



# Ohio Prosecuting Attorneys Association

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## Mandatory Prison for Convicted Rapist's Failure to Provide Change of Address

In *State v. Ashford*, 2<sup>nd</sup> Dist. No. 23311, 2010-Ohio-1681, the defendant pleaded no contest for failing to provide notice of change of address. Because rape was the sexually oriented offense underlying the defendant's duty to provide notice, the change-of-address offense was a first-degree felony, as R.C. 2950.99 pegs the degree of the offense to the highest degree of "sexually oriented offense" creating the duty to register, and rape is a first-degree felony.

The trial court imposed a three-year prison term for the change-of-address offense, saying that the prison term was mandatory. The 2<sup>nd</sup> District affirmed. Although R.C. 2950.99 itself does not provide for mandatory sentencing when the offender is a first-time violator of R.C. Chapter 2950, the general sentencing statutes warrant a mandatory prison term for the rapist's change-of-address offense:

{¶ 10} Ashford was required to notify the sheriff of his change of address due to a conviction for rape, a first degree felony. In accordance with R.C. 2950.99(A)(1)(a), Ashford's violation of R.C. 2950.05 was likewise a first degree felony. Because R.C. 2950.99 did not address, much less mandate, the sentence for a first-time violator of R.C. 2950.05, the trial court appropriately turned to the felony sentencing statutes to determine Ashford's sentence.

{¶ 11} The sentencing range for a first degree felony is three to ten years. R.C. 2929.14. R.C. 2929.13(F)(6) requires the prison to be mandatory if, as in Ashford's case, "the offender previously was convicted of or pleaded guilty to \*\*\* any first or second degree felony \*\*\*." Since Ashford was found guilty of failure to notify, a first degree felony, and had previously been convicted of a first degree felony (rape), his sentence was mandatory. Accordingly, the trial court did not err in sentencing Ashford to a mandatory, three-year prison term.

## Child is not "Victim" of Criminal Nonsupport Offense

Under R.C. 2951.041(B)(7), a motion for intervention in lieu of conviction cannot be granted if the victim of the charged offense was under 13. In *State v. Sorrell*, 2<sup>nd</sup> Dist. No. 23370, 2010-Ohio-1618, the defendant was charged with nine counts of felony

nonsupport, stretching over periods of six years for his three children. Two of these children were under 13 during the time frames. The total arrearage for the three children was over \$27,000.

The defendant sought intervention in lieu of conviction based on alcohol abuse. The trial court denied the motion based on the under-13 age of two of the children. The defendant pleaded no contest, received community control, and appealed the denial of the intervention motion.

The 2<sup>nd</sup> District reversed, concluding that the children were not really the victims of these offenses and therefore that the defendant had been eligible for intervention in lieu. The 2<sup>nd</sup> District reasoned, as follows:

{¶ 14} In support of the trial court’s holding that Sorrell’s minor children under the age of thirteen constituted “victims” pursuant to R.C. § 2951.041(B)(7) in order to find Sorrell statutorily ineligible for ILC, the State cites an opinion from the Tenth District which states that “in nonsupport cases, the principal victim is a child who has little or no ability to help himself or herself.” *State v. Hall*, 137 Ohio App.3d 666. At issue in *Hall*, however, was whether the defendant should be sentenced to a term of incarceration rather than community control for the non-support of his children. The court in *Hall* did not address whether children under the age of thirteen could be considered “victims” under R.C. § 2951.041(B)(7) as a basis to deny a defendant’s motion for ILC. Thus, *Hall* is not dispositive in the instant case.

{¶ 15} While the object of a support order is clearly the welfare of the dependent child, the child’s claim to any arrearage owed by the offender is secondary to that of the custodial parent or state agency tasked with the responsibility of collecting and distributing the payments made pursuant to the support order fashioned by the court. “In the absence of evidence to the contrary, the court will presume that the child was clothed, fed, and generally accorded the necessities of life, the payment for which the weekly support was intended.” *Connin v. Bailey* (1984), 15 Ohio St.3d 34, 37. Simply put, the court presumes that the custodial parent will provide for the daily needs of the dependent child regardless of whether the offender pays the support ordered by the court.

\* \* \*

{¶ 17} \* \* \* We note that R.C. 2951.041(B)(7) does not apply to minors between the age of thirteen and eighteen. This suggests a legislative intent to protect particularly young and vulnerable children. Many beneficiaries of child support are older than thirteen. Thus, we conclude the legislative intent was not to exclude non-support cases from ILC eligibility.

