[Cite as *State v. Dehler*, 2009-Ohio-5059.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Respondent-Appellee,	:	**CASE NO. 2008-T-0061**
- vs -	:	
LAMBERT DEHLER,	:	
Petitioner-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 402.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *Deena L. DeVico*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Respondent-Appellee).

Lambert Dehler, pro se, PID: 273-819, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, OH 44430-0901 (Petitioner-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Mr. Lambert Dehler appeals from the trial court's grant of summary judgment in favor of the state, finding that he was properly classified as a Tier III offender based upon his convictions of two counts of rape and gross sexual imposition, as well as its finding that the new Sexual Offender Registration and Notification Act (SORN or the "Act"), R.C. Chapter 2950 (also known as Senate Bill 10, Ohio's version of the Adam Walsh Act or AWA) is constitutional.

{¶2} We affirm, determining that Mr. Dehler was properly classified, that his classification and duty to register arose by operation of law solely by virtue of his convictions of rape and gross sexual imposition, and that when viewed through the prism of prior precedent set by a superior court, the new sexual offender registration provisions challenged by Mr. Dehler are constitutional.

{¶3} **Substantive and Procedural History**

{¶4} In 1992, a jury found Mr. Dehler guilty of two counts of rape and two counts of gross sexual imposition. Mr. Dehler was then sentenced to concurrently serve seven to 25 years on each count of rape; and to serve two consecutive terms of 18 months on each count of gross sexual imposition concurrently to the rape sentences.

{¶5} Mr. Dehler, who remains incarcerated, was notified of his new classification as a Tier III offender by the Attorney General on January 7, 2008. The notice informed Mr. Dehler that his classification and registration duties upon release will change due to the newly enacted R.C. Chapter 2950 SORN provisions. He was also notified of his new duties to register and his right to contest the application of the classification and requirements.

{¶6} Mr. Dehler timely filed his petition to contest the classification, and several days later filed a request for a second hearing, as well as other motions. Through these filings Mr. Dehler raised numerous arguments. Among them was an argument that the state was barred from classifying him as a sex offender because he had never been classified under prior versions of Ohio's sexual offender registration law. Thus, Mr. Dehler argued that the state was barred from classifying him as a sex offender due to the affirmative defenses of collateral estoppel, res judicata, and laches. He also

asserted that the Department of Rehabilitation and Correction ("DRC") "lost jurisdiction" after December 1, 2007, to serve written notice of the new registration and classification duties, and that inasmuch as his notice was served on January 1, 2008, and there is no statutory provision for late service, he is not subject to the Act. He further alleged double jeopardy, ex post facto, and separation of powers violations.

{¶7} The state did not file an answer brief opposing Mr. Dehler's motion for summary judgment, but filed its own motion for summary judgment, arguing that Mr. Dehler was properly classified as a Tier III offender because he committed rape, and that the new Act is constitutional.

{¶8} Before the trial court were Mr. Dehler's request for a hearing on the reclassification, both parties' motions for summary judgment, Mr. Dehler's motion for the immediate appointment of counsel, and Mr. Dehler's motion to dismiss the state's motion for summary judgment.

{¶9} The court found the new sex offender classification scheme was constitutional, and that Mr. Dehler was properly classified as a Tier III offender. The court denied Mr. Dehler's motions, including his request for an oral hearing. Finding no genuine issues of material fact remained for determination, the court granted the state's motion for summary judgment.

{¶10} Mr. Dehler timely appealed, raising five assignments of error:

{¶11} "[1.] The trial court erred by not granting Petitioner's Motion for Summary Judgment because the Department of Rehabilitation and Correction lost jurisdiction to distribute to adult prison inmates the Notice of New Classification and Registration Duties after December 1, 2007.

{¶12} "[2.] The trial court erred by not granting a hearing pursuant to R.C. 2950.032(E).

{¶13} "[3.] The trial court erred when it failed to provide the mandatory hearing under R.C. 2950.11(F)(2).

{¶14} "[4.] The trial court erred when it denied the appointment of counsel because the Petitioner filed timely requests for counsel under the Adam Walsh Act.

{¶15} "[5.] The Adam Walsh Act (AWA) amendments to R.C. 2950.01 et seq., do not apply to the Defendant because he was sentenced in 1992 and the state previously declined to avail itself of the prior law ("Megan's Law") and the current application of the AWA violates the doctrine of laches, res judicata, Clause I, Section 10, Article I, of the United States Constitution as ex post facto legislation, and violates Section 28, Article II, of the Ohio Constitution as retroactive legislation, and further violates R.C. 1.48 and 1.58, et. seq."

