

IN THE COURT OF APPEALS FOR CHAMPAIGN COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2009 CA 47
v.	:	T.C. NO. 2001 CR 155
DENNIS R. GIBSON, JR.	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

**OPINION**

Rendered on the 23<sup>rd</sup> day of July, 2010.

NICK A. SELVAGGIO, Atty. Reg. No. 0055607, Prosecuting Attorney, 200 N. Main Street,  
Urbana, Ohio 43078  
Attorney for Plaintiff-Appellee

DENNIS R. GIBSON, JR., #417-518, N.C.C.I., 670 Marion Williamsport Rd. E., P. O. Box  
1812, Marion, Ohio 43301  
Defendant-Appellant

FROELICH, J.

{¶ 1} Dennis R. Gibson, Jr., pro se, appeals from a judgment of the Champaign County Court of Common Pleas, which denied his motion seeking a declaration that his sexual predator classification was void and asking the court to enjoin enforcement of his sexual predator registration, reporting, and notification

requirements. For the following reasons, the trial court's judgment will be affirmed.

I

{¶ 2} This case is Gibson's sixth appeal to this Court.

{¶ 3} On September 1, 2001, Gibson entered a negotiated plea of guilty to rape, in violation of R.C. 2907.02(A)(2), a first degree felony, and gross sexual imposition, in violation of R.C. 2907.05(A)(4), a third degree felony. The trial court sentenced Gibson to nine years for rape and four years for gross sexual imposition, to be served concurrently. The court also found that Gibson was a sexual predator. At the sentencing hearing, Gibson was informed that he would "be subject to five years post release control in accordance with State law." The court's judgment entry stated that, "[a]fter release from prison, Defendant is ordered to be subject to post release control of a maximum of five (5) years, all subject to parole board determination according to law."

{¶ 4} Gibson did not file a timely direct appeal, and we overruled his motion to file a delayed appeal. *State v. Gibson* (Dec. 24, 2002), Champaign App. No. 02CA36. The Supreme Court denied review. *State v. Gibson*, 98 Ohio St.3d 1566, 2003-Ohio-2242.

{¶ 5} Since his conviction, Gibson has filed numerous motions. During 2004, Gibson filed an application for DNA testing, a motion for judicial release, and a motion to vacate his sentence. On January 29, 2005, the court denied each of these requests.

{¶ 6} On May 4, 2005, Gibson moved to withdraw his plea and sought relief from his conviction. Gibson asserted that his counsel had rendered ineffective

assistance by ignoring his claim of innocence, refusing to obtain requested exculpatory evidence, coercing his plea, and failing to file an appeal based on actual innocence. Gibson also claimed that the trial court erred in denying his application for DNA testing and in designating him a sexual predator. The trial court denied the motion on July 28, 2005, and we affirmed the trial court's decision.

*State v. Gibson*, Champaign App. No. 2005 CA 33, 2006-Ohio-6820. Gibson sought to reopen this appeal. We noted that App.R.26(B) only allows for the reopening of an appeal from a judgment of conviction and sentence. However, we addressed the substantive issues raised in Gibson's application and determined that it lacked merit. The Supreme Court of Ohio denied review.

{¶ 7} On July 25, 2006, Gibson filed a request for documents under the Freedom of Information Act and Public Records Act. He sought his presentence investigation report, the grand jury minutes, all findings by the trial court pursuant to R.C. 2317.39, and reports by the Champaign County Child Abuse Response Team and the Department of Job and Family Services. We affirmed the trial court's denial of his request. *State v. Gibson*, Champaign App. No. 2006 CA 26, 2007-Ohio-4547.

{¶ 8} In August 2006, Gibson requested more documents pertaining to the DNA testing that was performed in his case, and the trial court denied the request. We affirmed, determining that Gibson did not demonstrate that he had a justiciable claim or defense to present or that the documents he sought were necessary to support that claim or defense. *State v. Gibson*, Champaign App. No. 06 CA 37, 2007-Ohio-7161,

{¶ 9} In May 2007, Gibson filed numerous motions seeking, among other things, to present new evidence, to withdraw his plea, for a new trial, and for new DNA testing. The trial court denied each of the motions, and we affirmed. *State v. Gibson*, Champaign App. No. 2007 CA 38.

{¶ 10} In May 2009, Gibson again moved to withdraw his plea, arguing that his sentence was void because the court failed to comply with R.C. 2929.19(B)(3)(c), in that it failed to advise him of the mandatory term of post-release control to which Gibson is subject pursuant to R.C. 2967.28, and that this failure also violated Crim.R. 11(C)(2)(a). The trial court denied this motion, and we recently affirmed. *State v. Gibson*, Champaign App. No. 09 CA 33, 2010-Ohio-2505 (“*Gibson V*”).

