

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Ron O'Brien,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-37 (C.P.C. No. 09CVH-01-1329)
Darrell Messina,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 30, 2010

Ron O'Brien, Prosecuting Attorney, and *Denise L. DePalma*,
for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Darrell Messina, appeals from a judgment of the Franklin County Court of Common Pleas granting the summary judgment motion of plaintiff-appellee, Franklin County Prosecutor Ron O'Brien, denying defendant's summary judgment motion, and denying in part defendant's motion to strike affidavits. Because the trial court did not err in (1) applying the straight line method of measurement for purposes of calculating the distance between an offender's residence and school premises, (2)

denying defendant's motion to strike the affidavit plaintiff submitted to support his summary judgment motion, and (3) concluding the residency restriction in R.C. 2950.034 does not violate defendant's substantive due process rights, we affirm.

I. Facts and Procedural History

{¶2} On July 13, 2004, defendant was convicted of one count of unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A) and (B)(3), a felony of the third degree. Defendant received a three-year prison sentence, and the state classified defendant as a sexually oriented offender subject to statutory registration and verification requirements. Pursuant to former R.C. 2950.031, defendant's classification subjected defendant to a residency restriction that prohibits him from residing within 1,000 feet of any school premises.

{¶3} On January 29, 2009, plaintiff filed a complaint against defendant alleging defendant was residing within 1,000 feet of Ohio Avenue Elementary School, in violation of the residency restriction contained in former R.C. 2950.031, now amended and codified in R.C. 2950.034. Plaintiff sought preliminary and permanent injunctive relief under the statute to permanently preclude defendant from living within 1,000 feet of a school. After the trial court denied defendant's motion to dismiss, defendant filed an answer on April 16, 2009.

{¶4} On November 5, 2009, plaintiff and defendant filed cross-motions for summary judgment. Plaintiff supported its summary judgment motion with, among other things, the affidavit of Anthony Frissora, a deputy auditor for the Franklin County Auditor's Office, Real Estate Division. According to Frissora's affidavit, the GIS Tax map database utilized in the office of the Franklin County Auditor "can be used to determine the distance

between one parcel of property in relation to another." (Frissora Affidavit, Plaintiff's Motion for Summary Judgment, Exhibit C.) Using that database, Frissora, determined the distance between the Ohio Avenue Elementary School and defendant's address at 382 Carpenter Street, Apartment D, Columbus, Ohio 43205 is 815.65 feet.

{¶5} To support defendant's summary judgment motion, defendant submitted the affidavit of Richard A. Kalb, the chief investigator for the Franklin County Public Defender. Kalb averred that the shortest navigable distance between defendant's residence and Ohio Avenue Elementary School is 1,010 feet. (Kalb Affidavit, ¶25.) Defendant also responded to plaintiff's summary judgment motion with a combined memorandum contra and a motion to strike the affidavits plaintiff submitted with his motion.

{¶6} On December 31, 2009, the trial court issued a decision and entry granting plaintiff's summary judgment motion, denying defendant's summary judgment motion, and granting in part and denying in part defendant's motion to strike. In a January 6, 2010 judgment entry, the trial court granted plaintiff a permanent injunction against defendant that permanently precluded defendant from living within 1,000 feet of a school.

II. Assignments of Error

{¶7} Defendant timely appeals, assigning the following errors:

FIRST ASSIGNMENT OF ERROR

The trial court erred in using a straight line measurement between property lines to determine the distance between the Appellant's home and the Ohio Avenue Elementary School.

SECOND ASSIGNMENT OF ERROR

The trial court erred in failing to strike the affidavit of Deputy County Auditor Anthony Frissora pursuant to

Evid.R. 702, 703, and 705 on the grounds that there was insufficient foundation to establish him as an expert and to support his conclusions.

THIRD ASSIGNMENT OF ERROR

The trial court erred in failing to find that S.B. 10's residency restrictions violate the Due Process Clause of the United States Constitution and Section 16, Article I of the Ohio Constitution.

FOURTH ASSIGNMENT OF ERROR

The trial court erred in failing to find that the 25-year residency restriction imposed on Appellant under S.B. 10 violates procedural due process rights under the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution as the restriction was imposed without giving Appellant an opportunity to demonstrate that he did not pose a substantial risk to reoffend or a risk of dangerousness.

