

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-12-1083

Appellee

Trial Court No. CR0200803260

v.

Marlon Perryman

DECISION AND JUDGMENT

Appellant

Decided: March 22, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and David F. Cooper,
Assistant Prosecuting Attorney, for appellee.

Marlon Perryman, pro se.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals a judgment denying his motion to vacate his conviction for failure to comply with sex offender address verification requirements in the Lucas County Court of Common Pleas. Because we conclude appellant's sentence was the

result of the unconstitutional retroactive application of law, we reverse and remand for further proceedings.

{¶ 2} Because the record contains few of the documents from appellant's original case, we rely on what appear to be the undisputed representations of the parties in the underlying proceedings. Appellant, Marlon Perryman, was convicted of rape and gross sexual imposition in 1998 in Clark County. He was sentenced to a term of imprisonment and adjudicated a sexually oriented offender pursuant to the version of R.C. 2950.07 then in effect. As an adjudicated sexually oriented offender, appellant was required, on his release, to register with local law enforcement and verify his address once per year for a period of ten years.

{¶ 3} Appellant was released from prison on March 27, 2001, and registered for the first time on April 3, 2001. At some later point, appellant's offender status was administratively reclassified to a Tier III offender. A Tier III offender must verify his address every 90 days for life.

{¶ 4} In 2008, appellant, now living in Toledo, failed to verify his address as required. When he continued to fail to comply after notice from the county sheriff, the matter was referred to the Lucas County Grand Jury. On September 25, 2008, appellant was indicted for violating R.C. 2950.06, failure to verify, a first degree felony. After an initial not guilty plea, appellant agreed to plead no contest to an amended charge of attempted failure to verify, a second degree felony. The trial court accepted the plea,

found appellant guilty of the amended charge and sentenced him to four years imprisonment. This sentence was ordered to be served consecutively to a three-year term of incarceration imposed for a separate community control violation. Appellant did not appeal.

{¶ 5} On August 6, 2010, appellant filed a motion with the trial court to “vacate and set aside” his attempted failure to verify conviction. Citing *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, appellant insisted that his sexual offender status had been improperly administratively reclassified. As a result, appellant argued, his attempted failure to verify conviction should be void and the judgment of conviction vacated.

{¶ 6} The state moved to dismiss appellant’s motion, arguing that the motion was, in fact, a petition for postconviction relief that was untimely. Moreover, the state maintained, *Bodyke* cannot be applied retroactively, appellant was barred from relief by the doctrine of res judicata and the motion failed on its merits.

{¶ 7} The trial court construed appellant’s motion to be a petition for postconviction relief and found that it had been filed out of time, without a statutory ground for exception. On this conclusion, the court denied appellant’s motion and granted the state’s motion to dismiss. Appellant’s motion to reconsider was denied.

{¶ 8} On September 9, 2011, appellant filed a second motion to “set aside and vacate” his conviction. Appellant again relied on *Bodyke* for the proposition that

administrative reclassification of his sex offender status violated constitutional separation of powers. Appellant also argued, on authority of *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, that such reclassification was unconstitutionally retroactive. On either basis, appellant insisted, his judgment of conviction was void ab initio.

{¶ 9} Again the state responded that appellant's motion was a request for postconviction relief and was again untimely and without a statutory excuse. The state also reiterated its assertion that res judicata barred further consideration. The state conceded that, pursuant to *Bodyke* and *Williams*, appellant's sexual offender status reverts to that determined at original sentencing, but insisted that the cases should not be retroactively applied to negate a conviction. The state attempted to distinguish cases that held severance of the administrative reclassification provisions of the law required vacation of a conviction as being on direct appeal, not on a petition for postconviction relief, as here.

{¶ 10} The trial court again found the petition untimely and without statutory exception and concluded that it was without jurisdiction to entertain the motion. The court granted the state's motion to dismiss. From this judgment, appellant brings this appeal. Appellant sets forth two assignments of error:

I. The trial court abused its discretion and violated the appellant's rights to due process, by denying his motion without a hearing.

