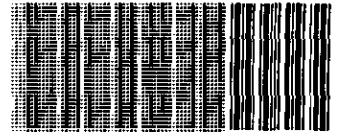


IN THE FIRST DISTRICT COURT OF APPEALS  
HAMILTON COUNTY, OHIO



D69836884

FRANCIS HYLE,  
Plaintiff-Appellee,

v.

GERRY PORTER, JR.  
Defendant-Appellant.

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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

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**APPLICATION OF R.C. § 2950.031 TO APPELLANT VIOLATES SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION**

Section 28, Article II of the Ohio Constitution provides that “the general assembly shall have no power to pass retroactive laws.” As the Ohio Supreme Court has noted, “[r]etroactive laws... have received the near universal distrust of civilization.” *Van Fossen, et al., v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 104, 522 N.E.2d 489. Section 28, Article II was intended to be a more potent protection against retroactive laws than the Ex Post Facto Clause of the United States Constitution, which only prohibits retroactive punishments. *Id.* at 105 & fn. 5; *see also State v. Walls*, 96 Ohio St. 3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶20, fn. 4. The question presented in Appellant’s Supplemental Brief is whether R.C. § 2950.031 violates Section 28, Article II of the Ohio Constitution.

**1. The Court Should Decide This Important Question.**

The issue of whether R.C. § 2950.031 violates the Section 28, Article II of the Ohio Constitution was not raised below. Nonetheless, this Court should decide the merits of this important question for the following reasons. First, resolution of this issue does not require any additional fact finding; rather, the question is purely one of law. Had Appellant raised this issue below and had the trial court ruled against him, this Court would be reviewing the issue *de novo* anyway. *See State v. Sufrunko* (4<sup>th</sup> App. Dist., 1995), 105 Ohio App. 3d 504, 506, 664 N.E.2d 596. Thus, this Court is in a position to decide the issue now without need for the trial court to address it first.

Second, this question is an important one that should be addressed sooner rather than later. Indeed, Appellee agrees that it makes jurisprudential sense for this Court to

resolve the constitutionality of 2950.031 as expeditiously as possible. Nothing is served by delaying the Court's consideration of this issue.

Third, this issue has assumed added importance since the Ohio Supreme Court's decision in *Norwood v. Horney* (2006), \_\_\_ Ohio St. 3d \_\_\_, 2006-Ohio-3799, which emphasizes the heightened protection afforded property rights under the Ohio Constitution.

**2. This Court Should Presume That § 2950.031 Does Not Apply Retroactively, Pursuant To R.C. § 1.48.**

In Ohio, statutes are presumed to be prospective unless specifically made retroactive. R.C. § 1.48; *State v. Consilio*, 9th Dist. No. 22761, 2006-Ohio-649, at ¶8. The Ohio Supreme Court has held that “[w]here there is no clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment.” *Kiser v. Coleman* (1986), 28 Ohio St. 3d 259, 262, 503 N.E. 2d 753. However, where a statute is *expressly* retroactive and substantive, rather than remedial, it is unconstitutional under Section 28, Article II. *State v. LaSalle* (2002), 92 Ohio St.3d 178, 2002 Ohio 4009, 772 N.E.2d 1172, at ¶13; *Consilio*, at ¶8; R.C. § 1.48.

Accordingly, the Ohio Supreme Court has formulated a two-part test to determine whether a statute is unconstitutionally retroactive. *LaSalle* at ¶14; *see also Babcock v. Wilcox* (1988), 36 Ohio St. 3d 100, 522 N.E.2d 489. First, the court must determine whether the legislature actually intended the statute to be applied retroactively. *Id.*; R.C. § 1.48. Second, if the court determines that the legislature intended the statute to apply retroactively, then, *and only then*, must the court determine whether the statute is substantive or remedial. *State v. Cook*, 83 Ohio St. 3d 404, 410, 1998-Ohio-291, 700 N.E.2d 570.