{¶ 11} On November 5, 2009, Gibson filed a “Motion of Complaint for Declaratory Relief Preliminary and Prohibitory Injunction, and Dismissal of Order of Sentencing Court’s Ruling on the Imposition of Predatory Classification, and that the Sentencing Court Dismiss the Sexual Predator Classification.” In his motion, Gibson argued that his sentence was void, because the court “did not properly include the imposition of postrelease control at sentencing for any count of the conviction” and the trial court improperly told him that he could seek judicial release if he were sent to prison for violating post-release control. Gibson claimed that, due to the void sentence, he cannot be required to register as a sexual predator. Gibson sought an injunction prohibiting the Champaign County’s Sheriff’s Department from enforcing his sexual predator registration, reporting, and notification requirements.

{¶ 12} The trial court overruled Gibson's motion, stating that it had "previously held the sentence is **not** void, and that this Court has complied with requirements governing post-release control notifications." (Emphasis in original.) The trial court further noted, quoting *State v. Williams*, 177 Ohio App.3d 865, 2008-Ohio-3586, ¶11, that, even assuming the sentence were void, the vacation of Gibson's sentence would not result in the vacation of his sexual predator classification.

{¶ 13} Gibson appeals from the denial of this motion, raising two assignments of error.

## II

{¶ 14} Gibson's assignments of error state:

{¶ 15} "THE TRIAL COURT DID NOT PROPERLY INFORM GIBSON ABOUT POST-RELEASE CONTROL AT SENTENCING AND DID NOT DULY INCORPORATE THE NOTICE INTO THE SENTENCING ENTRY, THEREFORE, VOIDING THE WHOLE SENTENCE ALONG WITH POST-RELEASE CONTROL, SEXUAL PREDATOR REGISTRATION, AND THE SENTENCE ITSELF.

{¶ 16} "APPELLANT'S MOTION OF COMPLAINT FOR DECLARATORY RELIEF PRELIMINARY AND PROHIBITORY INJUNCTION SHOULD HAVE BEEN GRANTED BY THE CHAMPAIGN COUNTY, OHIO COMMON PLEAS COURT."

{¶ 17} Gibson claims that the trial court should have granted his motion for declaratory and injunctive relief, because his sentence is void. Gibson asserts that, as a result, any post-release control requirements and his sexual predator

classification are also void.<sup>1</sup>

{¶ 18} “The two offenses of rape and gross sexual imposition of which Gibson was convicted are felony sex offenses. R.C. 2967.28(B)(1) mandates that each sentence to a prison term for a felony sex offense must include a requirement that the offender be subject to a five year period of post-release control imposed by the parole board after the offender's release from prison. The court that imposes the sentence of imprisonment must notify the offender at the sentencing hearing of any term of post-release control to which the offender is subject by law. R.C. 2929.19(B)(3)(c). Failure to advise the offender as required by R.C. 2929.19(B)(3)(c) renders the sentence the court imposed void. *State v. Boswell* [,121 Ohio St.3d 575, 2009-Ohio-1577].” *Gibson V* at ¶6.

{¶ 19} According to the transcript of the November 9, 2001, sentencing hearing, the trial court informed Gibson regarding post-release control, stating: “The Defendant will be subject to five years post release control in accordance with State law.” The court’s judgment entry stated that, “[a]fter release from prison, Defendant is ordered to be subject to post release control of a maximum of five (5) years, all subject to parole board determination according to law.”

{¶ 20} Gibson claims that the trial court was required to inform him at

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<sup>1</sup>The trial court resolved the merits of Gibson’s motion without addressing whether a motion for declaratory and injunctive relief was the appropriate procedure for seeking an order invalidating his sentence and sexual predator classification. Although we question the appropriateness of the procedure Gibson used, we state no opinion, at this time, on whether Gibson’s motion was the proper avenue for raising his claims. Rather, for purposes of this appeal, we will assume that Gibson’s motion was proper, and we will address the merits of Gibson’s assignments of error.

sentencing that post-release control is mandatory. We addressed and rejected the same argument in *Gibson V* and concluded that Gibson's sentence is not void.

{¶ 21} In this case, Gibson claims that the court's judgment entry also failed to properly include notice of post-release, rendering his judgment and his classification void. We need not address, however, whether the trial court properly included notice of post-release control under R.C. 2929.19(B)(3)(c) in Gibson's judgment entry because, regardless of the outcome of that issue, we agree with the trial court that Gibson's sexual predator status would not be affected even if Gibson's sentence were void.

