

[Cite as *In re A.H.*, 2010-Ohio-5434.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In the Matter of: :
A.H., : No. 09AP-186
(Appellant). : (C.P.C. No. 06JU-6153)
: (REGULAR CALENDAR)
:

D E C I S I O N

Rendered on November 9, 2010

Ron O'Brien, Prosecuting Attorney, and *Katherine J. Press*,
for appellee.

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

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch.

TYACK, P.J.

{¶1} A.H. is appealing from the sexual predator classification placed upon him following his 2006 adjudication that he committed the offenses of rape and abduction. At his original disposition hearing, he was committed to the Ohio Department of Youth Services ("DYS"). The issue of registration as a sex offender was reserved until such time as he would be released from the custody of DHS.

{¶2} On May 8, 2008, a hearing was held before a magistrate of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, on the

issues of classification and registration. At the end of the hearing, the magistrate recommended that A.H. be classified as a juvenile sex offender and be required to register as a Tier III offender.

{¶3} Counsel for A.H. filed objections on his behalf and a judge of the juvenile branch approved the magistrate's report, findings and recommendation. This appeal ensued.

{¶4} Counsel for A.H. has assigned four errors for our consideration:

FIRST ASSIGNMENT OF ERROR

The trial court erred in determining that a Tier III classification, with lifetime reporting and registration requirements, was warranted, as the minor child had successfully completed sex offender treatment at the Department of Youth Services and did not pose a risk to commit further offenses.

SECOND ASSIGNMENT OF ERROR

The classification, notification, and registration provisions of Senate Bill 10 as applied to juvenile adjudications violate constitutional prohibitions against cruel and unusual punishments. Eighth and Fourteenth Amendments to the United States Constitution; Section 9, Article I of the Ohio Constitution.

THIRD ASSIGNMENT OF ERROR

The retrospective application of Senate Bill 10 to juvenile adjudications violates Ohio's Retroactivity Clause as set forth in Section 28, Article II of the Ohio Constitution.

FOURTH ASSIGNMENT OF ERROR

The retrospective application of Senate Bill 10 to juvenile adjudications violates the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution.

{¶5} We are aware that several of the issues to be addressed in this case are pending before the Supreme Court of Ohio in the cases of *In re: Adrian R.* (Dec. 11,

2008), 5th Dist. No. 08-CA-17, 2008-Ohio-6581, and *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234. These cases were submitted to the Supreme Court of Ohio over one year ago, but the Supreme Court's rulings have not been issued. Release of those opinions may have been complicated by the untimely death of Chief Justice Thomas J. Moyer, leaving the court with six members to decide the cases and raising the possibility of an even split of the justices of that court. Because a member of this court is retiring at the end of the year, we cannot indefinitely delay adjudicating this case without knowing the inclinations of the Supreme Court of Ohio.

{¶6} Turning to the first assignment of error, the trial court had adequate evidentiary grounds for finding that A.H. presented a risk that he would commit future offenses. A.H. was 15 years old when he abducted and raped an 11 year old. The girl was raped both vaginally and rectally by A.H., and she was also raped by another individual at that time. The girl did not know A.H. before her abduction. The girl contracted a sexually transmitted disease as a result of the events of that day.

{¶7} A.H. had a history of assaultive behavior before the rape and continued to engage in assaultive behavior while in the custody of DYS.

{¶8} Given the evidence before it, the trial court was within its discretion to find that clear and convincing evidence supported a finding that A.H. should be classified as a juvenile sexual offender and classified as a Tier III offender.

{¶9} The first assignment of error is overruled.

{¶10} The second, third and fourth assignments of error allege that Senate Bill 10, the statute applicable to registration and classification, is unconstitutional as applied to juvenile offenders.

{¶11} The second assignment of error asserts that a lifetime reporting requirement is cruel and unusual punishment as applied to juvenile offenders. We cannot so find, based upon the history of the Eighth Amendment to the United States Constitution.

{¶12} When originally enacted, the Eighth Amendment was meant to bar punishments which now would be viewed as barbaric, such as cutting off body parts for certain crimes. The Eighth Amendment has been found to permit the execution of adult offenders, obviously a penalty far in excess of a penalty or requirement to register with a county sheriff every 90 days for the rest of your life. The Eighth Amendment has been found to bar the execution of juveniles. Recently, the United States Supreme Court barred a sentence of a life term of incarceration without parole for a specific juvenile. See *Graham v. Florida*, 130 S.Ct. 2011. However, the court divided four-four-one, with the majority finding that a statute which gave a sentence of a life term of incarceration for a juvenile was not automatically a violation of the Eighth Amendment. The lifetime reporting requirements applicable here are not in the same league as the penalties found to be constitutional for purposes of the Eighth Amendment.

{¶13} The second assignment of error is therefore overruled.

{¶14} The third and fourth assignments of error make the allegations that the Ohio legislation acted in violation of the Ohio Constitution and of the United States Constitution when it enacted the pertinent statute.

{¶15} Section 28, Article II, Ohio Constitution reads:

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of

parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

{¶16} This portion of the Ohio Constitution has been interpreted by the Supreme Court of Ohio in *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291 to permit retroactive laws which have a valid remedial purpose which is not punitive. Senate Bill 10 is meant to allow law enforcement to protect the general public from persons who have committed serious sexual offenses and who are deemed likely to commit such offenses again. The purpose is remedial.

{¶17} The statute clearly places a burden on persons who are adjudicated or found guilty of rape and other such offenses, but the burden is not so severe as to make the statute punitive.

{¶18} We are bound to follow *Cook*, and therefore must and do overrule the third assignment of error.

{¶19} The rulings of the United States Supreme Court on ex post facto law are also unhelpful to attacks on Senate Bill 10. The leading recent case in this area is *Smith v. Doe* (2003), 538 U.S. 84, 123 S.Ct. 1140. That case held that the ex post facto clause does not bar statute which are civil and non-punitive. The *Smith* case follows *Kansas v. Hendricks* (1997), 521 U.S. 346, 117 S.Ct. 2072, which allowed not just a reporting requirement for sex offenders, but permitted their continue detention in a state facility of an offender who is deemed likely to re-offend.

{¶20} In light of the holdings of the United States Supreme Court on the ex post facto clause, Senate Bill 10 cannot be found to violate the clause.

{¶21} The fourth assignment of error is overruled.

{¶22} All four assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is affirmed.

Judgment affirmed.

McGRATH and CONNOR, JJ., concur.
