[Cite as *In re T.M.*, 2009-Ohio-4224.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

IN [RE: T.M., an Adjudicated] delinquent child.	:	
	:	Case No. 08CA863
	:	
	:	**DECISION AND**
	:	**JUDGMENT ENTRY**
	:	File-stamped date: 7-29-09

APPEARANCES

Elizabeth R. Miller, Columbus, Ohio, for appellant.

C. David Kelley, Adams County Prosecutor, and Aaron E. Haslam, Assistant Adams County Prosecutor, West Union, Ohio, for appellee[1].

Kline, P.J.:

{¶1} T.M. appeals the juvenile court's classification of him as a juvenile offender registrant and, under Senate Bill 10, as a tier III registrant. On appeal, T.M. contends that he was denied effective assistance of counsel because his attorney failed to argue that the trial court should use its discretion and not subject him to classification. We agree and vacate the classification. T.M. contends Ohio's laws requiring registration and notification for sex offenders violate the United States and Ohio Constitutions. T.M. contends these laws violate the Due Process Clause, the Ex Post Facto Clause, the Retroactivity Clause, and the prohibition against cruel and unusual punishment. We disagree and find T.M. has failed to carry his burden to show beyond a reasonable doubt that these laws violate the United States or Ohio Constitution.

[1] C. David Kelley was the elected County Prosecutor at the time the appeal case was filed. However, Aaron E. Haslam is now the elected County Prosecutor.

Accordingly, we affirm, in part, and vacate, in part, the judgment of the trial court. We remand this cause to the trial court for re-classification under R.C. 2152.83(B).

I.

{¶2} On September 12, 2005, the state filed a complaint in juvenile court. The state alleged that 15-year-old T.M. was a delinquent child because he had engaged in sexual conduct, between December 1, 2001 and February 14, 2005, with a person less than thirteen years of age in violation of R.C. 2907.02(A)(1)(b).

{¶3} T.M. admitted to the charge. As a result, the court found that T.M. was a delinquent child. The court later sentenced T.M. to the care and custody of the Ohio Department of Youth Services for a minimum period of one year and a maximum period not to exceed his 21st birthday. The court stated in its entry that a classification hearing would be held upon the child's release from custody.

{¶4} T.M. was scheduled for release on January 2, 2008. The court therefore scheduled the classification hearing for December 26, 2007. The court found that T.M. was (1) a "Juvenile Sex Offender Registrant" and (2) a tier III registrant under recently enacted Senate Bill 10. The court reduced its findings to writing and filed two entries showing the same on February 11, 2008.

{¶5} T.M. filed a motion for reconsideration. The trial court denied the same by entry on February 21, 2008.

{¶6} T.M. appeals the trial court's classification determinations as stated in its February 11, 2008 entries and asserts the following assignments of error: I. "The trial court erred when it classified [T.M.] as a juvenile sexual offender registrant because it did not first make a determination as to [T.M.]'s age at the time of the offense and even

if [T.M.] was age eligible for classification, the court erred because [T.M.] was only subject to discretionary classification and the court failed to consider all of the factors mandated by R.C. 2152.83." II. "[T.M.] was denied the effective assistance of counsel when trial counsel failed to educate herself about the age distinctions in the classification law and the difference between mandatory and discretionary juvenile offender registrants and to ensure the court understood the non-mandatory nature of her client's duty to register under R.C. 2152.83, which led the court to classify [T.M.] as a Tier III juvenile offender registrant, as well as failed to object to the court's classification order despite evidence that no registration was possible or appropriate." III. "The trial court erred when it applied Senate Bill 10 to [T.M.], as the application of Senate Bill to [T.M.] violates his right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution." IV. "The trial court erred when it applied Senate Bill 10 to [T.M.], as the retroactive application of Senate Bill 10 to [T.M.] violates the Ex Post Facto clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution." V. "The trial court erred when it applied Senate Bill 10 to [T.M.], as the application of Senate Bill 10 to [T.M.] violates the United States Constitution's prohibition against cruel and unusual punishments."

II.

{¶7} We address T.M.'s second assignment of error out of order. T.M. contends that he was denied the effective assistance of counsel.

{¶8} Ohio law provides a statutory right to counsel for juveniles in proceedings held under R.C. 2152.83. R.C. 2151.352; see, also, *In re C.A.C.*, 2nd Dist.