{¶16} **Senate Bill 10 and the New SORN Act Provisions**

{¶17} "Ohio's new sexual offender law was adopted by the Ohio General Assembly in Senate Bill 10. The legislation was enacted so that the state law would be consistent with the federal Adam Walsh Child Protection and Safety Act of 1996.

{¶18} "Prior to Senate Bill 10, when a defendant was found guilty of a sexually oriented offense, he could be classified as a sexually oriented offender, a habitual sex offender, or a sexual predator. The prior statutory scheme provided that a defendant's designation under the three categories would be predicated upon the nature of the underlying offense and findings of fact made by the trial court during a sexual classification hearing.

{¶19} "Under the new legislation, those three labels are no longer applicable. Instead, a defendant who has committed a sexually oriented offense can only be designated as either a sex offender or a child victim offender. There are now three tiers of sexual offenders. The extent of the defendant's registration and notification requirements will depend on the tier. Furthermore, the placement in a tier turns solely on the crime committed.

{¶20} "Another change of the sexual offender classification system implemented under the new law concerns the duration of the registration and notification requirements for the sex offenders. Prior to Senate Bill 10, if a defendant was deemed a sexually oriented offender, he was required to register once each year for a period of 10 years, but there was no notification requirement; if he was labeled as a habitual sex offender, he had to register once every six months for 20 years, and the community could be given notice of his presence at the same rate; and, if he was designated a sexual predator, the duty to register was once every three months for life, and notification could also take place at the same rate for life.

{¶21} "Under the new statutory scheme set forth in current R.C. Chapter 2950, the registration and community notification requirements are increased for sex offenders. If the defendant's sexual offense places him in the 'Tier I' category, he is required to register once every year for a period of 15 years, but there is no community notification; if the defendant's offense falls under the 'Tier II' category, registration must take place once every six months for 25 years, and there is still no notification requirement; and, if the sexual offense places the defendant in the 'Tier III' category, the requirements are essentially the same as for a sexual predator, in that there is a duty to

register once every three months for life, and community notification can occur at that same rate for life. Community notification under the new scheme requires the sheriff to give the notice of an offender's name, address, and conviction to all residents, schools, and day care centers within 1,000 feet of the offender's residence. The new law also prohibits all sex offenders from residing within 1,000 feet of a school or day care center. These registration and notification requirements under the Adam Walsh Act are retroactive and applicable to offenders whose crimes were committed before the effective date of the statute." *State v. Charette,* 11th Dist. No. 2008-L-069, 2009-Ohio-2952, ¶7-11.

{¶22} In Mr. Dehler's case, he is automatically classified as a Tier III offender because rape is a Tier III offense. See R.C. 2950.01(G)(1)(a).

{¶23} **Summary Judgment Standard of Review**

{¶24} Mr. Dehler first contends that the trial court erred in granting summary judgment to the state because the DRC "lost jurisdiction" to give inmates the Notice of New Classification and Registration Duties after December 1, 2007. He asserts that as there is no question he received his notice on January 8, 2007, he is entitled to a judgment as a matter of law that he is not subject to the new classification.

{¶25} "Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶36, citing *Holik v. Richards*, 11th Dist. No. 2005-A-0006, 2006-Ohio-2644, ¶12, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. "In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion,

which is adverse to the nonmoving party." Id., citing Civ.R. 56(C). "Further, the standard in which we review the granting of a motion for summary judgment is de novo." Id., citing *Holik* at 293, citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105.

{¶26} "Accordingly, '[s]ummary judgment may not be granted until the moving party sufficiently demonstrates the absence of a genuine issue of material fact. The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.'" Id. at ¶37, citing *Brunstetter v. Keating,* 11th Dist. No. 2002-T-0057, 2003-Ohio-3270, ¶12, citing *Dresher* at 292. "Once the moving party meets the initial burden, the nonmoving party must then set forth specific facts demonstrating that a genuine issue of material fact does exist that must be preserved for trial, and if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." Id., citing *Brunstetter*, citing *Dresher* at 293.

{¶27} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply

by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112.

{¶28} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, is too broad and fails to account for the burden Civ.R. 56 places upon a moving party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff*." Id. at ¶40-41.

{¶29} Thus, in *Dresher,* the Supreme Court of Ohio held that "when neither the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and 'identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.'" Id. at ¶42, citing *Dresher* at 276.

{¶30} Specifically, Mr. Dehler contends that the trial court erred in granting the state's motion for summary judgment because pursuant to R.C. 2950.032(A)(2), the DRC was required to notify offenders of their new reclassification and registration duties by December 1, 2007. His theory on summary judgment is that he is entitled to judgment as a matter of law as he is not subject to the Act because the DRC was without "jurisdiction" to serve him with notice after December 1, 2007. He also contends that the state waived any defense to this argument because the state did not file an answer brief in opposition to his motion for summary judgment. Rather, the state filed its own motion for summary judgment presenting three grounds.

