

[Cite as *State v. Page*, 2011-Ohio-83.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94369

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIE PAGE, JR.

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND VACATED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-526018

BEFORE: Sweeney, J., Stewart, P.J., and Sweeney, J.*

RELEASED AND JOURNALIZED: January 13, 2011

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant Willie Page (“defendant”) appeals his three year prison sentence. After reviewing the facts of the case and pertinent law, we vacate defendant’s sentence and reverse his conviction.

{¶ 2} On January 10, 2005, defendant was convicted of importuning and was subsequently labeled a sexual predator under Ohio’s Megan’s Law, which, at the time, detailed the classification, registration, and notification requirements of convicted sex offenders. Former R.C. 2950 et. seq. On August 2, 2006, defendant was convicted under Megan’s Law of failing to register as a sex offender and sentenced to one year in prison.

{¶ 3} On January 1, 2008, Ohio's Adam Walsh Act ("AWA") went into effect, repealing Megan's Law and altering the classification, registration, and notification scheme of convicted sex offenders. See R.C. Chapter 2950. Thereafter, defendant was reclassified as a Tier III offender under the AWA.

{¶ 4} On July 1, 2009, defendant was indicted under the AWA for failing to verify his address as a sex offender, with a furthermore clause indicating he had a prior conviction for violating Ohio's sex offender registration and notification laws. The furthermore clause enhanced the minimum penalty that defendant faced as a repeat offender from the possibility of parole to a mandatory three years in prison. R.C. 2950.06(F) and 2950.99(A)(2)(b).

{¶ 5} On November 12, 2009, defendant pled no contest to failure to verify address and the court sentenced defendant to the mandatory minimum of three years in prison.

{¶ 6} Defendant appeals and raises one assignment of error for our review.

{¶ 7} I. "The trial court's sentencing of defendant according to R.C. 2950.99 as effective at the time of sentencing violated appellant's constitutional rights as it violates the *ex post facto* clause of the United States Constitution."

{¶ 8} The AWA classifies sex offenders using a three-tiered system, with designation into each tier based solely on the offense committed. In addition, the AWA includes provisions that retroactively reclassify offenders previously classified under prior versions of the law. See R.C. 2950.031 and 2950.032. As

the Ohio Supreme Court recently explained, “[t]he entire reclassification process is administered by the attorney general, with no involvement by any court. There is no individualized assessment. No consideration is given to any of the other factors employed previously in classification hearings held pursuant to Megan’s Law.” *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶22.

{¶ 9} In *Bodyke*, the Ohio Supreme Court held that reclassification of sex offenders under the AWA’s R.C. 2950.031 and 2950.032, “who have already been classified by court order under former law,” violates the separation-of-powers doctrine and is unconstitutional. *Id.* at ¶¶60-61. The *Bodyke* Court severed these provisions from the Ohio Revised Code, holding that “R.C. 2950.031 and 2950.032 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 (emphasis added).

{¶ 10} This court recently applied *Bodyke* to reverse convictions based on violations of sex offender registration and notification requirements under the AWA, when the defendant was initially classified as a sexual offender under

Megan's Law. The Ohio Supreme Court explicitly directed that the registration obligations of the prior law are to be reinstated in such cases.¹ *Bodyke*, at ¶66.

{¶ 11} In *State v. Smith*, Cuyahoga App. No. 92550, 2010-Ohio-2880, ¶29, this court held that because the reclassification under the AWA was unlawful, "it cannot serve as the predicate for the crime for which [the defendant] was indicted and convicted." See, also, *State v. Patterson*, Cuyahoga App. No. 93096, 2010-Ohio-3715; *State v. Jones*, Cuyahoga App. No. 93822, 2010-Ohio-5004.²

¹The dissent concludes that *Bodyke* does not apply to the instant case by creating a fictitious distinction between an unlawful reclassification "that imposes a more onerous verification requirement" and a reclassification that does not impose heightened verification requirements. *Bodyke* deemed reclassifications under the AWA unlawful, the only condition being that the offender has "already been classified by court order under former law." Furthermore, even if this distinction existed, *Bodyke* would still apply to this case, because more is required of an AWA Tier III offender than of a sexual predator under Megan's Law.

The *Bodyke* Court explained that, although "Tier III offenders have the same obligation to verify their personal information as sexual predators [under Megan's Law], * * * the scope of registration is expanded greatly." For example, under Megan's Law, a sexual predator was required to "verify" only in the county in which he resided. However, under the AWA, a Tier III offender is required to "verify" where he resides, where he attends school, where he is employed, where he is temporarily domiciled for more than three days, and in another state, if he works or attends school there. Additionally, he must "verify" more information under the AWA, such as the license plate number of any vehicle he owns or uses for employment, his driver's license number, and his email addresses, as well as other Internet identifiers. See, *Bodyke*, ¶¶26-27.

Regardless, *Bodyke* held that reclassification was unlawful because it violates the separation-of-powers doctrine by authorizing the executive branch to reopen final judgments of the judicial branch. *Id.*, ¶55. *Bodyke* does not carve out exceptions where some reclassifications under the AWA remain lawful; therefore, no reclassification can serve as the predicate for a new offense.

