

[Cite as *State v. Musser*, 2009-Ohio-4979.]

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

STATE OF OHIO, :
 :
Plaintiff-Appellee, : Case No. 08CA3077
 :
vs. :
 : AMENDED
RICHARD MUSSER, : DECISION AND JUDGMENT ENTRY
 :
 :
Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Richard Musser, No. 144-344, CCI, P.O. Box 5500,
Chillicothe, Ohio 45601, Pro Se

COUNSEL FOR APPELLEE: Michael M. Ater, Ross County Prosecuting Attorney,
and Jeffrey C. Marks, Ross County Assistant
Prosecuting Attorney, 72 North Paint Street,
Chillicothe, Ohio 45601

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 9-17-09

PER CURIAM.

{¶ 1} This is an appeal from a Ross County Common Pleas Court judgment denying a challenge by Richard Musser, petitioner below and appellant herein, pursuant to R.C. 2950.031(E), to his re-classification as a Tier III sexual offender. The following errors are assigned for our review:

FIRST ASSIGNMENT OF ERROR:

“THE RETROACTIVE APPLICATION OF OHIO’S AWA
VIOLATES THE PROHIBITION ON EX POST FACTO LAWS
IN ARTICLE I, SECTION 10 OF THE UNITED STATES

CONSTITUTION[.]”

SECOND ASSIGNMENT OF ERROR:

“THE RETROACTIVE APPLICATION OF OHIO’S AWA VIOLATES THE PROHIBITION ON RETROACTIVE LAWS IN ARTICLE II, SECTION 28 OF THE OHIO CONSTITUTION.”

THIRD ASSIGNMENT OF ERROR:

“THE RESIDENCY RESTRICTION OF THE AWA VIOLATES DUE PROCESS.”

FOURTH ASSIGNMENT OF ERROR:

“MUSSER CANNOT BE SUBJECTED TO THE COMMUNITY NOTIFICATION REQUIREMENT UNDER THE AWA BECAUSE HE WAS NOT SUBJECT TO COMMUNITY NOTIFICATION REQUIREMENTS UNDER PRE-AWA LAWS.”

{¶ 2} Appellant was convicted of rape in 1988 and, apparently, was deemed a sexually oriented offender. He was later re-classified a Tier III Sex Offender under new provisions enacted as part of Ohio’s “Adam Walsh Child Protection and Safety Act” (“AWA”), Am.Sub.S.B. 10, 2007 Ohio Laws, File No. 10.

{¶ 3} On February 11, 2008, appellant commenced the action below challenging that re-classification on various grounds. The case came on for hearing on November 6, 2008, and the court entered judgment eleven days later overruling the petition and denying his challenge. This appeal followed.

I

{¶ 4} Appellant’s first assignment of error posits a retroactive application of the AWA violates the United State’s Constitution’s ban on ex post facto laws. Various

appellate districts in this state have considered this argument and all of them agree that retroactive application of the AWA does not amount to an ex post facto law. See State v. Gallagher, Coshocton App. No. 08CA22, 2009-Ohio-2470, at ¶10; Gildersleeve v. State, Cuyahoga App. Nos. 91515, 91519, 91521 & 91532, 2009-Ohio-2031, at ¶¶17-33; Montgomery v. Leffler, Montgomery App. No. H-08-011, 2008-Ohio-6397, at ¶¶18-24. We find the reasoning in these cases to be persuasive and readily join in their conclusions. Appellant's first assignment of error is accordingly overruled.

II

{¶ 5} Appellant's second assignment of error posits application of the AWA to him violates Ohio's constitutional ban on retroactive laws. We have considered this very argument, and rejected it, on numerous occasions now. See e.g. State v. Coburn, Ross App. No. 08CA3062, 2009-Ohio-632, at ¶¶8-12; State v. Messer, Ross App. No. 08CA3050, 2009-Ohio-312, at ¶¶7-13; State v. Linville, Ross App. No. 08CA3051, 2009-Ohio-313, at ¶¶7-12. There is nothing in appellant's brief that prompts us to revisit those rulings and, therefore, his second assignment of error is without merit and is overruled.

III

{¶ 6} Appellant's third assignment of error posits that residency restrictions imposed on him by the AWA once he leaves prison will violate his due process rights. First, appellant did not raise this particular issue in his petition below nor does it appear to have been raised during any other part of the proceeding. It is therefore waived and cannot be raised, now, for the first time on appeal. Coburn, supra at ¶21; In re S.R.P.,

Butler App. No. CA2007-11-027, 2009-Ohio-11, at ¶29.

{¶ 7} Even if appellant had raised the issue below, however, it would have made no difference. This Court and others have ruled this issue is not “ripe” for consideration, or a petitioner lacks standing to raise it, unless an actual deprivation of due process is asserted by claiming the petitioner (1) is currently in violation of residency restriction or (2) has been forced to move from an area due to his close proximity to a school. Coburn, supra at ¶25; Downing v. State, Logan App. No. 8-08-29, 2009-Ohio-1834, at ¶16. Appellant remains incarcerated and, thus, cannot assert either claim. For these reasons, the third assignment of error is without merit and is overruled.

IV

{¶ 8} Appellant argues in his fourth assignment of error that the trial court erred in overruling his petition because, pursuant to R.C. 2950.11(F)(2), he is not subject to the community notification requirements of the AWA. We disagree.

{¶ 9} Initially, we note that: (1) appellant did not raise this issue in the trial court, (2) the record does not reveal what public notification requirements, if any, were imposed on appellant, and (3) the trial court stated that it found nothing to exempt him from county notification requirements. Thus, we could summarily overrule two assignments of error. Moreover, in State v. Pletcher, Ross App. No. 08CA3044, 2009-Ohio-1819, we noted that the defendant, who was originally designated a sexually oriented offender with no community notification requirements, argued after his reclassification "that because he was originally designated as a sexually oriented offender prior to his Tier III reclassification, he should not now be subject to community

notification." Id. at ¶25. We wrote, however, that "because Appellant is mistaken as to who has the burden of proof, we find his argument is without merit." Id. Here, appellant had the burden of proof with respect to his reclassification and failed to satisfy his burden. For these reasons, we hereby overrule appellant's fourth assignment of error.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed. Appellee shall recover of appellant 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 Ross County Common Pleas Court to carry this judgment into execution.

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

Kline, P.J. & McFarland, J.: Concur in Judgment & Opinion

Abele, J.: Concur in Judgment & Opinion as to Assignments of Error I, II & III:
Dissents as to Assignment of Error IV

For the Court

BY: _____

Roger L. Kline
Presiding Judge

BY: _____

Peter B. Abele, Judge

BY: _____
Matthew W. McFarland, 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.