

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Respondent-Appellee,	:	
v.	:	No. 09AP-616 (C.P.C. No. 02CR-06-3688)
Robert M. McColgan,	:	(REGULAR CALENDAR)
Petitioner-Appellant.	:	

D E C I S I O N

Rendered on August 18, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Petitioner-appellant, Robert M. McColgan, appeals from a judgment of the Franklin County Court of Common Pleas denying his petition to contest his sex offender reclassification as a Tier III sex offender. For the reasons that follow, we reverse the judgment of the trial court and remand this matter with instructions.

{¶2} On November 17, 2003, appellant entered guilty pleas to two counts of rape in violation of R.C. 2907.02, and was sentenced to consecutive six-year sentences. After a hearing, appellant was classified as a sexual predator under Ohio's version of Megan's Law, which created a registration and classification system for sex offenders.

{¶3} In 2007, Ohio enacted the current version of R.C. Chapter 2950, 2007 Am.Sub.S.B. No. 10 ("S.B. 10"), which is based on the federal Adam Walsh Act. S.B. 10 replaced the classification system of Megan's Law with a tier system consisting of three tiers dependent solely on the offense of conviction, i.e., Tier I, Tier II, and Tier III. Subsequent to the enactment of S.B. 10, appellant was reclassified as a Tier III sex offender and subject to additional reporting requirements, registration requirements, and community notification provisions.

{¶4} On April 17, 2008, appellant filed a petition to contest reclassification asserting various constitutional challenges. On June 3, 2009, the trial court rendered a decision denying appellant's petition and upholding S.B. 10 against all constitutional challenges raised by appellant.

{¶5} This appeal followed, and appellant brings the following four assignments of error for our review:

[1.] The trial court erred in failing to find application of Senate Bill 10's tier system of classification to offenders who were judicially classified under former versions of Chapter 2950 violates the Separation of Powers Doctrine.

[2.] Retroactive application of the provisions of Senate Bill 10 to those convicted of offenses committed before its January 1, 2008 effective date violates the ban on ex post facto lawmaking by the states set forth in Article I, Section 10 of the United States Constitution.

[3.] Application of the provisions of Senate Bill 10 to those convicted of offenses committed before its January 1, 2008 effective date violates the ban on retroactive laws set forth in Article II, Section 28, of the Ohio Constitution.

[4.] Retroactive application of S.B. 10 violates the Double Jeopardy Clauses of the United States Constitution's Fifth Amendment and Article I, Section 10 of the Ohio Constitution.

{¶6} On September 10, 2009, this court granted a motion to stay the proceedings until resolution of like constitutional questions presented in similar cases already pending in this court and the Supreme Court of Ohio. On April 15, 2011, the stay was vacated.

{¶7} Appellant's first and third assignments of error are dispositive to this appeal. In these assigned errors, appellant contends application of S.B. 10 to offenders sentenced prior to January 1, 2008 violates the separation of powers doctrine and the ban on retroactive laws set forth in Article II, Section 28 of the Ohio Constitution.

{¶8} On June 3, 2010, the Supreme Court of Ohio determined that the reclassification provisions of S.B. 10, R.C. 2950.031 and 2950.032, are unconstitutional because they violate the separation of powers doctrine. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶2. Concluding that R.C. 2950.031 and 2950.032 are unconstitutional, the Supreme Court chose severance of those provisions as the proper remedy. "R.C. 2950.031 and 2950.032 are severed and * * * after severance, they may not be enforced. R.C. 2950.031 and 2950.032 may not be applied to offenders previously adjudicated by judges under Megan's Law, and the classifications and community-notification and registration orders imposed previously by judges are reinstated." *Bodyke* at ¶66.

{¶9} Respondent-appellee, state of Ohio, submits that appellant cannot obtain relief, pursuant to R.C. 2950.031 and 2950.032, due to the Supreme Court's subsequent decision in *Chojnacki v. Cordray*, 126 Ohio St.3d 321, 2010-Ohio-3212. In that case, R.C. 2950.031 and 2950.032 were facially severed in their entirety leaving no part of either statute to be enforced. As a result, appellee contends the petition contest procedures created under those sections have been severed as well, thereby leaving the trial court without authority to rule on the reclassification. Hence, according to appellee, dismissal of the petition is the only proper result.

{¶10} However, "we have repeatedly rejected this argument and have instead recognized that, as a result of *Bodyke*, reclassifications made under the severed statutes must be vacated and the prior judicial classifications must be reinstated." *State v. Stapleton*, 10th Dist. No. 09AP-570, 2011-Ohio-3785, ¶11, citing *State v. Lawson*, 10th Dist. No. 09AP-672, 2011-Ohio-1255; *State v. Miliner*, 10th Dist. No. 09AP-643, 2010-Ohio-6117; *State v. Hickman*, 10th Dist. No. 09AP-617, 2010-Ohio-5548. "We reject the State's contention that there is an intra-district conflict as to the use of the petition-contest proceedings, as we have consistently ordered relief on the same grounds and by the same method, i.e., by remanding with instructions to reinstate the petitioners to their previous classifications." *Stapleton* at ¶11.

{¶11} Additionally, the Supreme Court recently held in *State v. Williams*, ___ Ohio St.3d ___, 2011-Ohio-3374, ¶20 (slip opinion):

When we consider all of the changes enacted by S.B. 10 in aggregate, we conclude that imposing the current registration requirements on a sex offender whose crime was committed prior to the enactment of S.B. 10 is punitive. Accordingly, we conclude that S.B. 10, as applied to defendants who

committed sex offenses prior to its enactment, violates Section 28, Article II of the Ohio Constitution, which prohibits the General Assembly from passing retroactive laws.

{¶12} In *Williams*, the Supreme Court reversed and remanded the case for the imposition of a sentence that was consistent with the law in effect at the time the defendant committed his offense, i.e, Megan's Law.

{¶13} Pursuant to *Bodyke* and *Williams*, we find appellant's reclassification as a Tier III sex offender unconstitutional, and, as such, that the trial court erred in denying appellant's petition contesting reclassification. *Stapleton* at ¶15. Accordingly, we sustain appellant's first and third assignments of error.

{¶14} Our disposition of appellant's first and third assignments of error renders appellant's remaining assignments of error moot.

{¶15} For the foregoing reasons, appellant's first and third assignments of error are sustained, appellant's second and fourth assignments of error are overruled as moot, the judgment of the Franklin County Court of Common Pleas is hereby reversed, and this matter is remanded to that court with instructions to: (1) vacate appellant's Tier III sex offender classification, and (2) reinstate his prior classification as a sexual predator, as well as his prior registration requirements pursuant to Megan's Law.

*Judgment reversed;
cause remanded with instructions.*

CONNOR and DORRIAN, JJ., concur.