{¶31} The state argued that as a matter of law there is no factual dispute as to classification based upon Mr. Dehler's rape conviction. The state also argued that Mr. Dehler's constitutional arguments are not properly raised within the rubric of a R.C. 2950.031(E) and R.C. 2950.032(E) hearing. Thirdly, the state argued that assuming the constitutional challenge was properly before the court, the Act is presumptively constitutional and Mr. Dehler cannot meet his burden of proof.

{¶32} On April 8, 2008, the court set a non-oral hearing date of May 30, 2008, for the summary judgment motion. Upon the submitted briefs and evidentiary materials, the court found there was no genuine issue of material fact in that Mr. Dehler was properly notified and classified. Thus, the court granted the state's motion for summary judgment and denied the relief sought in Mr. Dehler's various motions.

{¶33} We agree with the trial court that there is no genuine issue of material fact remaining for determination, and we determine that the court properly granted the state's motion for summary judgment.

{¶34} Mr. Dehler had never been classified as a sex offender, but his status as a Tier III offender arose by operation of law when he was convicted of rape in 1992. Furthermore, he received timely notice of his classification and duties to register under the new Act pursuant to R.C. 2950.03.

{¶35} **Timeliness of Receipt of Notice**

{¶36} Mr. Dehler is correct in his assertion that pursuant to R.C. 2950.032, the Attorney General was required to determine the offender's classification relative to the offender's offense between July 1, 2007 and December 1, 2007. See R.C. 2950.032(A)(1).

{¶37} Further, pursuant to R.C. 2950.032(A)(2), the DRC was required to provide written notice between July 1, 2007 and December 1, 2007, to all such offenders, *except* that "[t]he department *** [is] *not required to provide the written notice to an offender *** if the attorney general included in the document provided to the particular department *** notice that the attorney general will be sending that offender *** a registered letter and that the department is not required to provide to that offender *** the written notice.*" (Emphasis added.)

{¶38} It is axiomatic that statutes in pari materia are to be construed together; thus R.C. 2950.032 must be read in conjunction with the primary notice to offender statute, R.C. 2950.03.

{¶39} R.C. 2950.03(A)(1), notice to offender of duty to register, provides in relevant part:

{¶40} "Regardless of when the person committed the sexually oriented offense ***, if the person is an offender who is sentenced to a prison term, a term of

imprisonment, or any other type of confinement for any offense, and *if on or after January 1, 2008, the offender is serving that term*, *** the official in charge of the jail, workhouse, state correctional institution, or other institution in which the offender serves the prison term, ***, shall provide the notice to the offender *before the offender is released* ***." (Emphasis added.)

{¶41} While the statutory language is a tad convoluted, Mr. Dehler's argument that the provision of the new Act cannot apply to him because he received his notice after December 1, 2007, must fail because he remains incarcerated. None of his rights have been abused. His classification under either the old sex offender registration framework or the newly enacted one arose by operation of law, and the failure to classify Mr. Dehler and notify him of his classification and registration duties would be a failure only if it occurred after his release.

{¶42} Mr. Dehler's "Notice of New Classification and Registration Duties" is a part of our record. He received the notice on January 7, 2008. The notice was dated November 30, 2007, thus it is clear that the Attorney General made the determination that Mr. Dehler was a Tier III offender on that date. The notice was then timely provided, pursuant to R.C. 2950.03(A)(1), which clearly states that regardless of when the sexually oriented offense was committed and if, on or after January 1, 2008, the offender is incarcerated for that offense, notice shall be provided before the offender is released.

{¶43} This statutory interpretation is further reinforced by a reading of R.C. 2950.033, which applies to offenders whose duties to register are scheduled to terminate on or after July 1, 2007, and prior to January 1, 2008.

{¶44} R.C. 2950.033(A)(5) states in relevant part:

{¶45} "If the offender *** is in a category described in division (A)(1)(a) of section R.C. 2950.032 *** but does not receive a notice from the department of rehabilitation and correction *** pursuant to (A)(2) of that section, *notwithstanding the failure of the offender *** to receive the registered letter or the notice, the offender's *** duty to comply with Sections R.C. 2950.04, 2950.041, 2950.05, and 2950.06 shall continue in accordance with, and for the duration specified in, the provisions of Chapter 2950 of the Revised Code as they will exist under the changes to the provisions that will be implemented on January 1, 2008.*" (Emphasis added.)

{¶46} Thus, even those offenders who did not receive notice between July 1, 2007 and December 1, 2007, and whose duties were set to expire during that time period, are still expected to comply with the new Act. Regardless of whether those offenders received timely notice, their duties have been extended pursuant to the Act.