II. The trial court construed in error [appellant's] motion to vacate as a motion for post-conviction relief.

I. Sex Offender Registration Background

{¶ 11} Before we address appellant's assignments of error, some background is necessary. Although Ohio has had some form of sex offender registry since 1963, the system remained unchanged and little used for decades. *Bodyke* 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, at ¶ 3. The first major change came in 1996 when, in response to a New Jersey murder of a young girl by a convicted sex offender, the General Assembly enacted the Ohio version of "Megan's Law." *Id.* at ¶ 6; Am.Sub.H.B. No. 180 (Effective October 16, 1996.) The act provided for judicial classification of a sex offender as a "sexually oriented" offender, a "habitual sex offender" or a "sexual predator." Former R.C. 2950.01. A registration requirement and the frequency and duration of reporting were set for each category.

{¶ 12} After his conviction, appellant was judicially classified a "sexually oriented offender." As such, he was required, after his release, to register his address with law enforcement and to verify his address annually, former R.C. 2950.06(B)(2), for a period of ten years. Former R.C. 2950.07(B)(3). Failure to register or annually verify would constitute a fifth degree felony, because appellant's underlying conviction was a felony. Former R.C. 2950.99.

{¶ 13} In 2006, Congress enacted the Adam Walsh Act, creating tougher national standards for sex offender registration and encouraging states to adopt them. *Bodyke* 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, at ¶ 18-19. In 2007, the Ohio legislature repealed Megan’s Law and replaced it with a structure in conformity with the Adam Walsh Act. *Id.* at ¶ 20; 2007 Am.Sub.S.B. No. 10.

{¶ 14} S.B.10 eliminated the prior judicially imposed sexual offender classifications and substituted a three tiered system based on the offense for which the offender was convicted. *See* R.C. 2950.01(G). In this system, one who is convicted of rape, in violation of R.C. 2907.02, is classified a Tier III sex offender, irrespective of other considerations. R.C. 2950.01(G)(1)(a). A Tier III offender is required, after registration, to verify his or her address every 90 days, R.C. 2950.06(B)(3), for life. R.C. 2950.07(B)(1). One who violates the registration and verification requirements is guilty of an offense of equal degree to the most serious sexually oriented offense that was the basis for registration. R.C. 2950.99(A)(1)(a)(ii). The legislature directed the Ohio Attorney General to reclassify sex offenders previously classified under Megan’s Law in conformity with the new system. R.C. 2950.031(A)(1).

{¶ 15} Appellant’s most serious sexually oriented offense was rape. Under Adam Walsh/S.B. 10, appellant would be required to register and verify his address every 90 days for life. Failure to do so is a felony of the first degree.

{¶ 16} In *Bodyke*, Christian Bodyke and two others who had been classified as sexually oriented offenders between 1993 and 1999 challenged their 2007 reclassification to Tier III offenders. The trial court denied their petitions and we affirmed. *State v. Bodyke*, 6th Dist. Nos. H-07-040, H-07-041, H-07-042, 2008-Ohio-6387. On further appeal, however, appellants prevailed. The Supreme Court of Ohio held that the provisions of the S.B. 10 that required the attorney general to reclassify offenders, who had been judicially classified prior to the effective date of S.B. 10, violated the separation-of-powers doctrine. *Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, at paragraphs two and three of the syllabus. The court ordered the reclassification provisions severed from the act and directed that they “may not be applied to offenders previously adjudicated by judges under Megan's Law, and the classifications and community-notification and registration orders imposed previously by judges are reinstated.” *Id.* at ¶ 66. This decision was the basis of appellant’s first motion to vacate his conviction.

{¶ 17} Subsequently, in *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, syllabus, the court found the provisions of S.B. 10 as applied to defendants who committed sex offenses prior to its enactment was unconstitutionally retroactive. The court reversed Williams’ conviction and remanded the matter “for resentencing under the law in effect at the time Williams committed the offense.” *Id.* at ¶ 22. This was the basis of appellant’s second motion to vacate his conviction.

II. Postconviction Relief

{¶ 18} We shall discuss appellant's second assignment of error first. In it appellant suggests the trial court misconstrued his motion as a petition for postconviction relief. Appellant insists that, applying *Bodyke* and *Williams*, which void retroactive application of S.B. 10, there is no longer any legal support for his conviction and it should be set aside.

