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STATE OF OHIO

CUYAHOGA COUNTY

GERALD E. FUERN THE COURT OF COMMON PLEAS
CLERK OF COURTS
CUYAHOGA COUNTY

CASE NO. CR-529508

STATE OF OHIO,

Plaintiff,

- vs -

NEVIL BRUCE

Defendant.

JOURNAL ENTRY AND OPINION

JOAN SYNENBERG, JUDGE:

This cause came on for hearing upon the defendant's *Motion to Withdraw Guilty Plea* filed on May 17, 2011. Having considered defendant's motion, the State's brief in opposition, defendant's reply, and the *Notice of Supplemental Authority in Support of Motion to Withdraw Plea*, the court finds the motion well-taken. Accordingly, the motion is granted.

Background; Statement of the Case

On October 31, 2006, Defendant was convicted of the offense of sexual battery in Cuyahoga County Common Pleas Court Case No. CR-414397. He was sentenced to prison and classified under Megan's Law as an habitual sex offender.

Sometime after the enactment of the Adam Walsh Act ("AWA"), defendant was reclassified by the Ohio Attorney General as a Tier III sexual offender.

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On October 5, 2009, defendant was indicted (in this case) based on his reclassified status as a Tier III sexual offender, for failing to verify his address as a sex offender, a violation of R.C. § 2950.06(F). The indictment contained a furthermore clause indicating that defendant previously had been convicted of a registration offense in violation of R.C. § 2950.04(E) in Cuyahoga County Common Pleas Court Case No. CR-07-499890. The furthermore clause increased the offense level from a fourth degree felony to a third degree felony, and thus enhanced the minimum penalty defendant was facing as a repeat offender from possibility of parole to a mandatory three years in prison. See R.C. 2950.06(F) and 2950.99(A)(2)(b).

On April 22, 2010, defendant pled guilty to the offense as charged in the indictment. He was sentenced to three years in prison. Defendant did not appeal his conviction.

On June 3, 2010, the Ohio Supreme Court decided *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, in which the Court struck down as unconstitutional the reclassification provisions of the AWA (R.C. §§ 2950.031 and 2950.032).

On May 17, 2011, defendant filed his *Motion to Withdraw Guilty Plea*.

Crim.R. 32.1

Defendant's motion was filed pursuant to Crim.R. 32.1, which states: "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."

In the instant case, defendant was charged in, prosecuted on, and convicted upon an indictment that failed to charge a criminal offense. See *State v. Brunning*, 8th Dist. No. 95376, 2011-Ohio-1936, ¶ 12 (held: "the basis of the indictment was found to be unconstitutional, and therefore

the indictment failed to charge an offense against Brunning.”). Thus, the conviction is voidable. With the issue now properly before it, the court must set aside the conviction and dismiss the one-count indictment.

State v. Bodyke

In *State v. Bodyke*, the Ohio Supreme Court held that the reclassification provisions of the AWA were unconstitutional and severed them from the Act. According to the Court, the invalidated provisions meant 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.” *State v. Gingell* 128 Ohio St.3d 444, 2011-Ohio-1481, ¶¶ 6-7, quoting *Bodyke* at ¶ 66. The Eighth District Court of Appeals clarified the issue further, holding that the *Bodyke* remedy applies equally to offenders whose pre-AWA classification arose by operation of law. *Hannah v. State of Ohio*, 8th Dist. Nos. 95883-89, 2011-Ohio-2930; *Speight v. State of Ohio*, 8th Dist. Nos. 96041-44, 96405, 2011-Ohio-2933.

Before *Bodyke* was decided, the extrajudicial reclassification of sexual offenders was a vehicle for the State to subject Megan’s Law offenders to AWA offenses and enhanced penalties.

As noted in the Eighth District Court of Appeals case *State v. Gilbert*:

Once an offender was reclassified through R.C. §§ 2950.031 and 2950.032, the offenders’ obligation to report stemmed from the AWA and their reclassification. Therefore, the violations for an offender’s failure to verify or notify of a change of address pursuant to R.C. 2950.06(F) and R.C. 2950.05(F)(1) were based on the duties imposed by the AWA. Any attempt to deem the convictions otherwise valid would be essentially amending the indictment after the fact to charge an offender with a violation based on the duties under Megan’s Law, which were not reinstated until the Supreme Court issued the *Bodyke* decision.

