

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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| Franklin County Prosecuting Attorney Ron O'Brien, | : | |
| | : | |
| Plaintiff-Appellee, | : | No. 10AP-52 |
| v. | : | (C.P.C. No. 09CVH-01-1324) |
| | : | |
| Brandon L. Smith, | : | (REGULAR CALENDAR) |
| | : | |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on August 12, 2010

Ron O'Brien, Prosecuting Attorney, and *Denise L. DePalma*,
for appellee.

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

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Brandon L. Smith, appeals from a judgment of the Franklin County Court of Common Pleas granting the summary judgment motion of plaintiff-appellee, Franklin County Prosecuting Attorney Ron O'Brien. Because the trial

court did not err in (1) applying the residency restriction of R.C. 2950.034 to defendant, (2) concluding the residency restriction does not violate defendant's substantive due process rights, and (3) failing to find the residency restriction violated defendant's procedural due process rights, we affirm.

I. Facts and Procedural History

{¶2} On February 8, 2006, the Franklin County Court of Common Pleas entered a judgment finding defendant guilty of one count of sexual battery in violation of R.C. 2907.03, a felony of the third degree and a sexually oriented offense. The trial court sentenced defendant to one year in prison and classified him as a sexually oriented offender.

{¶3} On January 29, 2009, the state filed a complaint against defendant alleging defendant was residing within 1,000 feet of Watkins Elementary School in Columbus, Ohio in violation of the residency restrictions R.C. 2950.034 sets for those convicted of a sexually oriented offense. The state sought preliminary and permanent injunctive relief under that statute to permanently preclude defendant from living within 1,000 feet of a school. Defendant filed an answer to the complaint on May 1, 2009.

{¶4} On June 16, 2009, defendant filed a motion for summary judgment challenging the constitutionality of R.C. 2950.034. After the parties fully briefed the motion, the trial court overruled defendant's motion for summary judgment. Defendant appealed from the trial court's decision, but this court dismissed defendant's appeal on November 2, 2009 for lack of a final appealable order.

{¶5} On November 5, 2009, the state filed a motion for summary judgment. Following defendant's memorandum opposing the motion, the trial court granted the

state's summary judgment motion, concluding defendant is a sexually oriented offender under R.C. Chapter 2950, finding defendant's address was within 1,000 feet of Watkins Elementary School and rejecting defendant's constitutional arguments. The trial court journalized its decision in a December 21, 2009 judgment entry, permanently enjoining defendant from residing within 1,000 feet of any school premises.

II. Assignments of Error

{¶6} Defendant timely appeals, assigning the following errors:

First Assignment of Error

The trial court erred in applying R.C. 2950.034 retrospectively contrary to the holding of the Ohio Supreme Court in *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542.

Second Assignment of Error

The trial court erred in failing to find that S.B. 10's residency restrictions violate the Due Process Clause of the United States Constitution and Section 16, Article I of the Ohio Constitution.

Third Assignment of Error

The trial court erred in failing to find that the 25-year residency restriction imposed on Appellant under S.B. 10 violates procedural due process rights under the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution as the restriction was imposed without giving Appellant an opportunity to demonstrate that he did not pose a substantial risk to reoffend or a risk of dangerousness.

III. Standard of Review

{¶7} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. Summary judgment is appropriate only when the

moving party demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

IV. First Assignment of Error – Application of R.C. 2950.034

{¶8} Defendant's first assignment of error asserts the trial court erred in applying R.C. 2950.034 retrospectively. Defendant argues the Supreme Court of Ohio's decision in *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542 precludes retroactive application of the statute's residency restrictions to him.

{¶9} R.C. 2950.034 provides that "[n]o person who has been convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense * * * shall establish a residence or occupy residential premises within one thousand feet of any school premises or preschool or child day-care center premises." R.C. 2950.034(A). According to the statute, the prosecuting attorney "that has jurisdiction over the place at which the person establishes the residence or occupies the residential premises in question, has a cause of action for injunctive relief against" any person who violates division (A) of the statute. R.C. 2950.034(B). The most recent amendments to R.C. 2950.034 went into effect July 1, 2007 as part of Ohio's version of the Adam Walsh Act, also known as Senate Bill 10 ("S.B. 10").

{¶10} Defendant does not dispute that he was convicted of a sexually oriented offense; nor does he dispute that he resides within 1,000 feet of Watkins Elementary

School. Rather, defendant argues that because his conviction for a sexually oriented offense occurred in 2006, prior to the effective date of the current version of R.C. 2950.034, the trial court erred in retroactively applying R.C. 2950.034 to him. In support, defendant relies on the Supreme Court of Ohio's decision in *Hyle*, which held that "because R.C. 2950.031 [now R.C. 2950.034] was not expressly made retroactive, it does not apply to an offender who bought his home and committed his offense before the effective date of the statute." *Hyle* at ¶24.

