

[Cite as *State v. Clayborn*, 2009-Ohio-1751.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 08AP-593
 : (C.P.C. No. 07CR08-5606)
 Byron Clayborn, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

O P I N I O N

Rendered on April 14, 2009

Ron O'Brien, Prosecuting Attorney, *Steven L. Taylor* and *Laura M. Swisher*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

KLATT, J.

{¶1} Defendant-appellant, Byron Clayborn, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of one count of pandering sexually oriented matter involving a minor. Because Clayborn failed to timely appeal from this judgment, we dismiss his appeal.

{¶2} On August 6, 2007, Clayborn was indicted with: (1) 13 counts of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(1) and/or (2), a second degree felony, and (2) 13 counts of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(5), a fourth degree felony. Ultimately, Clayborn

pled guilty to one count of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(1) and/or (2), a second degree felony. During the combined plea and sentencing hearing, the trial court informed Clayborn that his guilty plea rendered him a tier II sex offender. Pursuant to R.C. 2950.03, the trial court then notified Clayborn of his duties to register and periodically verify his address.

{¶3} On May 30, 2008, the trial court issued a judgment entry convicting Clayborn of pandering sexually oriented matter involving a minor and imposing a two-year sentence. Clayborn now appeals from that judgment.

{¶4} According to App.R. 4(A):

A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.

Failure to comply with App.R. 4(A) is a jurisdictional defect and is fatal to any appeal. *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810, ¶17; *Bond v. Village of Canal Winchester*, 10th Dist. No. 07AP-556, 2008-Ohio-945, ¶11.

{¶5} In the case at bar, Clayborn filed his notice of appeal on July 15, 2008—46 days after the entry of the May 30, 2008 judgment. Thus, Clayborn's notice of appeal was untimely, and we must dismiss his appeal due to his noncompliance with App.R. 4(A).

{¶6} Clayborn, however, argues that this court should apply the portion of App.R. 4(A) governing the filing of notice of appeals in civil cases to his appeal. App.R. 4(A) tolls the time period for filing a notice of appeal in a civil case if the trial court's clerk fails to serve the parties within the three-day period specified in Civ.R. 58(B). *State ex rel. Sautter v. Grey*, 117 Ohio St.3d 465, 2008-Ohio-1444, ¶16. Clayborn asserts that the

clerk did not serve him as mandated in Civ.R. 58(B), and thus, this lack of service indefinitely tolled the time for filing his notice of appeal.

{¶7} The App.R. 4(A) tolling provision only saves Clayborn's appeal if Clayborn is appealing from a "civil case." Clayborn, however, appeals from a quintessential *criminal* case—a case initiated with an indictment alleging that Clayborn committed criminal offenses and concluded with a conviction for one of those offenses and a two-year sentence. Moreover, *State v. Furlong* (Feb. 6, 2001), 10th Dist. No. 00AP-637, does not provide Clayborn with a basis for claiming that he appeals from a civil case. In *Furlong*, we applied the App.R. 4(A) tolling provision to an appeal from a judgment finding that the defendant was a sexual predator. There, we allowed the defendant to benefit from a tolling provision that applies only to "civil case[s]" because the "sexual predator hearing is a civil proceeding." *Id.* In the case at bar, no civil proceeding occurred.

{¶8} Relying upon *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, the dissent asserts that a defendant's sex offender classification, even if imposed as a matter of law through the operation of statute, is civil in nature. While we do not disagree, we do not believe that the underlying case is a "civil case" merely because the trial court informed Clayborn that R.C. Chapter 2950 categorized him as a tier II sex offender.

{¶9} Because Clayborn appeals from a criminal—not civil—case, the App.R. 4(A) tolling provision does not extend the time for filing his appeal. Having found Clayborn's notice of appeal untimely, we dismiss this appeal.

Appeal dismissed.

SADLER, J, concurs.
BRYANT, J., dissents.

BRYANT, J., dissenting.

{¶10} Being unable to agree with the majority that the tolling provision contained in App.R. 4(A) does not apply and that, as a result, Clayborn's notice of appeal must be dismissed as untimely, I respectfully dissent.

{¶11} During the combined plea and sentencing hearing the trial court conducted, Clayborn objected to the trial court's applying R.C. Chapter 2950, as amended by Am.Sub.S.B. No. 10 ("S.B. 10"). Clayborn contended the prior version of R.C. Chapter 2950, in effect when he committed the offense that formed the basis of his guilty plea, must be applied to his conviction. After noting the objection for the record, the trial court determined Clayborn would be classified under the new law, S.B. 10, rather than the law existing at the time Clayborn committed the offense underlying his guilty plea. In his notice of appeal to this court, Clayborn appeals his sex-offender-classification under S.B. 10; he does not appeal his criminal conviction. Relying upon *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, and *State v. Furlong* (Feb. 6, 2001), 10th Dist. No. 00AP-637, Clayborn argues in his notice of appeal that the App.R. 4(A) tolling provision applies in this case because sex offender classification proceedings are civil in nature.

