

[Cite as *State v. Roberts*, 2010-Ohio-3250.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23684
vs.	:	T.C. CASE NO. 09CR1222
RICHARD MARK ROBERTS	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellee	:	

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O P I N I O N

Rendered on the 9<sup>th</sup> day of July, 2010.

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KLINE, J., (BY ASSIGNMENT):

{¶ 1} Richard M. Roberts (hereinafter "Roberts") appeals the judgment of the Montgomery County Court of Common Pleas, which convicted Roberts of failure to notify in violation of R.C. 2950.05(A)&(F)(1). On appeal, Roberts contends that his reclassification as a Tier II sex offender was unconstitutional.

Roberts further argues that he should not have been subjected to the Tier II registration requirements and, as a result, we should vacate his failure-to-notify conviction. Because the Supreme Court of Ohio recently found certain provisions of the "Adam Walsh Act" to be unconstitutional, we agree. Accordingly, we sustain Roberts's assignment of error and vacate Roberts's conviction for failure to notify.

## I

{¶2} In August 1997, Roberts pled guilty to three counts of corruption of a minor in violation of the former R.C. 2907.04. As a result, Roberts was classified as a Sexually Oriented Offender under "Megan's Law." See, generally, *State v. Cook*, 83 Ohio St.3d 404, 405-409, 1998-Ohio-291 (discussing Megan's Law). Based on this classification, Roberts had to "verify [his] residential address with the county sheriff where [he] reside[d] or [was] temporarily domiciled annually for ten years." *Id.* at 408. In other words, under his initial classification as a Sexually Oriented Offender, Roberts had to register as a sex offender until August 2007.

{¶3} In 2007, the State of Ohio passed its version of the Adam Walsh Act. See, generally, *State v. Bodyke*, \_\_\_ Ohio St.3d \_\_\_, 2010-Ohio-2424, at ¶18-28 (discussing the Adam Walsh Act and comparing it to Megan's Law). Under the Adam Walsh Act, Roberts

was reclassified as a Tier II sex offender. This reclassification extended Roberts's registration requirements from ten years to twenty-five years - or, simply put, beyond August 2007.

{¶ 4} On July 1, 2009, a Montgomery County Grand Jury indicted Roberts for failure to notify in violation of R.C. 2950.05(A)&(F) (1). The indictment states that, "between the dates of February 6, 2009 through April 13, 2009[,] \* \* \* [Roberts] did fail to provide written notice of the residence, school, institution of higher education, or place of employment address change to the Sheriff of Montgomery County, Ohio[.]"

{¶ 5} On August 20, 2009, Roberts filed a motion to dismiss the indictment. In his motion, Roberts claimed that his reclassification under the Adam Walsh Act was unconstitutional.

After the trial court overruled his motion, Roberts pled no contest to the failure-to-notify charge. The trial court then convicted Roberts and sentenced him accordingly. Roberts appeals and asserts the following assignment of error:

ASSIGNMENT OF ERROR

{¶ 6} "APPELLANT'S CONVICTION BASED ON THE ADAM WALSH ACT IS A VIOLATION OF THE EX POST FACTO, RETROACTIVITY, AND DOUBLE JEOPARDY CLAUSES OF THE OHIO AND U.S. CONSTITUTIONS WHEN APPELLANT HAD ALREADY SERVED THE SENTENCE ISSUED BY THE COURT IN AUGUST 1997."

{¶ 7} In his sole assignment of error, Roberts essentially contends that his reclassification under the Adam Walsh Act was unconstitutional. As a result, Roberts argues that we should vacate his failure-to-register conviction because he should not have been subjected to the additional requirements imposed upon him by the Adam Walsh Act.

{¶ 8} “[C]onstitutional analysis is a question of law which we review *de novo*.” *State v. Smith* (Jan. 14, 2000), Montgomery App. Nos. 17475, 17476 & 17477, citing *State v. Ziepfel* (1995), 107 Ohio App.3d 646, 652 (other citations omitted). See, also, *Wilson v. AC&S, Inc.*, 169 Ohio App.3d 720, 2006-Ohio-6704, at ¶61.

“[A] statute enacted in Ohio is presumed to be constitutional. \* \* \* That presumption \* \* \* remains unless [Roberts] establishes, beyond reasonable doubt, that the statute is unconstitutional.” *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, at ¶12 (internal citations omitted).

{¶ 9} The Supreme Court of Ohio recently found that certain provisions of the Adam Walsh Act are unconstitutional. See *Bodyke*. Specifically, the court found that R.C. 2950.031 and 2950.032 “impermissibly instruct the executive branch to review past decisions of the judicial branch and thereby violate the separation-of-powers doctrine.” *Id.* at paragraph two of the syllabus. The court also found that R.C. 2950.031 and 2950.032

"violate the separation-of-powers doctrine by requiring the opening of final judgments." *Id.* at paragraph three of the syllabus. As a result, the court held 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.

{¶ 10} Thus, pursuant to *Bodyke*, Roberts's classification as a Sexually Oriented Offender has been reinstated, and the requirements imposed upon him by the Adam Walsh Act are a nullity. Under his classification as a Sexually Oriented Offender, Roberts's registration order expired in August 2007. Therefore, Roberts cannot be convicted for failing to report between the dates of February 6, 2009, and April 13, 2009.

{¶ 11} Accordingly, we sustain Roberts's first assignment of error and will vacate Roberts's conviction for failure to notify.

DONOVAN, P.J. And FAIN, J., concur.

(Hon. Roger L. Kline, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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