

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-205
DANIEL W. WOOD	:	
	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of
Common Pleas Case No. 2008-CR-1461(B)

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: June 14, 2010

APPEARANCES:

For Plaintiff-Appellee:

JOHN D. FERRERO 0018590
Stark County Prosecutor
110 Central Plaza, South, Ste. 510
Canton, Ohio 44702

KATHLEEN O. TATARSKY 0017115
Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

AARON KOVALCHIK 0077045
111 Second St., N.W.
Suite 302
Canton, Ohio 44702

Delaney, J.

{¶1} Defendant-Appellant, Daniel W. Wood, appeals from the judgment of the Stark County Court of Common Pleas, convicting him of one count of kidnapping of a child under thirteen years of age, a felony of the first degree, in violation of R.C. 2905.01(B), and four counts of child endangering, felonies of the second and third degree, in violation of R.C. 2919.22. Specifically, the facts, as alleged in the Bill of Particulars, alleged that Appellant along with his co-defendant, Amanda Wood, restrained a six-year old child victim by tying the victim to his bed with items including a shoestring on at least one occasion for an extended period of time, including throughout the night. The actions of Appellant and his codefendant caused harm to the child victim, including, but not limited to, severe ankle abrasions, muscle atrophy, retinal hemorrhaging, and dehydration.

{¶2} Appellant initially pled not guilty to the charges. On April 1, 2009, Appellant changed his plea of not guilty to guilty of all charges in the indictment. Appellant was sentenced to six years in prison based on a joint recommendation of the prosecution and the defense.

{¶3} Subsequent to being conveyed to prison, the Ohio Department of Rehabilitation and Corrections noted that as a result of Appellant's guilty plea to kidnapping pursuant to R.C. 2905.01(B), the law required that Appellant be classified as a Tier III sex offender because he committed a child victim oriented offense pursuant to R.C. 2950.01(G)(1)(f).

{¶4} On June 24, 2009, the trial court held a hearing wherein it classified Appellant as a Tier III sex offender. Appellant objected to the classification, arguing that

he wanted the trial court to enforce the original plea agreement, which did not include a classification as a sex offender. Appellant argued that because he was married to the child victim's legal guardian, he was essentially a "parent" to the child and therefore was exempt from classification under R.C. 2950.01(G)(1)(f).

{¶5} The trial court rejected Appellant's argument and imposed the Tier III sex offender classification, as required by law. The court then notified Appellant of his registration and notification duties upon his release from prison.

{¶6} It is from this judgment that Appellant now appeals and raises three Assignments of Error:

{¶7} "I. THE TRIAL COURT ERRED IN RE-SENTENCING APPELLANT AFTER HIS SENTENCE HAD ALREADY BEEN IMPOSED.

{¶8} "II. THE TRIAL COURT ERRED WHEN IT CLASSIFIED APPELLANT A TIER III OFFENDER AS DEFINED BY ORC 2950.01(G).

{¶9} "III. THE TRIAL COURT ERRED WHEN IT APPLIED ORC 2950.01(G) TO APPELLANT AND VIOLATED HIS RIGHTS TO DUE PROCESS AS GUARANTTED [SIC] BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."

{¶10} Additionally, Appellant filed a supplemental brief, raising the following assignment of error for review:

{¶11} "IV. THE TRIAL COURT ERRED WHEN IT FAILED TO CONDCUT [SIC] A HEARING TO CONSIDER WHETHER APPELLANT WAS SUBJECT TO THE NOTIFICATION PROVISIONS OF ORC 2950.11."

I.

{¶12} In Appellant's first assignment of error, he argues that the trial court erred by "resentencing" him by imposing his Tier III classification after the court had already imposed sentence.

{¶13} Classification of an offender under R.C. 2950.01 et seq. does not constitute a resentencing under Ohio law. *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, and other courts, have previously held that sex-offender classification proceedings are civil in nature and are separate and distinct from an offender's underlying criminal conviction and sentence. *State v. Williams* (2000), 88 Ohio St.3d 513, 527, 728 N.E.2d 342; *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, 700 N.E.2d 570; *Sigler v. State*, 5th Dist. No. 08-CA-79, 2009-Ohio-2010. An offender is classified as a Tier I, II, or III sex offender, per R.C. 2950.01, based upon the offense of which they are convicted. Appellant was convicted of kidnapping a child under the age of 18 who was not Appellant's biological or adopted child. R.C. 2905.01(B). Therefore, pursuant to R.C. 2950.01(G)(1)(f), Appellant was classified as a Tier III offender by operation of law.