{¶ 18} In light of the foregoing, we hold that the “victim” in a non-support case is not the dependent child who is the object of the support order. Rather, the

“victim” is the custodial parent to whom the support payments are to be made. Thus, the trial court abused its discretion when it held that Sorrell was statutorily ineligible for ILC pursuant to R.C. § 2951.041(B)(7), since the victim of Sorrell’s failure to pay child support was Robyn Sorrell, the custodial parent.

Many would view this logic is counterintuitive, as the court concedes that the child is the “object” and intended “beneficiary” of the ordered support, but, somehow, the child is not a victim. The court also wrongly views the issue as an either-or problem. While the custodial parent can be seen as a victim, there is no good reason why the children cannot be seen as victims as well. There can be multiple victims of a single offense.

One suspects that many custodial parents struggling to fill the gap of the unpaid support would view this ruling as offensive. Many cannot fill the gap completely, and the children’s standard of living frequently suffers in direct and indirect ways. And even when the custodial parent completely fills the gap, the court’s logic turns this crime upside down in concluding that the irresponsible criminal nonsupporter should benefit from the custodial parent’s acts of responsibility.

#### No Defense for Voluntary Intoxication

In *State v. Hill*, 10<sup>th</sup> Dist. No. 09AP-398, 2010-Ohio-1687, the defendant was convicted of felonious assault because he cut the victim with a box cutter. On appeal, he challenged the evidence of “knowingly,” contending that he was too intoxicated to act knowingly. The 10<sup>th</sup> District rejected that argument based on R.C. 2901.21(C), which prohibits the use of voluntary intoxication as a defense in this way:

{¶27} Hill’s only argument regarding mental state is that his intoxication at the time of the offense prevented him from acting knowingly, the mental state required to commit felonious assault. R.C. 2901.21(C), however, states, in part, as follows:

Voluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense. \* \*  
\* Evidence that a person was voluntarily intoxicated may be admissible to show whether or not the person was physically capable of performing the act with which the person is charged.

This court has held that, since the General Assembly amended R.C. 2901.21 in 2000, “voluntary intoxication may no longer be taken into account in determining the existence of a mental state that is an element of a criminal offense.” *State v. Melhado*, 10<sup>th</sup> Dist. No. 02AP-458, 2003-Ohio-4763, ¶48. See also [*State v. Inman* [9<sup>th</sup> Dist. No. 03CA0099-M, 2004-Ohio-1420] at ¶7 (holding that a voluntary intoxication defense is not applicable to a charge of felonious assault).

The 10<sup>th</sup> District rejected the defendant’s reliance on a 4<sup>th</sup> District case from 2009, which suggested that voluntary intoxication was still a viable defense.

{¶28} Hill directs this court to the Fourth District Court of Appeals’ opinion in *State v. Goad*, 4th Dist. No. 08CA25, 2009-Ohio-580, in which the court suggested that, despite the language of R.C. 2901.21(C), intoxication may, in fact, preclude the existence of a knowing mental state, as required for felonious assault. We reject Hill’s reliance on *Goad*. Not only has this court held that courts may no longer take voluntary intoxication into account when determining the existence of a mental state that is an element of a criminal offense, see *Melhado* at ¶48, but the cases upon which the Fourth District relied predate the 2000 amendments to R.C. 2901.21, which added the controlling statutory language.

### No Merger for Felonious Assault and Domestic Violence

In *State v. Bosley*, 1<sup>st</sup> Dist. No. C-090330, 2010-Ohio-1570, the defendant was found guilty of both felonious assault and domestic violence in a knife attack on his wife. The 1<sup>st</sup> District concluded that the offenses should not merge:

{¶26} Recently, in *State v. Brown*, [119 Ohio St.3d 447, 2008-Ohio-4569,] the Ohio Supreme Court expanded the allied-offenses analysis and created a preemptive exception that supersedes application of the two-step analysis. Under *Brown*, a defendant can be found guilty of multiple offenses that might otherwise be considered allied offenses, if in statutorily defining the offenses the legislature has manifested a clear intent to protect separate and distinct societal interests.

\* \* \*

{¶28} In determining whether separate societal interests exist for felonious assault and domestic violence, we first look to the Ohio Supreme Court’s recent decision in *Ohio v. Carswell* [114 Ohio St.3d 210, 2007-Ohio-3723] for guidance. As *Carswell* noted, “[t]he General Assembly enacted the domestic violence statutes specifically to criminalize those activities commonly known as domestic violence. In contrast to stranger violence, domestic violence arises out of the relationship between the victim and the perpetrator.”