Nos. 2005-CA-134, 2005-CA-135, 2006-Ohio-4003, at ¶44 (affording a juvenile a right to counsel at a classification hearing without considering the basis of the right). Ohio courts have construed other statutory rights to counsel as requiring the effective assistance of counsel. *State v. Jordan*, 6th Dist. No. L-02-1270, 2003-Ohio-3428, at ¶28; *State v. Price* (Dec. 31, 2001), 10th Dist. No. 00AP-1434, unreported; *State v. Dotson* (Mar. 12, 2001), 4th Dist. No. 99CA33, 2001-Ohio-2507.

{¶9} "'In Ohio, a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel's ineffectiveness.'" *State v. Countryman*, 4th Dist. No. 08CA12, 2008-Ohio-6700, at ¶20, quoting *State v. Wright,* 4th Dist. No. 00CA39, 2001-Ohio-2473; *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56. To secure reversal for the ineffective assistance of counsel, one must show two things: (1) "that counsel's performance was deficient* * * " which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by [law;]" and (2) "that the deficient performance prejudiced the defense * * * [,]" which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. See, also, *Countryman* at ¶20.

{¶10} "A defendant establishes prejudice if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Meddock*, 4th Dist. No. 08CA3020, 2008-Ohio-6051, at ¶13, quoting *Strickland* at 694.

{¶11} "When counsel's alleged ineffectiveness involves the failure to pursue a motion or legal defense, this actual prejudice prong of *Strickland* breaks down into two components. First, the defendant must show that the motion or defense 'is meritorious,' and, second, the defendant must show that there is a reasonable probability that the outcome would have been different if the motion had been granted or the defense pursued." *In re Adrian R.*, 5th Dist. No. 08-CA-17, 2008-Ohio-6581, at ¶23, citing *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375 (other citations omitted).

{¶12} Here, under the first prong of the *Strickland* test, we find counsel's performance at the classification hearing deficient.

{¶13} "The court that adjudicates a child a delinquent child, on the judge's own motion * * * may conduct at the time of the child's release from the secure facility a * * * hearing to determine whether the child should be classified a juvenile offender registrant." R.C 2152.83(B)(1)-(2). However, the juvenile court has discretion and may decline to issue an order at this hearing. R.C. 2152.83(B)(2)(a). If the court issues an order, it must consider the six factors listed in R.C. 2152.83(D).

{¶14} Here, it appears from the record that not only T.M.'s counsel, but the prosecuting attorney and the court, may have mistakenly believed that T.M.'s classification was mandatory. T.M.'s counsel did not raise any argument that T.M. should not be subject to classification. Further, T.M.'s counsel made no argument based on the factors listed as mandatory considerations under R.C. 2152.83(D) before the court issued its order. Stated differently, even if the trial court understood the discretionary nature of its determination, defense counsel made no argument that indicated that the trial court should decline to issue an order classifying T.M. as a

juvenile offender registrant, let alone make that argument on the basis of the mandatory factors listed in the statute. Therefore, for these reasons, we find the performance of T.M.'s attorney deficient.

{¶15} We now examine the second prong of the *Strickland* test, i.e., the prejudice prong. Under *Strickland*, as noted above, the question is whether there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. As we stated earlier, a reasonable probability is a probability sufficient to undermine confidence in the outcome.

{¶16} The record indicates T.M.'s argument has some merit. The trial court did consider whether T.M. should be subjected to community notification and concluded that he should not be. Transcript at 43. Furthermore, the court stated, "It's been a long time since I've seen a transformation [* * *] I mean, a complete change in one person, * * * to the positive[.] * * * That you've made a lot of good decisions. * * * Department of Youth Services has done a tremendous job in bringing back a much better product than that which we had sent. So, I see no reason why you shouldn't be highly successful in this life." Transcript at 66. Thus, in this case, the court may well have exercised its discretion under R.C. 2152.83(B)(2)(a) to decline to issue an order that classifies the child a juvenile offender registrant. Of course, the offense T.M. admitted to is a serious one, and the court may well have classified T.M. as a juvenile offender registrant anyway. But under these circumstances, we find that the failure of trial counsel to raise any argument in this case that T.M. should not be subject to classification undermines our confidence in the outcome of the hearing. Consequently,

under the second prong of the *Strickland* test, we find that T.M. was prejudiced by his counsel's performance.