{¶47} As Mr. Dehler received his notice on January 7, 2008, and is still incarcerated for the 1992 conviction for rape and gross sexual imposition, we fail to see how he is relieved of the mandatory requirements of the Act. Indeed, even offenders whose duties were set to expire, and who did not receive timely notice, are expected to comply.

{¶48} Mr. Dehler's first assignment of error is without merit.

{¶49} **Right to a Hearing Pursuant to R.C. 2950.032(E)**

{¶50} Mr. Dehler next contends that he was entitled to a hearing pursuant to R.C. 2950.032(E). This contention is wholly without merit as the court did hold a hearing, albeit on the motions, briefs, and evidentiary materials supplied by the parties.

Nothing in R.C. 2950.032(E) requires the court to hold an oral hearing upon the petitioner's request for a reclassification hearing.

{¶51} Pursuant to R.C. 2950.031(E), "*** [i]n any hearing under this division, the *Rules of Civil Procedure* *** apply. *** The court shall schedule a hearing, and shall provide notice to the offender *** and prosecutor of the date, time, and place of the hearing."

{¶52} Firstly, the docket reflects that the court sent proper notice on April 8, 2008, and that a hearing was scheduled for May 30, 2008, on Mr. Dehler's motion for summary judgment.

{¶53} Secondly, Civ.R. 7(B)(2) provides: "To expedite its business, the court may make provision by rule or order for the submission and determination of motion without oral hearing upon brief written statements of reasons in support and opposition." As the state properly notes, Local Rule 9.06 of the Trumbull County Court of Common Pleas provides that "[e]very motion shall state its nature with specificity, and be submitted and determined upon the papers hereinafter referenced. *Oral argument of motions may be permitted on application and proper showing.* ***." (Emphasis added.)

{¶54} Thirdly, nothing in Civ.R. 56 requires the court to hold an oral hearing. "[A] trial court is not required to set or hold a hearing prior to ruling on a motion for summary judgment. Rather, 'the non-moving party is entitled simply to sufficient notice of the filing of the motion [pursuant to] Civ.R. 5, and an adequate opportunity to respond [pursuant to] Civ.R. 56(C).'" *Marino v. Oriana House, Inc.,* 9th Dist. No. 23389, 2007-Ohio-1823, ¶12. (Citations omitted.)

{¶55} This is not a case where the court must determine at an evidentiary hearing whether Mr. Dehler was properly classified. Having been convicted on two counts of rape in violation of R.C. 2907.02, as well as two counts of gross sexual imposition in violation of 2907.04, his classification as a Tier III offender automatically arose by operation of law. That is because the determination of the tier turns solely upon the offense committed. Mr. Dehler does not claim that his offenses place him in another tier. Thus, there exists no genuine issue of material fact as to his proper classification.

{¶56} Pursuant to R.C. 2950.01(G)(1)(a), a Tier III sex offender means:

{¶57} "***

{¶58} "*A violation of section 2907.02 or 2907.03 of the Revised Code.*"

{¶59} It makes no difference whether the offender committed the crime with an underage victim, a sexual motivation, or violence. In other words, the trial court need not make any of the determinations that must be made in order to classify an offender as a Tier III offender who has been convicted of other sexual offenses, such as gross sexual imposition, but which are heightened due to the offender's actions or the context of the crime, such as the age of the victim, violations of other laws, sexual motivation, violence, and conspiracy. See R.C. 2950.01(G)(1)(a)-(i).

{¶60} The very fact that Mr. Dehler was convicted on two counts of rape automatically classifies him as a Tier III offender. Once the court determines that the crime fits the tier, nothing remains to be decided. The need for an evidentiary hearing is obviated and summary judgment is appropriately granted.

{¶61} Mr. Dehler's second assignment of error is without merit.

{¶62} **Right to a Hearing Pursuant to R.C. 2950.11(F)(2)**

{¶63} In his third assignment of error, Mr. Dehler contends that the trial court erred by failing to hold a mandatory hearing pursuant to R.C. 2950.11(F)(2). R.C. 2950.11(F)(2), unlike R.C. 2950.03(E), does not mandate a hearing. Rather, a plain reading of the statute reveals the trial court's decision to hold a hearing is discretionary. Thus, Mr. Dehler's contention is without merit.

{¶64} Specifically, R.C. 2950.11(F)(2) outlines the factors a court must consider *if* it holds a hearing. Thus, it provides that the community notification provisions of R.C. 2950.11 do not apply if, after considering the eleven factors of R.C. 2950.11(F)(2)(a)-(k), the court determines that the offender would not have been subject to the notification provisions of former R.C. 2950.11.