{¶ 22} A defendant's sex offender classification is not a "final judgment of conviction" and is not a part of the criminal sanctions imposed upon a convicted defendant under the sentencing statutes. *State v. Barker*, Montgomery App. No. 22963, ¶13. Proceedings under R.C. Chapter 2950 are civil, rather than punitive or criminal. *Id.*, citing *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, certiorari denied *Hayden v. Ohio* (2003), 537 U.S. 1197, 123 S.Ct. 1265, 154 L.Ed.2d 1035; *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291. Although Gibson was informed of his sexual offender classification at sentencing and his status was included in the court's judgment entry, his classification was a separate and distinct proceeding, which is not affected by the validity of his sentencing.

{¶ 23} The Fifth and Ninth Appellate District have reached similar conclusions. In *Williams*, the defendant was convicted of complicity to rape, sexual battery, and other offenses; the trial court found her to be a sexually oriented offender and sentenced her to a total of ten years for her underlying convictions.

*Williams*, supra. The trial court later ordered that the defendant be resentenced due to the court's prior failure to advise Williams about post-release control. When Williams was resentenced in 2008, the court also reclassified her as a Tier III sex offender, without the community notification requirement, under the Adam Walsh Act. The State appealed.

{¶ 24} On review, the Ninth District concluded that the trial court had correctly held a hearing to resentence Williams to inform her of post-release control. However, the appellate court determined that the trial court lacked jurisdiction to reclassify Williams. It stated:

{¶ 25} "Sex-offender-classification proceedings are civil in nature and legally distinct from the proceedings governing a defendant's underlying criminal conviction(s) and sentence. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, syllabus (holding that different standards of review apply to appeals from classification proceedings and criminal convictions). This court has the authority to consider a challenge to a sexual-offender classification even if it lacks the authority to consider an offender's underlying sentence. See *State v. Dobrski*, 9th Dist. No. 06CA008925, 2007-Ohio-3121, 2007 WL 1805021. In *Dobrski*, we held that an appellant's sentencing entry was not a final, appealable order because it did not comply with Crim.R. 32(C) and this court's holding in *State v. Miller*, 9th Dist. No. 06CA0046-M, 2007-Ohio-1353, 2007 WL 879666. *Dobrski* at ¶2-4. Yet *Dobrski*'s classification order was a final, appealable order conferring jurisdiction upon this court because it was the result of a 'special proceeding' that affected *Dobrski*'s substantial rights under R.C. 2505.02(B). *Id.* at

¶6. Consequently, this court considered Dobrski's classification challenge on the merits while simultaneously concluding that it lacked jurisdiction to consider his sentence. *Id.* at ¶15-16. \*\*\* Accordingly, in either a defendant's or a state's appeal, an appeal from the defendant's classification is legally distinct from any appeal regarding his underlying sentence.

{¶ 26} “Despite the fact that Williams's sentence was void and had to be vacated pursuant to [*State v.*] *Bezak*, [114 Ohio St.3d 94, 2007-Ohio-3250,] the status of her sentence did not affect the status of her classification. That is, the vacation of her sentence did not result in the vacation of her legally distinct sexual-offender classification. See *Dobrski*, *supra*. Williams never challenged her sex-offender classification on direct appeal. Thus, Williams had a valid sexual-offender classification when the AWA went into effect on January 1, 2008.” (Footnote omitted.) *Williams* at ¶10-11. See, also, *State v. Culgan*, Medina App. No. 08 CA 80-M, 2009-Ohio-2783 (stating, citing *Williams*, that a classification journal entry is separate and distinct from a sentencing entry, and that a proper classification entry is final and appealable even if the related sentencing entry is not).

{¶ 27} Following *Williams*, the Fifth District has also found that a defendant's sex offender classification “was intact” when he “was before the trial court for resentencing based on the court's failure to advise him of post-release control.” *State v. Poissant*, Fairfield App. No. 08 CA 7, 2009-Ohio-4235, ¶45. The appellate court thus concluded that it was the province of the Attorney General's Office, not the court, to reclassify the defendant as a Tier III offender. *Id.*

{¶ 28} Based on our precedent and on the authority of *Williams* and *Poissant*, we conclude that the validity of Gibson's sentence would not affect the validity of Gibson's classification as a sexual predator. The trial court properly held that Gibson's sexual predator classification was not void.

{¶ 29} Gibson claims that the trial court made other errors at sentencing, such as "allowing Gibson to believe" that he could seek judicial release during his mandatory nine-year sentence, that the trial court did not comply with Crim.R. 11(C), and the trial court should not have found Gibson to be a sexual predator. These challenges have been or could have been raised in prior appeals and are barred by *res judicata*.

{¶ 30} Because the trial court did not err in concluding that Gibson's sexual predator designation is not affected by the validity of Gibson's sentence, the trial court properly denied Gibson's motion for declaratory and injunctive relief.

{¶ 31} The assignments of error are overruled.

### III

{¶ 32} The judgment of the trial court will be affirmed.

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

Nick A. Selvaggio  
Dennis R. Gibson, Jr.  
Hon. Roger B. Wilson