III. Standard of Review

{¶8} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. Summary judgment is appropriate only when the moving party demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶9} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the

record demonstrating the absence of a material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The moving party cannot discharge its initial burden simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must point to specific evidence of the type listed in Civ.R. 56(C) to affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. *Id.* If the moving party fails to satisfy its initial burden, the court must deny the motion for summary judgment. *Id.* Once the moving party discharges its initial burden, summary judgment is appropriate if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. *Id.*

IV. First Assignment of Error – Straight Line Measurement

{¶10} In his first assignment of error, defendant asserts the trial court erred in using a straight line to measure the distance between his residence and the Ohio Avenue Elementary School to determine whether defendant lived within 1,000 feet of the school.

{¶11} Consistent with former R.C. 2950.031, R.C. 2950.034 provides that "[n]o person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense * * * shall establish a residence or occupy residential premises within one thousand feet of any school premises * * *." R.C. 2950.034(A). The statute does not specify the method a court should use to measure the distance between an implicated person's residence and a school. The trial court used a straight line measurement that, in effect, makes the offender's home the center point of a circle with a 1,000 foot radius; to meet the statutory residency restriction, no school can be located anywhere within the circle.

{¶12} Defendant contends the trial court misapplied the statute when it adopted a straight line test. Defendant asserts the court should have used the shortest navigable distance between the offender's home and any school to determine whether the two are located within 1,000 feet of each other. Defendant's approach thus ignores the straight line, or radius approach, and instead computes the shortest possible walking or driving distance, taking into account whether a ravine, wall, bridge, or any other obstacle alters the actual route a person would have to take to travel between the two locations.

{¶13} The meaning of the phrase contained in a statute is a matter of statutory interpretation and poses a question of law rather than a question of fact. See, e.g., *Pour House, Inc. v. Ohio Dept. of Health*, 10th Dist. No. 09AP-157, 2009-Ohio-5475, ¶14, citing *Washington Cty. Home v. Ohio Dept. of Health*, 178 Ohio App.3d 78, 2008-Ohio-4342, ¶27. Whether the phrase "within one thousand feet" as used in R.C. 2950.034(A) contemplates a straight line measurement or the shortest navigable distance thus is a question of law. In resolving that question of law, "[c]ourts lack the authority to ignore the plain and unambiguous language of a statute under the guise of statutory interpretation or liberal or narrow construction." *Pour House* at ¶14, citing *Guethlein v. Ohio State Liquor Control Comm.*, 10th Dist. No. 05AP-888, 2006-Ohio-1525, ¶12; *Boardman Twp. Bd. of Trustees v. Fleming* (1996), 110 Ohio App.3d 539, 542. "Rather, a court must give effect to the words used in the statute, accord the words their usual and customary meaning, and not delete words used or insert words that are not used." *Pour House* at ¶14, quoting *Guethlein*, citing *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St.3d 50.

{¶14} In other statutes that require the distance between two locations to be measured, but do not specify the method of measurement, courts favor the straight line

approach. See, e.g., *State v. Franklin*, 164 Ohio App.3d 758, 2005-Ohio-6854 (holding the court could rely on global imaging software to compute the distance between two locations using a straight line approach for drug trafficking charges enhanced for occurring within 1,000 feet of a school premises); *Harris v. Univ. Hosps. of Cleveland*, 8th Dist. No. 76724, 2002-Ohio-983 (holding that for purposes of a non-compete agreement, "[c]ase law has been historically uniform in rejecting [the shortest navigable distance] theory and in holding that the correct way to measure the distance between locations is as the crow flies, or the straight-line approach used by a surveyor"), citing *Drs. Guren, Jaffe & Assoc., Inc. dba Am. Dental Ctrs. v. Phillip* (Oct. 5, 1984), 11th Dist. No. 10-112, relying on *State v. Sheperd* (1980), 61 Ohio St.2d 328, 331 (holding statute that allowed police to direct a vehicle to proceed to the nearest available scales "within three miles" referred to "straight-line distance" because "[i]f the General Assembly had intended to require the use of road miles, it would have surely used a phrase more explicitly indicating that intent"). See also *Sprow v. Hartford Ins. Co.* (C.A.5, 1979), 594 F.2d 412, 417-18 (holding the proper method to measure distance for purposes of the "bulge" rule contained in 100-mile long-arm jurisdiction statute "is the straight lines or 'as the crow flies' measure of air miles," since the straight line approach is "a uniform standard, offering more certainty than a measure based on road miles, which will continually fluctuate as new and different routes are constructed").

