

[Cite as *State v. Spencer* , 2013-Ohio-465.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-472 (C.P.C. No. 11CR-4756)
Nicholas W. Spencer,	:	
Defendant-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on February 12, 2013

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

Yeura R. Venters, Public Defender, and *Timothy E. Pierce*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} The State of Ohio is appealing from the dismissal of criminal charges against Nicholas W. Spencer. It assigns a single error for our consideration:

THE COMMON PLEAS COURT ERRED IN DISMISSING THE INDICTMENT IN THE ABSENCE OF ANY SHOWING THAT THIS PROSECUTION FOR FAILING TO PROVIDE NOTICE OF CHANGE ADDRESS AND FOR FAILING TO VERIFY ADDRESS WAS UNCONSTITUTIONAL.

{¶ 2} The case law regarding registration of sexual predators and sexual offenders has been made convoluted by both the Ohio legislature and rulings of the Supreme Court of Ohio. The trial judge assigned to Spencer's case heard lengthy arguments on behalf of

the parties and decided the indictment charging Spencer with two felonies of the first degree should be dismissed. The charges were failure to verify current address, in violation of R.C. 2950.06, and failure to provide notice of change of address, in violation of R.C. 2950.05.

{¶ 3} Spencer had been convicted of rape in 1998 and sentenced to prison for seven years. As a result of his convictions, he was classified as a sexual predator under the statutory scheme then in existence. That statutory scheme is popularly known as "Megan's Law."

{¶ 4} As a sexual predator, Spencer was required to register and give notice of his residence once he was released from prison. Failure to do so was a felony of the fifth degree.

{¶ 5} Before Spencer got out of prison, the legislature changed the penalties for failure to register. Persons who had committed a felony of the first degree, like rape, were now guilty of a felony of the third degree if they failed to register.

{¶ 6} After Spencer was released from prison, but apparently while he was still on post-release control, the legislature changed the statutory framework again, making violations of the failure to register and/or failure to provide required notices as to residence a felony of the first degree for persons who had been convicted of rape or other felonies of the first degree.

{¶ 7} The Supreme Court of Ohio was asked to review these statutory changes and decided in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, that the legislature could not reclassify sexual offenders who had already been classified by the courts. The *Bodyke* decision was decided on a separation of powers issue, namely that the legislature could not overturn a valid court order. As noted above, Spencer had initially been labeled a sexual predator.

{¶ 8} The *Bodyke* decision was followed by *State v. Gingell*, 128 Ohio St.3d 444, 2011-Ohio-1481, in which the Supreme Court of Ohio ruled that the state of Ohio could not pursue criminal charges which were founded upon a reclassification which had been found to be unconstitutional.

{¶ 9} The trial court judge who heard Spencer's case had to determine how the facts of his criminal history fitted into this evolving legal framework. The judge decided

that the legal framework to be applied was the law in existence at the time Spencer was convicted and sentenced. The intervening statutory changes had changed and had added requirements that someone such as Spencer report not only his residence but also his counties of school and employment. The statutory changes had also increased the legal penalties substantially, as indicated above.

{¶ 10} In the trial court, the state argued that Spencer should be prosecuted as if he violated a felony of the first degree. Appellate counsel for the state now argues that even if Spencer could not be validly charged with a felony of the first degree, he could still be charged with violating a felony of the third degree—the statutory scheme in effect when he was released from prison and his duties to notify authorities of his whereabouts really became effective.

{¶ 11} This appellate court has frequently ruled that issues not raised before the trial court will not be addressed on appeal. Frequently, such rulings are consistent with the state's position on appeal that criminal defendants and appellants should not be permitted to raise new issues and if the issues are raised on appeal, they are to be evaluated by using a plain error standard. Since neither party argued a position completely consistent with what the Supreme Court has since indicated is the correct position, we will not burden either party with a plain error standard.

{¶ 12} Since the trial court's ruling in Spencer's case, the Supreme Court has decided *State v. Howard*, _____ Ohio St.3d_____, 2012-Ohio-5738. In *Howard*, the Supreme Court stated:

We hold that for a defendant whose sex-offender classification was determined under Megan's Law, the penalty for a violation of the reporting requirements of former R.C. 2950.05 that occurs after Megan's Law was supplanted by the AWA [Adam Walsh Act] is the penalty set forth in the version of R.C. 2950.99 in place just before the effective date of the AWA.

Id. at ¶ 29.

{¶ 13} Applying this statement to Spencer's situation, penalties he faces for violating R.C. 2950.05 would be the penalties applicable to a felony of the third degree, not the penalties associated with a felony of the first degree as set forth in the indictment.

The trial judge assigned to Spencer's case was correct to bar the case from proceeding as a felony of the first degree.

{¶ 14} The question then becomes whether the state should have been allowed to pursue the charge of violating R.C. 2950.05 without seeking a new indictment or could proceed with the charge under the initial indictment while treating the charge as a felony of the third degree.

{¶ 15} Crim.R. 7(D) provides:

The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence * * *.

{¶ 16} Had counsel for the state requested an amendment to the indictment, the trial judge should have amended the indictment to reflect that the charge was a felony of the third degree. The state, instead, asked that the charge proceed as a felony of the first degree. The trial judge also could have stricken references in the indictment to a prior connection as surplusage upon request. *See* Crim.R. 7(C).

{¶ 17} Faced with a defective indictment, the trial judge ordered the indictment dismissed, but without prejudice to the filing of a new indictment which correctly stated the charges and degree of the offenses.

{¶ 18} Turning to the assignment of error as written by the state in its appellate brief, a trial court has the authority to dismiss a defective indictment without finding that the charge alleged in the indictment is unconstitutional. Further, when the state of Ohio pursues charges against the defendant named in a defective indictment and refuses or fails to amend the indictment to cure the defects, the trial court does not abuse its discretion in dismissing the indictment before trial without prejudice to the state obtaining a new indictment which is not defective.

{¶ 19} The sole assignment of error is overruled. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.