{¶29} The Ohio Supreme Court’s reasoning in *Carswell* supports our conclusion that there are separate societal interests underlying the felonious-assault and domestic-violence statutes. The Twelfth Appellate District has likewise made this distinction, holding that a defendant could be convicted and sentenced for felonious assault, multiple counts of child endangerment, and domestic violence because “the legislature manifested an intention to serve different societal interests in enacting these three statutes.” [*State v. Craycraft*, 12th Dist. Nos. CA2009-02-013 and CA2009-02-014, 2010-Ohio-596.] *Craycraft* reasoned that “R.C. 2919.25, the domestic violence statute, generally protects family or household members from physical harm, \* \* \* [whereas] R.C. 2903.11, the felonious assault statute, was more broadly wrought to protect any person or unborn child, but the harm sustained by the victim must be serious physical harm.”

{¶30} We recognize that the defendant in *Craycraft* was convicted and sentenced for felonious assault under R.C. 2903.11(a)(1), whereas Bosley was convicted under subsection (a)(2) of the same statute, which requires the additional element that the physical harm must have been caused by means of a deadly weapon. But in this case, that distinction is insignificant, given that subsections (a)(1) and (a)(2) generally involve the same type of criminal conduct. Thus in substance, both subsection (a)(1) and subsection (a)(2) protect parallel societal interests that are in contrast with the societal interests protected under the domestic-violence statute.

{¶31} Bosley attacked his live-in girlfriend with a sharp object – and his actions satisfied the elements of both felonious assault and domestic violence. We are convinced that the legislature intended to protect a distinct societal interest in enacting the domestic-violence statute – to protect those who are intimately associated with the assailant – whereas the felonious-assault statute was intended to prevent physical harm to all persons. We therefore hold that Bosley was properly convicted of both felonious assault and domestic violence.

#### Drug Analyst Report Admissible Absent Demand for Testimony

In *State v. Moore*, 8<sup>th</sup> Dist. No. 85828, 2010-Ohio-1569, the 8<sup>th</sup> District addressed the validity of R.C. 2925.51(A) in light of *Melendez-Diaz v. Massachusetts* (2009), 129 S.Ct. 2527. In *Melendez-Diaz*, the Court held that lab reports certified for use at trial are “testimonial” and therefore are not generally admissible without the testimony of the analyst who authored the report.

In *Moore*, the 8<sup>th</sup> District upheld the admission of a Cleveland police chemist’s report under R.C. 2925.51(A), even though the chemist was unavailable and did not testify. The 8<sup>th</sup> District distinguished *Melendez-Diaz*:

{¶ 27} Pursuant to R.C. 2925.51(A), “a laboratory report from the bureau of criminal identification and investigation, \* \* \* is prima-facie evidence of the content, identity, and weight \* \* \* of the substance.” While this statute appears to violate the holding in *Melendez-Diaz*, which analyzed a newly (sic) identical Massachusetts statute, R.C. 2925.51 contains a critical exception.

{¶ 28} R.C. 2925.51(C) specifically states, “[t]he report shall not be prime-facie evidence \* \* \* if the accused or the accused’s attorney demands the testimony of the person signing the report, by serving the demand upon the prosecuting attorney within seven days \* \* \* from receipt of the report.” (Emphasis added.)

{¶ 29} This is precisely the type of “notice and demand” statute addressed in *Melendez-Diaz*. *Melendez-Diaz* at 2541. Although the statute does allow the introduction of the lab report without the analyst’s testimony, it specifically provides an exception whereby the defendant may simply object

within seven days of receiving the lab report and the analyst will be required to testify. *Melendez-Diaz* noted that a defendant must always make the appropriate objection in order to preserve his Sixth Amendment right of confrontation. *Id.* Further, *Melendez-Diaz* also referenced “notice and demand” statutes as an appropriate way to allow the defendant to view the report and decide whether he wishes to cross-examine the analyst. *Id.* at 2541-2542.

{¶ 30} Consequently, we find that R.C. 2925.51 complies with the rationale of *Melendez-Diaz* and satisfies the Sixth Amendment. Since Moore failed to object in conformity with R.C. 2925.51, Moore’s conviction is affirmed.