{¶65} The right to a hearing is clearly discretionary under R.C. 2950.11. The relevant portion of R.C. 2950.11 is located in R.C. 2950.11(H)(1), which states "[u]pon the motion of the offender or the prosecuting attorney *** the judge *may schedule a hearing* to determine whether the interests of justice would be served by suspending the community notification requirement under this section in relation to the offender. The judge *may dismiss the motion without a hearing* but may not issue an order suspending the community notification requirement without a hearing. ***." (Emphasis added.)

{¶66} Thus, it is within the court's discretion to hold a hearing pursuant to R.C. 2950.11 to determine whether community notifications for certain offenders should be considered, and further, the court may dismiss the motion without holding a hearing. The court may not, however, issue an order suspending the community notification requirements without holding a hearing and considering all the relevant factors.

{¶67} In either case, the court dismissed Mr. Dehler's motion for a hearing pursuant to R.C. 2950.11, after finding that there was no error in his classification upon a review of Mr. Dehler's various motions and the state's motion for summary judgment. The court properly found there were no genuine material issues of fact as Mr. Dehler was properly classified pursuant to the new provisions of the Act. The court, quite simply, was not required to hold a hearing pursuant to R.C. 2950.11(F)(2), and upon dismissal, was not required to issue findings of fact. We find no abuse of discretion in the trial court's denial of the request for a hearing.

{¶68} Mr. Dehler's third assignment of error is without merit.

{¶69} **Right to Counsel Pursuant to the Adam Walsh Act**

{¶70} In his fourth assignment of error, Mr. Dehler contends that he was denied an appointment of counsel, which he timely requested pursuant to the new Act, and that he is entitled to such counsel pursuant to R.C. 120.16, Ohio Atty. Gen. Ops. No. 99-031, and R.C. 2950.11(F)(2). Mr. Dehler's contentions are without merit as he cites to authorities that were in effect under the former provisions which contained a statutory right to appointed counsel.

{¶71} Although former R.C. 2950.09(B)(1) contained a statutory right to counsel, there is no such right under the new Act. Rather, a review of Senate Bill 10 reveals the legislature intended sex offender reclassification hearings to be purely civil and non-punitive in nature; and, most fundamentally, eliminated the statutory right to counsel that was contained in former R.C. 2950.09. Thus, Mr. Dehler's contentions are without merit.

{¶72} We note at the outset that other districts confronted with this issue have similarly found that there is no right to counsel under the new Act. *State v. King*, 2d Dist. No. 08-CA-02, 2008-Ohio-2594, ¶35; *State v. Linville,* 4th Dist. No. 08CA3051, 2009-Ohio-313, ¶17. The General Assembly eliminated the statutory provision for the right to counsel in enacting the new Act, and the Supreme Court of Ohio, in interpreting former R.C. Chapter 2950, has been clear that these proceedings are constitutional, civil, and non-punitive in nature. See *State v. Cook* (1998), 83 Ohio St.3d 404, 413 and *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202 (Lanzinger J., concurring in part and dissenting in part.)

{¶73} "[L]itigants have no generalized right to appointed counsel in civil actions." *Linville* at ¶14, quoting *Graham v. City of Findlay Police Dept.,* 3d Dist. No. 5-01-32, 2002-Ohio-1215, citing *State ex rel. Jenkins v. Stern* (1987), 33 Ohio St.3d 108; *Roth v. Roth* (1989), 65 Ohio App.3d 768.

{¶74} Thus, Mr. Dehler would only be entitled to counsel if it was statutorily provided or if there was an infringement of his substantial liberty interest or vested right. As succinctly stated by Judge Fain in his concurring opinion in *State v. King*, "[i]ncarceration is not one of the possible outcomes that may result from the proceeding for which [he] seeks the appointment of counsel, and, therefore [he] is not entitled to the appointment of counsel at the State's expense." Id. at ¶36.

{¶75} Pursuant to R.C. 120.16(A)(1), representation is provided to "indigent adults *** who are charged with the commission of an offense or act that is a violation of a state statute and for which the penalty or any possible adjudication includes the potential loss of liberty ***."

{¶76} R.C. 120.16, however, is concerned with criminal matters, and the Supreme Court of Ohio has been clear the sexual offender classification and notification provisions, although located in Ohio's criminal code, are civil in nature. See *Cook* and *Wilson.*

{¶77} More fundamentally, Mr. Dehler has not been deprived of a substantial liberty by being classified as a Tier III sex offender. The Supreme Court of Ohio succinctly stated in *Cook* that "except with regard to constitutional protections against ex post facto laws *** *felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.*" Id. at 412, quoting *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281-282. (Emphasis added.) This is so because "where no vested right has been created, 'a later enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, unless the past transaction or consideration created at least a reasonable expectation of finality.'" Id., quoting *Matz* at 281.