{¶14} Accordingly, because a classification of an offender as a Tier I, II, or III sex offender status is not a "sentence", the trial court did not err in classifying Appellant as a Tier III offender after the trial court imposed sentence on Appellant's criminal conviction.

{¶15} Appellant's first assignment of error is overruled.

II.

{¶16} In his second assignment of error, Appellant argues that the trial court erred in classifying him as a Tier III offender for the offense of kidnapping, under R.C. 2905.01(B). Specifically, Appellant claims that because he was married to the mother of the child who was the victim of his kidnapping offense, he was “in fact a parent of the victim of the offense.” Appellant’s brief, p. 8. We disagree.

{¶17} R.C. 2950.01(G)(1)(f) provides:

{¶18} “(G) ‘Tier III sex offender/child-victim offender’ means any of the following:

{¶19} “(1) A sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any of the following sexually oriented offenses:

{¶20} “(f) A violation of division (B) of section 2905.01 of the Revised Code when the victim of the offense is under eighteen years of age and the offender is not a parent of the victim of the offense; * * *

{¶21} R.C. 2950.01(A)(9) includes as a “sexually oriented offense” a violation of R.C. 2905.01, when the victim of the offense is under eighteen years of age and the offender is not a parent of the victim of the offense.

{¶22} R.C. 2950.01(A)(9) does not extend the exemption against classification to any persons other than “parents.” In construing the intent of a statute, “words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.”

R.C. 1.42

{¶23} The legislature declined to include “guardians,” “custodians,” “persons having custody or control,” or “persons in loco parentis” as being exempt from the mandates of R.C. 2950.01(A)(9). In other statutes, the legislature has deemed it appropriate to include these other categories of custodial relationships. For instance, R.C. 2905.05, Ohio’s child enticement statute, describes an offender as one who does not have the express or implied consent of the “parent, guardian, or other legal custodian of the child.” Additionally, R.C. 2919.22, the child endangering statute, describes offenders as “parent[s], guardian[s], custodian[s], person having custody or control, or person in loco parentis o a child under eighteen years of age.” Moreover, R.C. 2151.03 defines a neglected child as one abandoned by “parents, guardian, or custodian.”

{¶24} R.C. 2950.01(G)(1)(f), however, has chosen only to include the term “parent” in the statute. Certainly, the legislature could have chosen to include custodians, guardians, or a person acting in loco parentis in R.C. 2950.01 if it had so desired. By not doing so, however, the legislature chose to exclude those who were not the biological or adoptive parents of a child from the protections against classification under R.C. 2950.01 et seq. for the purposes of a kidnapping conviction under R.C. 2905.01(B).

{¶25} Moreover, in *State v. Amanda Wood*, 5th Dist. No. 2009-CA-00190, 2010-Ohio-884, this Court has already determined that the General Assembly has chosen not to expand the use of the word “parent” in R.C. 2950.01(A)(9) and R.C. 2950(G)(1)(f) to include custodians or legal guardians who are not the “parent” of the child.

{¶26} Accordingly, Appellant’s second assignment of error is overruled.

III.

{¶27} In Appellant's third assignment of error, he asserts that the trial court erred in classifying him as a Tier III offender because R.C. 2950.01 is unconstitutional as it deprives him of Due Process.

{¶28} Appellant did not challenge the constitutionality of the Adam Walsh Act or of R.C. 2950.01 at the trial court level. "Failure 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 this state's orderly procedure, and therefore need not be heard for the first time on appeal." *In re Adrian R.*, 5th Dist. No. 08-CA-17, 2008-Ohio-6581, T ¶26, citing *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus, 489 N.E.2d 277. The waiver doctrine announced in *Awan* is discretionary. *In re M.D.* (1988), 38 Ohio St.3d 149, 151, 527 N.E.2d 286, 288. See also *State v. Longpre*, 4th Dist. No. 08CA3017, 2008-Ohio-3832 (applying waiver doctrine to Senate Bill 10).