²We are aware that at least one Ohio appellate district has reached the opposite conclusion. In *State v. Green*, Hamilton App. No. C-090650, 2010-Ohio-4371, the First District Court of Appeals of Ohio concluded that a defendant who, under Megan's Law, was classified as a sexually oriented offender by operation of law could be reclassified

{¶ 12} In the instant case, defendant’s reclassification under Ohio’s AWA is contrary to law under *Bodyke*. Adhering to precedent in this district, convictions arising from alleged reporting violations under the AWA for any individual reclassified under its provisions are contrary to law as well. *Smith; Patterson*, supra. We reverse defendant’s conviction for failure to verify address in violation of R.C. 2950.06(F), vacate his sentence, and hold that defendant is subject to the reporting requirements, and penalties for violating these requirements, of sexual predators pursuant to Megan’s Law.

{¶ 13} Defendant’s sole assignment of error is sustained, and his conviction is reversed.

It is, therefore, considered that said appellant recover of said appellee its costs herein.

under the AWA. “*Bodyke* does not apply to cases in which there is no prior court order classifying the offender under a sex-offender category. If there is no prior judicial order classifying the sex offender, then reclassification by the attorney general under [Ohio’s AWA] does not violate the separation-of-powers doctrine because it does not require the opening of a final court order or a review by the executive branch of a past decision of the judicial branch.”

Id. at ¶9.

It must be noted, however, that a court has exercised its discretion under Megan’s Law to classify an offender by, for example, denying the State’s request for a sexual predator classification hearing — in which case the court effectively classified the individual as a sexually oriented offender. *State ex rel. Mason v. Griffin* (2000), 90 Ohio St.3d 299, 303, 737 N.E.2d 958 (holding that “a sentencing court may do one of two things once it receives [a] recommendation that an offender be adjudicated as being a sexual predator. First, the court may conduct a hearing and determine whether the offender is a sexual predator. Alternatively, the court may determine without a hearing that the offender is not a sexual predator, and, if it does so, it must include its determination in the offender’s institutional record”).

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

JAMES D. SWEENEY, J.,* CONCURS;
MELODY J. STEWART, P.J., CONCURS IN PART AND DISSENTS IN PART.
(SEE ATTACHED CONCURRING AND DISSENTING OPINION.)

*(Sitting by Assignment: Judge James D. Sweeney, Retired, of the Eighth District Court of Appeals)

MELODY J. STEWART, P.J., CONCURRING IN PART AND DISSENTING IN PART:

{¶ 14} I agree with the majority that *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, requires that we reverse Page's reclassification as a Tier III offender under the Adam Walsh Act ("AWA"). However, I respectfully dissent from the decision to reverse his conviction and sentence because Page's conviction stands regardless of which classification system, AWA or the former Ohio Megan's Law, is applied.

{¶ 15} In 2005, Page was found guilty of importuning and the court classified him as a sexual predator under Ohio Megan’s Law. The version of R.C. 2950.06(B)(1)(a) in effect at the time required Page to verify his address every 90 days. The enactment of the AWA did not change this verification requirement for Page. He continued to have the same duty to verify his address every 90 days. There is no argument that Page failed to fulfill this statutory requirement, regardless of which standard was used.

{¶ 16} The true issue in this case is not whether Page violated his statutory duty to verify his address every 90 days, but whether *Bodyke* somehow affects the AWA’s sentence enhancements for repeat offenders like Page. The enhanced penalty provision of the AWA is not couched in terms of the new classifications. It refers only to “violations” of the reporting statutes, not to the type of tier offender involved. Moreover, there is no question that the General Assembly could validly pass a law that prospectively enhances a penalty for repeat offenders. As the First District Court of Appeals noted when addressing a similar issue regarding a sentencing enhancement, “[the statute] is not violative of the constitutional prohibition against ex post facto laws because it is not ‘retrospective,’ i.e., it does not ‘change * * * the legal consequences of acts completed before its effective date,’ but simply mandates an enhanced penalty for acts committed after the effective date of the

provision if the defendant has previously been convicted[.]” *State v. Clark* (Aug. 5, 1992), 1st Dist. No. C-910541 (internal citations omitted).

{¶ 17} *Bodyke* specifically stated that “[b]y excising the [reclassification provisions of the statute], we do not ‘detract from the overriding objectives of the General Assembly,’ i.e., to better protect the public from the recidivism of sex offenders, and the remainder of the AWA, ‘which is capable of being read and of standing alone, is left in place.’” *Id.* at ¶66, quoting *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶98. *Bodyke* only severed the reclassification provisions of the AWA; it did not sever the penalty provisions. I agree that under *Bodyke*, an unlawful reclassification that imposes a more onerous verification requirement cannot serve as the predicate for the crime of failure to verify. In this case, the unlawful reclassification did not do so. Page was required to verify his address every 90 days under Megan’s Law and under the AWA. He plainly violated this verification requirement. There being no valid argument that the General Assembly improperly enhanced the sentence for repeat verification offenders, I conclude that *Bodyke* has no application to Page’s conviction and the court properly enhanced his sentence as required by statute.