{¶78} Ohio has had a sex offender registration statute in effect since 1963. See *Cook* at 406. Further, the "harsh consequences [of] classification and community notification *** come not as a direct result of the sexual offender law, but instead as a direct societal consequence of [the offender's] past actions." Id. at 413, quoting *State v. Lyttle* (Dec. 22, 1997), 12th Dist. No. CA97-03-060, 1997 Ohio App. LEXIS 5705.

{¶79} "As a result, convicted sex offenders 'have no reasonable expectation that [their] criminal conduct would not be subject to future versions of R.C. Chapter 2950.'" *Linville* at ¶16, quoting *King* at ¶33. Thus, because Mr. Dehler has no settled

expectation regarding his registration obligations, he has not been deprived of any liberty interest.

{¶80} Mr. Dehler further argues that pursuant to R.C. 2950.11(F)(2), he is entitled to appointed counsel because counsel is necessary "to allow petitioner to present evidence of at least 11 factors which would have shown that he would not have been subject to notification provisions under the prior law." This argument is simply without merit. As we noted in Mr. Dehler's third assignment of error, there is no mandatory right to a hearing pursuant to R.C. 2950.11(F)(2).

{¶81} While R.C. 2950.11(F)(2) allows the court to hold a hearing on the notification provisions, notably absent is a provision providing for a statutory right to counsel at the hearing. This statute simply lists eleven factors the court is required to consider in determining whether "the person would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment. ***."

{¶82} Mr. Dehler is correct that former R.C. 2950.09 provided a statutory right to counsel to determine whether an offender was a sexual predator under the former classification scheme. Former R.C. 2950.09, however, has since been repealed under the new Act, and again, notably absent in the new provisions is the former statutorily created right to counsel. Further, the court no longer makes a determination as to the offender's classification, but rather the classification is now automatic based on the offender's crime.

{¶83} As Mr. Dehler has no right to appointed counsel, statutory or otherwise, his fourth assignment of error is without merit.

{¶84} **The New Act is Constitutional**

{¶85} In his final assignment of error, Mr. Dehler contends that the new Act is not applicable to him because he was sentenced in 1992 and was never classified; thus, the application of the current law as applied to him violates the "doctrines of laches; res judicata; Clause I, Section 10, Article I of the United States Constitution as ex post facto legislation; violates Section 28, Article II of the of the Ohio Constitution as retroactive legislation, and further violates R.C. 1.48 and 1.58, et. seq."

{¶86} First, the fact that Mr. Dehler has never been classified as a sex offender under the old sex offender classification scheme is of no consequence so long as he is classified prior to his release from confinement.

{¶87} In *State v. Brewer* (1999), 86 Ohio St.3d 160, the Supreme Court of Ohio reviewed the version of R.C. 2950.03 then in effect, which required "that the offender be provided with notice, including information regarding registration duties, and including a statement as to whether the offender has been adjudicated as being a sexual predator. *** This notice must be provided by the appropriate official 'at least ten days before the offender is released.'" Id. at 165, citing former R.C. 2950.03(A)(1). Thus, even under the former scheme of R.C. Chapter 2950, classification was proper as long as it occurred prior to the offender's release. As Mr. Dehler is currently still incarcerated, he may now for the first time be classified.

{¶88} Furthermore, under the new scheme, sex offender hearings prior to classification no longer exist. "S.B. 10 abolished prior sex offender classifications in former R.C. Chapter 2950. *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195, ¶15. Designations like 'sexual predator' no longer exist, nor do sex offender

hearings under the former law. *Williams* at ¶15. Now, under S.B. 10, an offender who commits a sex offense is classified as either a sex offender or a child-victim offender. *Williams* at ¶16. Depending on the sex offense committed, the offender is placed in Tier I, Tier II, or Tier III. Id. Trial courts no longer have discretion in imposing a certain classification on offenders, and the offender's likelihood to reoffend is no longer considered. Id. Rather, offenders are now classified solely on the offense for which they were convicted. Id. As an exception, offenders are automatically placed in a higher tier if (1) they have a prior conviction for a sexually-oriented or child victim-oriented offense, or (2) they have been previously classified as sexual predators. Id." *State v. Gilfillan,* 10th Dist. No. 08AP-317, 2009-Ohio-1104, ¶110.

{¶89} "Each tier under S.B. 10 has registration requirements, but they differ in terms of the duration of the duty and the frequency of the in-person address verification." *Gilfillan* at ¶111, citing *Williams* at ¶18. Mr. Dehler is a Tier III offender because rape is a Tier III offense. Id., citing R.C. 2950.01(G)(1)(a). As such, "Tier III offenders are required to register for life and to verify their addresses every 90 days; community notification may occur every 90 days for life." Id., citing *Williams* at ¶18.