In *Consilio*, the Ninth District Court of Appeals addressed the question of whether R.C. § 2901.07 – which requires persons convicted of felonies to submit a DNA sample – was an unconstitutional retroactive law. With respect to the first step of the analysis, the Court held that there was insufficient evidence to conclude that the legislature intended the statute to apply retroactively. The Court observed that § 2901.07 “contains no express language that the statute is to be applied retroactively.” *Consilio*, at ¶11. The Court further observed that the “legislature did not include the term ‘retroactive’ or ‘retrospective’ in any of the sections, nor did it state that the statute applies to offenders that have already been convicted or had been convicted on, before and/or prior to a certain date.” *Id.* Because there was insufficient evidence of intent to make the statute retroactive, the court presumed that the legislature intended the statute to apply prospectively only, and thus did not reach the question of whether the statute was substantive. *Id.* at ¶15.

In this case, § 2950.031 provides:

No person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to either a sexually oriented offense that is not a registration-exempt sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises.

Just as in the statute at issue in *Consilio*, there is no language that explicitly makes the statute retroactive. As the *Consilio* court pointed out, another section in Chapter 2950, R.C. § 2950.09, specifically states that it applies to persons convicted “on or after January 1, 1997.” 2006-Ohio-649 at ¶9; *see State v. Cook*, 83 Ohio St. 3d at 410; *see also*, cases and related statutes collected at *Consilio*, 2006-Ohio-649 at ¶10 (all demonstrating the legislature’s ability to be explicit about retroactivity.) Therefore, this Court should

conclude that the legislature intended for § 2950.031 to apply prospectively only. Accordingly, this statute does not apply to Mr. Porter, who committed his offense before § 2950.031's effective date.


**3. If § 2950.031 Is Intended To Apply Retroactively, It Violates The Ohio Constitutional Prohibition Against Retroactive Laws.**

As discussed above, the Ohio Constitution prohibits retroactive laws that directly impair *substantive* rights. *State v. Cook*, 83 Ohio St. 3d at 410, 1998-Ohio-291, 700 N.E.2d 570. A statute is deemed substantive "if it impairs or takes away *vested rights*, affects an accrued substantive right, imposes new or additional burdens, duties, obligation or liabilities as to a past transaction, or creates a new right." *Id.* at 411, 1998-Ohio-291, 700 N.E.2d 570 (emphasis added) *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d at 107, 522 N.E.2d 489. As the Ohio Supreme Court made clear over 100 years ago, "[i]t is a general rule, that retrospective laws which ... tend to divest vested rights of property are void, and courts will always struggle to give laws a prospective construction or interpretation." *Cincinnati v. Seasongood* (1889), 46 Ohio St. 303, 304; 21 N.E. 630.

There is no question that § 2950.031 divests Mr. Porter of his vested property rights. As a result of the enforcement of § 2950.031 against him, Mr. Porter has been deprived of the ability to reside in the home he has owned for the past 15 years. This is a precious right. As the Ohio Supreme Court made clear recently in a different context, "[f]or the individual property owner, the appropriation is not simply the seizure of a house. It is the taking of a home--the place where ancestors toiled, where families were raised, where memories were made." *Norwood v. Horney* (2006), \_\_\_\_ Ohio St. 3d \_\_\_\_, 2006-Ohio-3799 at ¶4. No one can seriously dispute that Mr. Porter has a vested right to remain in the home he owns. Because Mr. Porter's right to reside in the home he

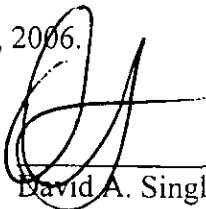
owns is impaired by § 2950.031, the statute is substantive and therefore cannot be applied to him without violating Section 28, Article II of the Ohio Constitution.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Defendant-Appellant's brief was served by fax and mail upon Bernard Bouchard, Esq., Assistant Prosecuting Attorney, Hamilton County Prosecutor's Office, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, this 31<sup>st</sup> day of August, 2006.

  
\_\_\_\_\_  
David A. Singleton