{¶ 19} If appellant's motion was for postconviction relief, it was clearly filed out of time. R.C. 2953.21(A)(2) limits the time for filing a petition for postconviction relief to 180 days after the expiration of time for filing an appeal. Appellant's motion was well beyond that.

{¶ 20} Appellant, however, did not denominate his motion as for postconviction relief. Indeed, in every pleading he filed he denied he was seeking postconviction relief. It was the trial court that classified the motion in that manner. Appellant argues that the legal basis for his conviction was eviscerated by the Ohio Supreme Court's decision to void retroactive application of S.B. 10.

{¶ 21} We find instructive *State v. Montgomery*, 2d Dist. No. 24450, 2012-Ohio-391. Lawrence Montgomery was convicted of a 1987 rape and subsequently designated a sexually oriented offender. He was released from prison in 2004. In 2007, he was administratively reclassified as a Tier II sexual offender, requiring him to verify his

address every 90 days for life. In 2008, he failed to verify his address. He was charged and convicted of a violation of R.C. 2950.06, as a first degree felony. He did not appeal. *Id.* at ¶ 5.

{¶ 22} After *Bodyke* was announced, Montgomery filed a motion to vacate his sentence, which his trial court construed as a motion for postconviction relief and denied as untimely. Montgomery appealed. *Id.* at ¶ 7.

{¶ 23} The appeals court reversed the trial court, vacating Montgomery's guilty plea, conviction and sentence. The appellate court concluded that, while the criminal rules do not expressly provide for a motion to vacate a conviction, the relief Montgomery sought is more correctly characterized as a Crim.R. 32.1 motion to withdraw a guilty plea. According to the court:

Given the expansive wording of *Bodyke* directing us to apply its holding to all offenders reclassified under [S.B. 10], and the fact that a void sentence may be reviewed at any time, we review Appellant's arguments under the law governing a postsentence motion to withdraw a plea rather under the more restrictive rules governing Civ.R. 60(B) motions or petitions for postconviction relief. [F]undamental fairness requires that we review the merits of his appeal under the framework of a Crim.R. 32.1 motion to withdraw a plea. *Id.* at ¶ 15.

{¶ 24} Crim.R. 32.1 allows an offender to withdraw or vacate a plea at any time to correct manifest injustice. The rule provides:

A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.

{¶ 25} “Manifest injustice” has been defined as a “clear or openly unjust act.” *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998). Under such a standard, “a postsentence withdrawal motion is allowable only in extraordinary cases.” *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977). The proponent of the motion bears the burden of establishing manifest injustice. *Id.* at paragraph one of the syllabus. The determination of whether to grant such relief rests within the sound discretion of the court. *Id.* at paragraph two of the syllabus.

{¶ 26} In *Bodyke and Williams*, the Ohio Supreme Court declared the retroactive application of S.B. 10 unconstitutional. Since it is the retroactive application of S.B. 10 that elevated appellant’s offense from a fifth degree felony to a second degree felony, we agree with the court of appeals for the second district that, “it would be a manifest injustice to continue [a defendant’s] incarceration based on a void statute and sentence.” *Montgomery* 2d Dist. No. 24450, 2012-Ohio-391, at ¶ 24. At a minimum, appellant’s sentence must be vacated.

{¶ 27} Accordingly, appellant's second assignment of error is well-taken.

III. Hearing on Motion

{¶ 28} In his first assignment of error, appellant complains that the trial court should have granted him a hearing on his motion.

{¶ 29} This assignment of error is moot because we have held that appellant's sentence is void and must be vacated. At the least, there must be a resentencing hearing.

{¶ 30} There is a greater question, however, as to whether appellant's conviction itself must be vacated. As in *Montgomery*, at ¶ 23, from the record before us we are unable to ascertain whether appellant was convicted of violating his annual address verification arising from his Megan's Law classification or the 90-day address verification under S.B. 10. Since the 90-day requirement arises from the unconstitutional retroactive application of S.B. 10, if this was the basis of appellant's conviction, the conviction is wholly void. Accordingly, further proceedings are necessary.

{¶ 31} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed. Appellant's sentence is vacated and this matter is remanded to said court for either resentencing or the vacation of his conviction in conformity with this decision. Appellee is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment Reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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