{¶90} Second, as to the constitutional challenges Mr. Dehler raises, the Supreme Court of Ohio considered these challenges under the former sex offender statutes and determined that because a convicted felon has no reasonable expectation that his or her criminal conduct will not be subject to further legislation, the former version of R.C. Chapter 2950 could be applied to sex offenders who committed their crimes before the legislation took effect. *King* at ¶33, citing *Cook* at 412. Similarly here,

Mr. Dehler could have no reasonable expectation that his criminal conduct would not be subject to future versions of R.C. 2950.

{¶91} As the Second Appellate District noted in *King*: "[i]ndeed, *Cook* indicates that convicted sex offenders have no reasonable 'settled expectations' or vested rights concerning the registration obligations imposed on them. If the rule were otherwise, the initial version of R.C. Chapter 2950 could not have been applied retroactively in the first place." Id. at ¶33.

{¶92} Therefore, as to Mr. Dehler's constitutional challenges of the new Act, we find they are without merit, as we and other districts have recently determined these new provisions, while they may make the registration requirements more onerous and burdensome, do not violate any constitutional rights of offenders.

{¶93} In our recent decision, *State v. Swank,* 11th Dist. No. 2008-L-019, 2008-Ohio-6059, we found that the newly enacted provisions of the Act withstood constitutional challenges with respect to ex post facto, retroactivity, due process, and separation of powers claims. We determined that the newly enacted legislation was civil, remedial, and non-punitive in nature, and although the registration and notification provisions are now heightened depending on the classification of the offender, we determined that based on the prior decisions of the Supreme Court of Ohio in *Cook* and *Wilson*, these provisions were de minimis procedural requirements.[1] See, also,

1. We note, however, as we did in *Charette,* that the Supreme Court of Ohio has become more divided on the issue of whether the registration and notification statute has evolved from a remedial and civil statute into a punitive one. As Justice Lanzinger stated in her concurring in part and dissenting in part opinion in *Wilson*: "I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions." See, also, *State v. Ferguson,* 120 Ohio St.3d 7, 2008-Ohio-4824 (Lanzinger, J., dissenting). We believe Senate Bill 10 merits review by the Supreme Court of Ohio to address the issue of whether the current version of R.C.

Charette; Gilfillan at ¶109-119; *Sewell v. State*, 1st Dist. No. C-080503, 2009-Ohio-872; *State v. Sewell*, 4th Dist. No. 08CA3042, 2009-Ohio-594, *State v. Desbiens,* 2d Dist. No. 22489, 2008-Ohio-3375.

{¶94} Mr. Dehler's fifth assignment of error is without merit.

{¶95} The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion,

TIMOTHY P. CANNON, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶96} I concur with the judgment ultimately reached by the majority, but do so for reasons other than those adduced by the majority. Accordingly, I concur in judgment only.

{¶97} In 1992, Dehler was convicted of two counts of Rape and two counts of Gross Sexual Imposition and sentenced to serve two consecutive prison terms of seven to twenty-five years.[2]

{¶98} In 1996, R.C. Chapter 2950 was rewritten as part of Am.Sub.H.B. No. 180, effective January 1, 1997. Although former R.C. 2950.09(C)(1) provided for the classification of sex offenders convicted prior to H.B. 180 and serving a term of imprisonment as of January 1, 1997, Dehler was never classified as a sexual offender.

Chapter 2950 has been transformed from remedial to punitive law. Before that court revisits the issue, however, we, as an inferior court, are bound to apply its holdings in *Cook* and *Wilson*.

2. Dehler's convictions for Gross Sexual Imposition were subsequently vacated on appeal. See *State v. Dehler*, 8th Dist. Nos. 65006 and 66020, 1994 Ohio App. LEXIS 2269.

{¶99} There are currently many pending appeals by offenders who have been classified under the Adam Walsh Act, but who were convicted and classified in final sentencing judgments prior to its enactment. In these cases, where there is an existing prior final sentencing judgment, re-classification under the provisions of the Adam Walsh Act violates the constitutional doctrine of separation of powers.

{¶100} "It is well settled that the legislature has no right or power to invade the province of the judiciary, by annulling, setting aside, modifying, or impairing a final judgment previously rendered by a court of competent jurisdiction." *Cowen v. State ex rel. Donovan* (1922), 101 Ohio St. 387, 394; *Bartlett v. Ohio* (1905), 73 Ohio St. 54, 58 ("it is well settled that the legislature cannot annul, reverse or modify a judgment of a court already rendered"). In effect, the separation of powers doctrine applies the principle of res judicata, typically used as a bar to further litigation by parties, to legislative action. Cf. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, at paragraph one of the syllabus ("[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action").