{¶29} Because Appellant failed to raise this issue in the trial court, he has waived his right to raise it on appeal. We will, however, address his claim under a plain error standard of review. A reviewing court may review claims of defects affecting substantial rights even if they were not brought to the attention of the court. Ohio Crim. R. 52(B).

{¶30} This Court has previously rejected constitutional challenges to sexual offender classifications based on alleged Due Process violations. See *In re Adrian R.*, *supra*. See also *Williams*, *supra*, at 527. No due process violation occurs where "the law required an offender to be registered based on the fact of the conviction alone." *Doe*

I v. Dann et al., (June 9, 2008), N.D. Ohio No. 1:08-CV-00220-PAG, Document 146, 2008 WL 2390778. Moreover, “public disclosure of a state's sex offender registry without a hearing as to whether an offender is ‘currently dangerous’ does not offend due process where the law required an offender to be registered based on the fact of his conviction alone.” *Doe I v. Dann et al.*, citing *Connecticut Dept. of Public Safety v. Doe* (2003), 538 U.S. 1, 123 S.Ct. 1160. Therefore, due process is not implicated by Senate Bill 10.

{¶31} Appellant’s third assignment of error is overruled.

IV.

{¶32} In Appellant’s fourth assignment of error, which he filed as a supplemental issue after oral argument was held, he claims that the trial court erred by failing to conduct a hearing to consider whether Appellant was subject to the community notification provisions of R.C. 2950.11(F)(2). In support of his argument, Appellant cites to the recent Ohio Supreme Court decision of *State v. McConville*, ____ Ohio St.3d ____, Slip Opinion No. 2010-Ohio-958.

{¶33} *McConville* addressed the issue of whether a Tier III offender who was notified of their Tier III status after January 1, 2008, is entitled to a hearing pursuant to R.C. 2950.11(F)(2), in order to demonstrate whether the offender should be subjected to community notification requirements as a registered sex offender. The Supreme Court determined that the provisions of R.C. 2950.11(F)(2) are applicable to offenders who were notified of their status after January 1, 2008. Moreover, the Supreme Court determined that the trial court has discretion, in certain circumstances based on the

factors set forth in R.C. 2950.11, to relieve a Tier III offender of the community notification requirements.

{¶34} R.C. 2950.11(F)(2) provides:

{¶35} “The notification provisions of this section do not apply to a person described in division (F)(1)(a), (b), or (c) of this section if a court finds at a hearing after considering the factors described in this division that the person would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment.” The statute sets forth the factors that the court “shall consider,” and these are the same as those factors that courts were required to consider under prior law in determining whether the offender is a sexual predator, see R.C. 2950.11(F)(2)(a)-(i) & (k), except that the new law adds a factor (j) to consider whether the offender would have been considered a habitual sex offender. Appellant did not request such a hearing.

{¶36} R.C. 2950.11(F)(2) does not mandate a hearing; rather, a plain reading of the statute reveals that the hearing is discretionary. See *State v. Dehler*, 11th Dist. No. 2008-T-0061, 2009-Ohio-5059, ¶63. R.C. 2950.11(F)(2) outlines the factors a court must consider *if* it holds a hearing. Thus, it provides that the community notification provisions of R.C. 2950.11 do not apply if, after considering the eleven factors of R.C. 2950.11(F)(2)(a)-(k), the court determines that the offender would not have been subject to the notification provisions of former R.C. 2950.11.

{¶37} Moreover, R.C. 2950.11(H)(1), states, “[u]pon the motion of the offender or the prosecuting attorney * * * the judge *may schedule a hearing* to determine whether the interests of justice would be served by suspending the community notification

requirement under this section in relation to the offender. The judge *may dismiss the motion without a hearing* but may not issue an order suspending the community notification requirement without a hearing. * * *.” (Emphasis added).

{¶38} Accordingly, it is within the trial court's discretion to dismiss the motion without a hearing or to hold a hearing pursuant to R.C. 2950.11 to determine whether community notification should be suspended. The court may not, however, issue an order suspending the community notification requirements without holding a hearing and considering all the relevant factors.

{¶39} As Appellant failed to request a hearing, he cannot now argue that the trial court erred in failing to suspend the community notification provision pursuant to R.C. 2950.11.

{¶40} Appellant's fourth assignment of error is overruled.

{¶41} For the foregoing reasons, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.

Edwards, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN

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FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DANIEL W. WOOD	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-205
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN