Ohio St.3d 21, 23; *State v. Krutz* (1986), 28 Ohio St.3d 36, 38, certiorari denied (1987), 481 U.S. 1028, 107 S.Ct. 1953. "Where the

language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph five of the syllabus.

{¶21} To support its assignment of error, the state points to the language of R.C. 2950.04(A)(2) of the AWA, which states that "[r]egardless of when the sexually oriented offense was committed, each offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a sexually oriented offense shall comply" with the registration requirements described in R.C. 2950.04(A)(2)(a), (b), (c), (d), and (e). Focusing on the initial clause of R.C. 2950.04(A)(2), the state contends that the date of defendant's conviction or release from imprisonment is immaterial to his statutory duties.

{¶22} The trial court relied on the Supreme Court's decision in *Champion* to grant defendant's motion. Applying the law then in effect, *Champion* determined that "a person whose prison term for a sexually oriented offense was completed before July 1, 1997, is not required to register under R.C. 2950.04(A)(1)(a) or periodically verify a current address under R.C. 2950.06(A)[.]" *Id.* at ¶13. The state, however, notes *Champion* was premised on statutory language that the AWA substantially changed.

{¶23} Former R.C. 2950.04(A)(1)(a), (b), and (c) based the statutory duties of registration and address verification on whether, as pertinent here, the defendant was released from incarceration on or after July 1, 1997. The AWA is much broader and specifically deletes the time frame references found in the former version of the statute. As a result, an offender, "regardless of when the sexually oriented offense was

committed," must comply with the requirements set forth in R.C. 2950.04(A)(2)(a), (b), (c), (d), and (e) if the offender was convicted of, pleaded guilty to or is convicted of or pleads guilty to a sexually oriented offense. *State v. Hollis*, 8th Dist. No. 91467, 2009-Ohio-2368, ¶¶22, 24 (noting S.B. 10 "clearly states that it applies to offenders whose crimes were committed before the act took effect," leaving the trial court with "no option but to apply the AWA, in spite of the date of [defendant's] offense"); *State v. Bundy*, 2d Dist. No. 23063, 2009-Ohio-5395, ¶¶54, 55, appeal allowed, 124 Ohio St.3d 1473 (stating that even if defendant "did not have an obligation to register his address at the time of his initial conviction in 2003, he was required to register when the new law became effective in January 2008" because "the law that became effective in January 2008, applies to all offenders who have been convicted of a sexually oriented offense, regardless of when the offense was committed").

{¶24} Based on the statutory language, we can conclude only that defendant's duties under the AWA are not premised on the time frame referenced in the law cited in *Champion* but on the language of the AWA which requires compliance, regardless of when defendant pleaded guilty to the offense. Accordingly, the provisions of the AWA apply to defendant. The state's second assignment of error is sustained.

{¶25} The state's third assignment of error asserts the trial court erred in removing defendant's name from the various lists that local, state, and federal governments maintain. Because the basis for the trial court order was its conclusion that defendant had no duty under the notification and registration provision of the AWA, the trial court's order to remove defendant's name from the stated lists likewise must be reversed. The state's third assignment of error is sustained.

{¶26} Having sustained the state's three assignments of error, we reverse the judgments of the trial court and remand for further proceedings consistent with this decision.

*Judgments reversed
and cases remanded.*

SADLER and CONNOR, JJ., concur.