{¶11} At the time defendant committed his offense, former R.C. 2950.031 was in effect, having become so on July 21, 2003. It set forth the prior version of the residency restriction, prohibiting "registered sex offenders from residing within 1,000 feet of a school premises." *State ex rel. O'Brien v. Heimlich*, 10th Dist. No. 08AP-521, 2009-Ohio-1550, ¶3. "In 2005, the General Assembly amended the statute to accord county prosecutors the power to enforce the statute's provisions through a cause of action for injunctive relief." *Id.* Thus, at the time of defendant's sexually oriented offense, not only was a residency restriction in place barring persons convicted of a sexually oriented offense from living within 1,000 feet of a school, but the prosecuting attorney was given authority to enforce the statutory provisions. The only difference between the current version contained in R.C. 2950.034 and the residency restriction in effect at the time of defendant's offense is that former R.C. 2950.031 did not restrict a person convicted of a sexually oriented offense from living within 1,000 feet of a daycare facility or a preschool.

{¶12} Neither the state nor defendant contends this case involves a residence within 1,000 feet of a preschool or daycare facility. Instead, the complaint alleges defendant lives within 1,000 feet of Watkins Elementary School. Elementary schools are

within the definition of "school" for purposes of the residency restriction under former R.C. 2950.031 and under R.C. 2950.034, the current statute. See R.C. 2950.01(S) (stating "school" has the same meaning as that contained in R.C. 2925.01). Under statutory provisions in effect at the time of defendant's offense, defendant became subject to a residency restriction that prohibits defendant from living within 1000 feet of a school. The amendments to the residency restrictions contained in S.B 10 did not and do not affect the existing residency restrictions that applied to defendant at the time of his offense.

{¶13} To support its motion for summary judgment, the state, using the type of evidence Civ.R. 56 contemplates, established that defendant was living within 1,000 feet of a school. Defendant did not respond with Civ.R. 56 evidence to dispute the state's evidence, but instead posed a legal argument under *Hyle*. Because the trial court did not apply the residency restriction retroactively, we overrule defendant's first assignment of error.

V. Second Assignment of Error – Substantive Due Process

{¶14} In his second assignment of error, defendant asserts the trial court erred in failing to find the residency restrictions of R.C. 2950.034 violate defendant's substantive due process rights by (1) restraining defendant's liberty, (2) infringing on defendant's right to live where he chooses, and (3) failing the strict scrutiny test.

{¶15} This court previously resolved a substantive due process challenge to the residency restriction. In *Heimlich*, we held the residency restriction did not infringe upon any substantive property or liberty rights under either the Ohio or United States Constitutions. *Heimlich* at ¶35. As a result, we determined the residency restriction is not subject to a strict scrutiny challenge, but to rational basis review. Under such a review, we

upheld the residency restriction, concluding "[t]he residency restriction in former R.C. 2950.031(A) clearly bears a rational relationship to the state's legitimate interest in protecting children from identified sexually oriented offenders." *Id.* at ¶39.

{¶16} Consistent with *Heimlich*, the residency restriction does not violate defendant's substantive due process rights. Defendant's second assignment of error is overruled.

VI. Third Assignment of Error – Procedural Due Process

{¶17} Defendant's third assignment of error asserts the trial court erred in failing to find the residency restriction violates defendant's procedural due process rights. Defendant argues the state imposed the residency restriction without affording defendant an opportunity to demonstrate he does not pose a risk to reoffend or a risk of dangerousness.

{¶18} Defendant failed to raise his procedural due process argument in the trial court. "The failure to raise at the trial court level the constitutionality of a statute or its application, when the issue is apparent at the time of trial, waives the issue and deviates from this state's orderly procedure. The issue therefore need not be heard for the first time on appeal." *In re D.T.*, 10th Dist. No. 07AP-853, 2008-Ohio-2287, ¶19, citing *In re N.W.*, 10th Dist. No. 07AP-590, 2008-Ohio-297, ¶37, citing *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus.

{¶19} Because defendant waived his procedural due process argument, we decline to address it. Defendant's third assignment of error is overruled.

VII. Disposition

{¶20} The trial court did not err in applying the 1,000-foot residency restriction to defendant. The residency restriction does not violate defendant's substantive due process rights, and defendant waived the issue of his procedural due process rights. Having overruled defendant's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.