{¶15} Indeed, this court approved, albeit indirectly, using the straight line approach to calculate the distance between an offender's residence and a school premises for purposes of R.C. 2950.034(A). In *State ex rel. O'Brien v. Heimlich*, 10th Dist. No. 08AP-521, 2009-Ohio-1550, the offender argued the proper method of measurement

under former R.C. 2950.031(A) is "along a reasonably navigable path" rather than the straight line approach. *Heimlich* at ¶14. *Heimlich* held the prosecuting attorney satisfied its burden under Civ.R. 56(C) in moving for summary judgment by providing an affidavit using the straight line approach through global imaging software to calculate the distance between the offender's residence and the school premises. *Id.* at ¶21. By contrast, although defendant notes cases where courts used the reasonably navigable distance method to calculate the distance between two locations, none of those cases expressly hinged on the method of measurement. See, e.g., *State v. Curtis*, 2d Dist. No. 2003 CA 74, 2005-Ohio-120 (noting issue was whether the measurement was taken from the relevant location, not the appropriate method of measurement); *State v. Cates* (Nov. 21, 2000), 10th Dist. No. 00AP-73 (involving police officer who used driving distance to determine whether a drug offense occurred within 1,000 feet of a school, where the distance was only 500 feet and the specific method of measurement was not at issue).

{¶16} In the final analysis, the straight line, or as "the crow flies," approach is the proper method to measure whether a defendant lives "within one thousand feet" under R.C. 2950.034(A). Such an interpretation applies the ordinary meaning of the term "within." See *Sheperd* at 331. Moreover, the straight line approach provides more predictability and more uniform application than does the navigable distance approach, which would put the distance between the two locations in flux depending on the construction or destruction of infrastructure. See *Sproy*, *supra*. Parties wishing to challenge the straight line measurement still may do so by questioning the accuracy or reliability of the tools the plaintiff uses to calculate the measurement. Nonetheless, to the extent defendant suggests *Heimlich* allows an offender to create a question of material

fact regarding the distance between two locations through the method of calculation, we clarify an offender may do so only by attacking the *accuracy* of the measurement, not the *method* of measurement.

{¶17} Defendant further asserts that, even if we adopt the straight line approach, the trial court erred in measuring the distance from the property line of the apartment complex in which defendant resides rather than from the nearest wall of defendant's individual unit. Initially, defendant failed to raise his argument in the trial court and thus waived the argument for purposes of appeal. *Porter Drywall, Inc. v. Nations Const., LLC*, 10th Dist. No. 07AP-726, 2008-Ohio-1512, ¶11, citing *State v. Childs* (1968), 14 Ohio St.2d 56, paragraph three of the syllabus (stating the general rule that "an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court"); *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus.

{¶18} Even if defendant's argument is considered, it is without merit. The statute defines "residential premises" as "the building in which a residential unit is located and the grounds upon which that building stands, extending to the perimeter of the property." R.C. 2950.01(T). Thus, the appropriate measurement is from property line to property line rather than from the nearest wall of defendant's individual apartment unit.

{¶19} Because the straight line approach is appropriate in calculating the distance between two locations under the statute, we overrule defendant's first assignment of error.

V. Second Assignment of Error – Motion to Strike Affidavit

{¶20} Defendant's second assignment of error asserts the trial court erred in denying his motion to strike Frissora's affidavit, as the affidavit lacks sufficient foundation to establish Frissora as an expert and to support his conclusions.

{¶21} A trial court may consider evidence in the form of an affidavit in deciding a motion for summary judgment, but "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Civ.R. 56(E). "Personal knowledge" has been defined as " 'knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.' " *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, ¶26 (quotation omitted). A trial court's decision to grant or deny a motion to strike affidavits is reviewed for an abuse of discretion. *Churchill v. Gen. Motors Corp.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶9 (citation omitted).

{¶22} In deciding whether to strike the affidavit in question, the trial court noted "Mr. Frissora has sufficiently established his competency to testify as to the operation of the GIS Tax map database." (Decision, 8.) In that regard, Frissora's affidavit indicates he is a deputy auditor employed for over 17 years in the Real Estate Division of the Franklin County Auditor's Office. (Frissora Affidavit, ¶3-4.) Frissora attested he utilized the GIS Tax map database maintained in the auditor's office to determine the distance between defendant's residence and the Ohio Avenue Elementary School. (Affidavit, ¶12.) He further stated he is "familiar with the technical specifications and capabilities of the GIS Tax map database." (Affidavit, ¶5, 7.) Frissora averred the GIS Tax map database "can

be utilized to determine the distance between one parcel of property in relation to another" and "to list all properties within a specified distance of an identified parcel of property" with a margin of error of two and one-half feet. (Affidavit, ¶7, 8-9.) Using the GIS Tax map database, Frissora "determined that Ohio Avenue Elementary School * * * is approximately 815.65 feet" from defendant's residence at 382 Carpenter Street, Apt. D. (Affidavit, ¶14.)