{¶17} In fairness, T.M. raised the issue of the trial court's discretion to not issue an order classifying a child in the "motion for reconsideration." However, there is no apparent rule that would allow such a motion under the rules for juvenile procedure. The statutory provision that allows for the filing of petitions to reclassify or declassify does not apply because the motion for reconsideration was filed within three years of the first classification hearing. R.C. 2152.85(B)(1). The trial court does not explain why the motion was denied. "However, after a trial court issues a final, appealable order, a motion for reconsideration of that final order is a nullity, and any judgment entered on such a motion is also a nullity." *Napier v. Napier,* 4th Dist. No. 08CA9, 2009-Ohio-3111, at ¶7, citing *Pitts v. Ohio Dept. of Trans.* (1981), 67 Ohio St.2d 378, 379; *Kauder v. Kauder* (1974), 38 Ohio St.2d 265, 267. Therefore, we will not consider the motion for reconsideration or the judgment denying it.

{¶18} Accordingly, we sustain T.M.'s second assignment of error. We vacate T.M.'s classification and remand this cause to the trial court for a re-classification hearing.

IV.

{¶19} T.M.'s third, fourth, and fifth assignments of error consist of challenges to the constitutionality of S.B. 10.

{¶20} As T.M.'s constitutional claims are matters of law, we review them de novo. *Long Beach Assn., Inc. v. Jones* (1998), 82 Ohio St.3d 574, 576, citing *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 145, 147.

{¶21} Statutes enacted in Ohio are "presumed to be constitutional." *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, at ¶12, citing *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.2d 159, 161. This presumption remains until one challenging a statute's constitutionality shows, "beyond reasonable doubt, that the statute is unconstitutional." Id., citing *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7, 13.

A.

{¶22} T.M. in his third assignment of error contends that the application of S.B. 10 to him violates his right to due process of law. T.M. raises two arguments that S.B. 10 violates his due process rights.

{¶23} First, T.M. contends that the statute violates procedural due process as it substantially decreased the procedural protections afforded to juvenile offenders. Most notably, T.M. states, "Under Senate Bill 10, a court no longer makes specific case-by-case determinations of a juvenile offender's dangerousness or likelihood to reoffend; rather, the court simply notes the offense committed and assigns the child to the corresponding registration tier." T.M.'s Brief at 14. But nowhere does T.M. provide a citation or an argument for the principle that a sex offender classification system violates due process where that system does not make case by case decisions.

{¶24} We have previously explained procedural due process rights in reference to S.B. 10 in *State v. Netherland*, 4th Dist. No. 08CA3043, 2008-Ohio-7007, at ¶17. "The right to procedural due process is found in the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution. To trigger protections under these clauses, a sex offender must show that he was deprived

of a protected liberty or property interest as a result of the registration requirement. See *Steele v. Hamilton Cty. Community Mental Health Bd.*, 90 Ohio St.3d 176, 181, 2000-Ohio-47, 736 N.E.2d 10. Although due process is 'flexible and calls for such procedural protections as the particular situation demands,' *Mathews v. Eldridge* (1976), 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18, quoting *Morrissey v. Brewer* (1972), 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484, the basic requirements of this clause are notice and an opportunity to be heard. *State v. Hochhausler*, 76 Ohio St.3d 455, 459, 1996-Ohio-374, 668 N.E.2d 457." *Netherland* at ¶17.

{¶25} The Supreme Court of the United States recently considered a procedural due process challenge to Connecticut's sex offender registry. *Connecticut Dept. of Public Safety v. Doe* (2003), 538 U.S. 1. The registration scheme at issue in that case, much like S.B. 10, relied exclusively on the nature of the conviction. Id. at 4-5. The petitioner argued he was entitled to a hearing so he could demonstrate that he was not currently dangerous. Id. at 4. The Court held that the state was under no obligation to provide a hearing to establish a fact unnecessary under the statute, unless the registrant could show that fact was necessary because of a constitutional provision. Id. Likewise, for T.M. to prevail on this assignment of error, T.M. must demonstrate that S.B. 10 violates substantive due process. A procedure to demonstrate a particular fact is only constitutionally required when the constitution requires that fact to be determined.

{¶26} "[T]he state violates an individual's substantive due process rights when it engages in 'conduct which shocks the conscience and offends those canons of decency and fairness which express the notions of justice of English-

speaking peoples even toward those charged with the most heinous offenses.'" *Walters v. Ghee* (Apr. 1, 1998), 4th Dist. No. 96CA2254, unreported, quoting *Newell v. Brown* (C.A.6 1992) 981 F.2d 880 (other internal quotations omitted).