{¶101} An offender's classification as a sexual offender constitutes such a valid final judgment. *State v. Washington*, 11th Dist. No. 99-L-015, 2001-Ohio-8905, 2001 Ohio App. LEXIS 8905, at *9 ("a defendant's status as a sexually Oriented offender *** arises from a finding rendered by the trial court, which in turn adversely affects a defendant's rights by the imposition of registration requirements").

{¶102} Thus, where an offender has been previously classified as a Sexually Oriented Offender, Habitual Sex Offender, or Sexual Predator in a valid judgment entry

rendered by a court of competent jurisdiction, that judgment may not be impaired by subsequent legislative enactment. See *Spangler v. State*, 11th Dist. No. 2008-L-062, 2009-Ohio-3178, at ¶¶55-64.

{¶103} In contrast to the majority of these cases, Dehler has not been previously classified as a sexual offender. As the application of the Adam Walsh Act to Dehler does not disturb the settled judgment of a court of competent jurisdiction, there is no constitutional impediment to his classification.

TIMOTHY P. CANNON, J., dissenting.

{¶104} I respectfully dissent. The majority concludes that Dehler's right to a hearing was not compromised. I disagree.

{¶105} Dehler filed a request for a hearing pursuant to R.C. 2950.032(E) to contest his classification as a Tier III offender. This request was filed within 60 days of Dehler receiving notice of his classification, thus it was timely. R.C. 2950.032(E).

{¶106} Dehler had a right to a hearing pursuant to R.C. 2950.032(E), which provides, in pertinent part:

{¶107} "An offender or delinquent child who is provided a notice under division (A)(2) or (B) of this section may request *as a matter of right* a court hearing to contest the application to the offender or delinquent child of the new registration requirements under Chapter 2950 of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008." (Emphasis added.)

{¶108} R.C. 2950.032(E) states that the provisions in R.C. 2950.031 apply regarding the conduct of the hearing. R.C. 2950.031(E) provides, in part:

{¶109} "[If a hearing is properly requested, the] court shall schedule a hearing, and shall provide notice to the offender or delinquent child and prosecutor *of the date, time, and place of the hearing*. ***

{¶110} "*** If an offender or delinquent child requests a hearing in accordance with this division, *at the hearing, all parties are entitled to be heard*, and *the court shall consider all relevant information and testimony* presented relative to the application to the offender or delinquent child of the new registration requirements under Chapter 2950 of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008. ***" (Emphasis added.)

{¶111} The "non-oral hearing" that occurred in this matter did not give Dehler an opportunity to be heard or to present testimony. Also, it did not occur at a specific "date, time, and place."

{¶112} The majority cites to the following language of R.C. 2950.031(E), which indicates the Rules of Civil Procedure are to apply to these hearings:

{¶113} "In any hearing under this division, the Rules of Civil Procedure *** apply, *except to the extent that those Rules would by their nature be clearly inapplicable*." (Emphasis added.)

{¶114} The majority uses this language to conclude that non-oral hearings are permitted in summary judgment exercises pursuant to Civ.R. 56 and, thus, a hearing was not required in this matter. The majority also notes that Civ.R. 7(B)(2) and Loc.R.

9.06 of the Trumbull County Court of Common Pleas permit certain motions to be decided without an oral hearing.

{¶115} I believe rules of civil procedure (or local rules) that are in direct conflict to the mandate of the statute to conduct a hearing are "by their nature *** clearly inapplicable." See R.C. 2950.031(E). Moreover, pursuant to the language of the statute, the Rules of Civil Procedure apply *at the hearing*.

{¶116} The requirement of having a hearing appears, on its face, to be somewhat nonsensical. The limited issues the trial court is permitted to consider appear to be capable of resolution by simple administrative review. However, by mandating a hearing, it appears the legislature has attempted to provide a procedural safeguard to an otherwise unattractive due process picture. Whatever the reason, the legislature did not *suggest* a hearing, nor did it make the hearing an *option*. I believe the clear language, no matter how empty a right it supports, can only be read to *mandate* a hearing. As a result, I do not believe the legislature intended for a court to use a rule of civil procedure or a local rule to supersede its unambiguous directive that a hearing occur.

{¶117} The statute calls for a hearing. Dehler did not receive a hearing. Accordingly, I would reverse the judgment of the Trumbull County Court of Common Pleas and remand this matter to the trial court in order for the trial court to provide Dehler with his statutory right to a hearing.[3]

3. I note that, pursuant to R.C. 2950.032(E), this hearing should occur by video conferencing, if such technology is available, unless the trial court determines that "the interests of justice" require Dehler to be physically present.