State v. Gilbert, 8th Dist. Nos. 95083 and 95084), 2011-Ohio-1928, ¶ 10. By severing and excising the two reclassification sections (R.C. §§ 2950.031 and 2950.032), *Bodyke* removed this vehicle, and thus eliminated the State's ability to enforce any AWA provision against offenders classified pursuant to Megan's Law.

Since *Bodyke*, the Eighth District Court of Appeals consistently has held that an unconstitutional reclassification "cannot serve as the predicate for the violations charged in the indictments . . . even if the reporting requirements under the AWA and Megan's Law are identical." *Gilbert* at ¶ 15; *State v. Page*, 8th Dist. No. 94369, 2011-Ohio-83, ¶ 11 (reporting requirements originating from the unlawful reclassification cannot serve as the basis for a reporting violation.); *State v. Ortega-Martinez*, 8th Dist. No. 95656, 2011-Ohio-2540, ¶ 17; accord, *State v. Smith*, 8th Dist. No. 92550, 2010-Ohio-2880, ¶ 29 ("an unlawful reclassification under Ohio's AWA cannot serve as the predicate for the crime of failure to verify.").

State v. Ortega-Martinez and State v. Brunning

In *Ortega-Martinez*, the trial court dismissed the indictment charging the defendant with failure to verify his address. The State appealed. The Eighth District Court of Appeals affirmed, stating that "[b]ecause appellant's indictment was predicated on an unlawful reclassification, he cannot be convicted of the offense charged." *Ortega-Martinez* at ¶ 17.

In *State v. Brunning*, defendant Brunning pleaded guilty to a three-count indictment charging failure to verify his current address; failure to notify the sheriff of a change of address; and tampering with records (based on the allegation that he falsified documents in connection with the first two counts). Brunning appealed. The Eighth District Court of Appeals reversed.

In *Brunning*, the State argued that by pleading guilty, Brunning had waived any right to challenge his conviction based on the constitutionality of the AWA. Citing *State v. Hayden*, 8th Dist. No. 90474, 2008-Ohio-6279, the State argued that a defendant cannot claim the indictment is insufficient after pleading guilty.

The court of appeals noted that “neither the trial court nor Brunning had the benefit of the Bodyke decision during the pendency of the trial court’s proceedings.” It concluded that “Brunning’s reclassification under the AWA is contrary to the law[; therefore,] Brunning’s conviction arising from reporting violations under the AWA is . . . also contrary to law.” *Brunning* at ¶ 11 [citations omitted]. The court discounted the State’s argument (that Brunning had waived the right to challenge his conviction based on a defective indictment), and held that “the basis of the indictment was found to be unconstitutional, and therefore the indictment failed to charge an offense against Brunning.” *Id.* at ¶ 12.

Conclusion

Defendant currently is incarcerated based on his having pled guilty to an AWA offense he never could have committed. This court has the opportunity to correct that manifest injustice.

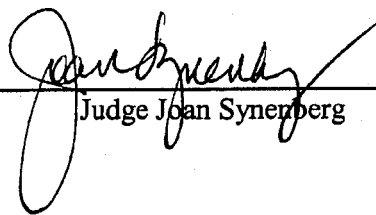
The Ohio Supreme Court and the Eighth District Court of Appeals have set a clear course for this court to follow. The Court of Appeals has determined as a matter of law that where the basis of an indictment has been found to be unconstitutional, the indictment fails to charge an offense. Based on the wealth of binding legal precedent and the policy behind Crim.R. 32.1, it would be manifestly unjust for this court not to grant defendant’s motion.

Therefore, pursuant to Crim.R. 32.1, and in accordance with the law of the Ohio Supreme Court and the law of this District, defendant’s judgment of conviction is set aside. The court vacates

defendant's sentence, vacates defendant's plea, and dismisses the single count indictment with prejudice. Pursuant to *Bodyke, Gingell*, and their progeny, defendant's previously-imposed classifications and community-notification and registration orders are reinstated and remain in full force and effect.

Judgment accordingly.

IT IS SO ORDERED. FINAL.



Judge Joan Synerberg