{¶27} T.M. contends S.B. 10 somehow violates substantive due process because it inflicts punishment on the accused and this conflicts with the principles of juvenile law, which is meant to promote rehabilitation and in furtherance of that goal the law "should make every effort to avoid [juveniles] being attain[t]ed as criminal before growing to the full measure of adult responsibility." T.M.'s Brief at 14, quoting *State v. Agler* (1969), 19 Ohio St.2d 70, 71.

{¶28} However, this court has repeatedly held that S.B. 10 is civil in nature; a conclusion that necessarily rejects T.M.'s argument. *State v. Coburn*, 4th Dist. No. 08CA3062, 2009-Ohio-632, at ¶12; *State v. Randlett*, 4th Dist. No. 08CA3046, 2009-Ohio-112, at ¶14; *State v. Linville,* 4th Dist. No. 08CA3051, 2009-Ohio-313, at ¶11; *State v. Messer,* 4th Dist. No. 08CA3050, 2009-Ohio-312, at ¶12. We see no reason to revisit this conclusion now, and we find S.B. 10 is not so punitive as to frustrate the purpose of Ohio's juvenile law.

B.

{¶29} T.M. in his fourth assignment of error contends that the application of S.B.10 to him violates the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution.

{¶30} Previously, we have found S.B. 10 does not violate the United States Constitution's prohibition on ex post facto laws or the Ohio Constitution's

prohibition on retroactive laws; see, e.g., *Coburn* at ¶8-13; *Randlett* at ¶8-15; *Linville* at ¶7-12; *Messer* at ¶7-13. We see no reason to revisit this issue for this case.

C.

{¶31} T.M. in his fifth assignment of error contends the application of S.B. 10 to him violates the United States Constitution's prohibition against cruel and unusual punishments.

{¶32} This court has not yet addressed these specific challenges to S.B. 10, but other Ohio courts have found that S.B. 10 does not constitute either (1) excessive punishment; see, e.g., *Holcomb v. State*, 3rd Dist. Nos. 8-08-23, 8-08-24, 8-08-25, 8-08-26, 2009-Ohio-782, at ¶11; *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195, at ¶103-105; *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051, at ¶75-77; or (2) cruel and unusual punishment. See, e.g., *Gildersleeve v. State*, 8th Dist. Nos. 91515, 91519, 91521, 91532, 2009-Ohio-2031, at ¶41-43; *In re M.E.*, 5th Dist. No. 2008CA00161, 2009-Ohio-1762, at ¶24; *Montgomery v. Leffler,* 6th Dist. No. H-08-011, 2008-Ohio-6397, at ¶24; *In re Smith,* 3rd Dist. No. 1-07-58, 2008-Ohio-3234, at ¶37-38. "As long as R.C. Chapter 2950 is viewed as civil, and not criminal–remedial, and not punitive–then the period of registration cannot be viewed as punishment. Accordingly, it logically follows that it does not constitute cruel and unusual punishment since the punishment element is lacking." *Byers* at ¶77. We choose to follow *Byers* and all other Ohio courts that holds the same. Therefore, we find that, as applied to T.M., S.B. 10 does not constitute either excessive punishment or cruel and unusual punishment.

D.

{¶33} In T.M. third, fourth, and fifth assignments of error, we find that T.M. has failed to show beyond a reasonable doubt that S.B. 10 is unconstitutional.

{¶34} Accordingly, we overrule T.M. third, fourth, and fifth assignments of error.

IV.

{¶35} T.M. contends in his first assignment of error that the lower court erred by failing to consider mandatory statutory considerations before classifying him as a juvenile offender registrant. However, based on our resolution of T.M.'s second assignment of error, T.M.'s first assignment of error is moot. See App.R. 12(A)(1)(c).

V.

{¶36} In conclusion, we sustain T.M.'s second assignment of error, vacate the lower court's classification and remand this cause for re-classification. We overrule T.M.'s third, fourth, and fifth assignments of error. Finally, we find T.M.'s first assignment of error moot.

JUDGMENT AFFIRMED, IN PART, VACATED, IN PART, AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, IN PART, and VACATED, IN PART. We remand this cause to the trial court for a re-classification hearing. Appellant and Appellee shall equally pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J.: Concurs in Judgment and Opinion.
McFarland, J.: Concurs in Judgment Only.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.