{¶23} In *Heimlich*, this court determined that a deputy auditor's affidavit stating the distance between a residence and a school using the GIS Tax map database satisfies the plaintiff's burden of proof with respect to whether a sex offender resides within 1,000 feet of a school. *Id.* at ¶20. We specifically noted "global imaging devices are reliable and widely utilized to measure distance." *Id.*, citing *Franklin* at ¶11 (holding evidence obtained from global imaging devices is not scientific evidence requiring support from expert testimony). Indeed, Frissora's affidavit in *Heimlich* contained information virtually identical to his affidavit in the present case, except for the specific measurements between the specific parcels of property at issue in each case. See *id.* at ¶15. As in *Heimlich*, Frissora's affidavit was made with personal knowledge based on his employment and job duties with the Franklin County Auditor's Office. The trial court did not abuse its discretion in not striking Frissora's affidavit. We therefore overrule defendant's second assignment of error.

VI. Third Assignment of Error – Substantive Due Process

{¶24} In his third assignment of error, defendant asserts the trial court erred in failing to find the residency restriction at issue violates defendant's substantive due

process rights by (1) restraining defendant's liberty, (2) infringing on defendant's right to live where he chooses, and (3) failing the strict scrutiny test.

{¶25} In *Heimlich*, this court resolved a substantive due process challenge to the residency restriction, holding the restriction did not infringe upon any substantive property or liberty rights under either the Ohio or United States Constitutions. *Heimlich* at ¶35. As a result, *Heimlich* determined the residency restriction is not subject to a strict scrutiny challenge, but to rational basis review. Under such a review, *Heimlich* upheld the residency restriction, concluding "[t]he residency restriction in former R.C. 2950.031(A) clearly bears a rational relationship to the state's legitimate interest in protecting children from identified sexually oriented offenders." *Id.* at ¶39.

{¶26} Consistent with *Heimlich*, the residency restriction at issue does not violate defendant's substantive due process rights. See also *Franklin Cty. Prosecuting Attorney v. Smith*, 10th Dist. No. 10AP-52, 2010-Ohio-3748, ¶15-16 (following *Heimlich* and rejecting the same assignment of error defendant asserts here). Defendant's third assignment of error is overruled.

VII. Fourth Assignment of Error – Procedural Due Process

{¶27} Defendant's fourth assignment of error asserts the trial court erred in failing to find the residency restriction subject of plaintiff's action violates defendant's procedural due process rights. Defendant argues the state imposed the residency restriction without affording defendant an opportunity to demonstrate he does not pose a risk to reoffend or a risk of dangerousness.

{¶28} Defendant failed to raise his procedural due process argument in the trial court. "The failure to raise at the trial court level the constitutionality of a statute or its

application, when the issue is apparent at the time of trial, waives the issue and deviates from this state's orderly procedure. The issue therefore need not be heard for the first time on appeal." *In re D.T.*, 10th Dist. No. 07AP-853, 2008-Ohio-2287, ¶19, citing *In re N.W.*, 10th Dist. No. 07AP-590, 2008-Ohio-297, ¶37, citing *Awan* at syllabus.

{¶29} Because defendant waived his procedural due process argument, we decline to address it. Defendant's fourth assignment of error is overruled.

VIII. Disposition

{¶30} The trial court did not err in construing the residency restriction to contemplate a straight line measurement between defendant's residence and the school premises at issue. Nor did the trial court err in failing to strike Frissora's affidavit, submitted to support plaintiff's summary judgment motion.

{¶31} Because Frissora's affidavit satisfied plaintiff's initial burden under Civ.R. 56(C) to demonstrate defendant resided within 1,000 feet of a school premises, the burden shifted to defendant to provide Civ.R. 56 evidentiary materials to create a genuine issue of material fact. Although defendant submitted an affidavit indicating the distance between his residence and the Ohio Avenue Elementary School was 1,010 feet utilizing the shortest navigable distance method, defendant did not submit any Civ.R. 56 evidentiary materials to contest the accuracy or reliability of plaintiff's measurement using the straight line method. As a result, defendant's affidavit failed to create a genuine issue of material fact as to the distance between defendant's residence and the elementary school at issue. Finally, *Heimlich* renders defendant's substantive due process contentions unpersuasive, and defendant waived his procedural due process argument.

{¶32} Accordingly, the trial court did not err in granting plaintiff's motion for summary judgment. Having overruled defendant's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and SADLER, JJ., concur.