{¶12} Based upon its determination that Clayborn appeals from a criminal case, not a "civil case," the majority concludes "the App.R. 4(A) tolling provision does not extend the time for filing his appeal." (Opinion, ¶9.) I respectfully disagree with the majority's conclusion that the App.R. 4(A) tolling provision does not apply to extend the time for filing this appeal.

{¶13} The Supreme Court of Ohio consistently has held that an offender's sexual offender classification under R.C. Chapter 2950 is civil in nature even though it arises

from an offender's criminal conviction. See *Cook*, supra (holding that the statutory scheme provided for in R.C. Chapter 2950, as enacted in 1996 H.B. No. 180, is civil in nature); *State v. Williams* (2000), 88 Ohio St.3d 513 (reaffirming that principle); *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169 (reaffirming *Cook* and *Williams*, and further holding a trial court may determine whether a defendant is a sexually oriented offender without conducting a hearing for that purpose); *Wilson*, supra, at syllabus (affirming that sex-offender classification proceedings under R.C. Chapter 2950 remain civil in nature); *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824 (concluding R.C. Chapter 2950, as amended by 2003 S.B. No. 5, is a civil, remedial statute). See also *Smith v. Doe* (2003), 538 U.S. 84, 123 S.Ct. 1140 (concluding statutory schemes similar to S.B. No. 5's amendment of R.C. Chapter 2950 are civil in nature).

{¶14} The Supreme Court of Ohio has not yet determined whether R.C. Chapter 2950 remains a civil, regulatory scheme after S.B. 10 amended it. Although S.B. 10 altered the landscape with regard to sex offender classification, registration and notification provisions in R.C. Chapter 2950, the precedent the Ohio Supreme Court set with respect to that chapter cannot be ignored. Until the Supreme Court decides otherwise, I must conclude, as have other appellate courts in this state, that an offender's sexual offender classification under R.C. Chapter 2950, as amended by S.B. 10, is civil in nature. See *Sewell v. State*, 1st Dist. No. C-080503, 2009-Ohio-872; *State v. King*, 2d Dist. No. 08-CA-02, 2008-Ohio-2594; *In re Gant*, 3d Dist. No. 1-08-11, 2008-Ohio-5198; *State v. Sewell*, 4th Dist. No. 08CA3042, 2009-Ohio-594; *Montgomery v. Leffler*, 6th Dist. No. H-08-011, 2008-Ohio-6397; *State v. Omiecinski*, 8th Dist. No. 90510, 2009-Ohio-1066; *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195.

{¶15} Moreover, I disagree with the majority's attempt to distinguish *Furlong*. Just as this court determined in *Furlong* that the trial court's sexual predator determination under the prior version of R.C. Chapter 2950 was a civil proceeding subject to App.R. 4(A)'s tolling provision, so, too, is the trial court's determination here under R.C. Chapter 2950, as amended by S.B. 10, that the amended provisions may be applied to Clayborn even though his crime pre-dated the statute's amendment.

{¶16} In reality, my view of this case diverges from the majority opinion because we begin from a different premise. The majority apparently relies heavily on its conclusion that the trial court took no action under R.C. Chapter 2950 because defendant's classification occurred as a matter of law. By contrast, in my opinion the trial court decided an appealable issue under R.C. Chapter 2950: whether the amended provisions may be applied retroactively. As in *Furlong*, the trial court's decision occurred as a result of a proceeding involving statutes deemed civil in nature. As a result, Clayborn, like *Furlong*, is entitled to invoke the tolling provision of App.R. 4(A). Indeed, when those accountable under the sexual classification provisions of R.C. Chapter 2950 historically have been subject to the restrictions evolving from R.C. Chapter 2950's civil nature, it seems an anomaly to reverse the characterization in the single instance where a benefit accrues from the characterization.

{¶17} Based on the foregoing, I conclude the trial court's decision on which version of R.C. Chapter 2950 to apply is an adverse decision that Clayborn may appeal, is civil in nature, and therefore is subject to App.R. 4(A)'s tolling provision, despite the fact the decision was rendered in conjunction with Clayborn's criminal conviction and sentencing. *Cook; Williams; Wilson; Hayden; Ferguson; Furlong*, supra. Because the trial court apparently failed to comply with Civ.R. 58(B) in the underlying case, I conclude this

court has jurisdiction in this matter under App.R. 4(A) because the time for filing a notice of appeal of the trial court's judgment was delayed. *Furlong*, supra; *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, syllabus. Because the majority concludes otherwise, I dissent.
