[Cite as *State v. Shepherd*, 2009-Ohio-5760.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Respondent-Appellee,	:	**CASE NO. 2009-T-0009**
- vs -	:	
CHARLES SHEPHERD,	:	
Defendant-Petitioner-Appellant.	:	

Appeal from the Court of Common Pleas, Case No. 08 CV 1012.

Judgment: Reversed and remanded.

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 Plaintiff-Respondent-Appellee).

Charles Shepherd, pro se, P.I.D. 434-286, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, OH 44430-0901 (Defendant-Petitioner-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Charles Shepherd appeals from the trial court's entry of summary judgment in favor of the state, finding that he was properly classified as a Tier III Sex Offender, 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} In 2002, Shepherd was indicted on one count of rape, in violation of R.C.

2907.02 with sexually-violent-predator and repeat-violent-offender specifications, and one count of attempted kidnapping, in violation of R.C. 2905.01 with sexual-motivation and repeat-violent-offender specifications. A jury trial ensued, and Shepherd was found guilty of both counts. The trial court sentenced Shepherd to an indefinite prison term of 20 years to life on the rape charge and eight years on the attempted kidnapping charge. In addition, Shepherd was sentenced to ten years for the sexual-motivation specification attached to the kidnapping charge, for a total prison term of 38 years to life.

{¶3} Shepherd received a letter from the Ohio Attorney General in February 2008. The letter stated that, pursuant to the newly-enacted AWA, Shepherd had been classified as a Tier III sexual offender, and that he now would be required to register with the county sheriff once every 90 days for the rest of his life. In response to this letter, Shepherd filed a timely petition in the Trumbull County Court of Common Pleas to contest the application of the new "sexual offender" law to his prior conviction. Thereafter, he filed a motion for summary judgment. Shepherd also filed a renewed motion for appointment of counsel, which was denied by the trial court.

{¶4} Through these filings Shepherd raised numerous arguments. Shepherd argues 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. Therefore, because Shepherd was served with notice on February 24, 2008, he claims he is not subject to the Act. He further alleged double jeopardy, ex post facto, and separation of powers violations.

{¶5} The state of Ohio filed a motion for summary judgment in June 2008 in response to Shepherd's petition. In addition, the state of Ohio filed a response to

Shepherd's motion for summary judgment in July 2008. The trial court granted the state's motion for summary judgment and denied all of Shepherd's pending motions, including his request for an oral hearing. The trial court concluded that the AWA did not violate the constitutional principles of double jeopardy, retroactivity, ex post facto, separation of powers, and the basic right to contract.

{¶6} It is from this judgment that Shepherd filed a timely notice of appeal and asserts the following assignments of error for our review:

{¶7} "[1.] The trial court erred by not granting [Appellant'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.

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

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

{¶10} "[4.] The [AWA] amendments to R.C. 2950.01 et seq., do not apply to the [Appellant] because he was sentenced in 2002 and the current application of the AWA violates, Clause 1, Section 10, Article I, of the United States Constitution as ex post facto legislation, and violates Section 28, Article 11, of the Ohio Constitution as retroactive legislation."

{¶11} Under his first assignment of error, Shepherd asserts the DRC lacked jurisdiction to serve his "Notice of New Classification and Registration Duties" after

December 1, 2007. Shepherd, in his motion for summary judgment, included an affidavit asserting that he did not receive this notice until February 24, 2008.

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

{¶13} "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.)

{¶14} Pursuant to R.C. 2950.032, "[a]ttorney general to determine tier classification for each offender or delinquent child; notice of provisions implemented on January 1, 2008," the Attorney General 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*." R.C. 2950.032(A)(2). (Emphasis added.)

{¶15} With respect to this issue, this court stated in *State v. Dehler*, 11th Dist. No. 2008-T-0061, 2009-Ohio-5059:

{¶16} "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.

{¶17} "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.

{¶18} "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.

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

{¶20} "'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 of 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.' ***

{¶21} "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. Id. at ¶41-47. (Emphasis sic.)

{¶22} "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."

{¶23} While Shepherd maintains he did not receive his notice until February 28, 2008, a review of the record in the instant case reveals Shepherd's "Notice of New Classification and Registration Duties" was dated November 30, 2007. Therefore, it is evident that the Attorney General classified Shepherd as a Tier III sex offender on said date. Moreover, as stated, Shepherd is currently incarcerated due to his 2002 convictions for rape and attempted kidnapping. Consequently, Shepherd is not relieved from complying with the requirements set forth in the Act.

{¶24} Based on the foregoing, Shepherd's first assignment of error is without merit.

{¶25} Under Shepherd's second assignment of error, he contends the trial court erred in not granting a hearing pursuant to R.C. 2950.032(E). We agree.

{¶26} Shepherd 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 Shepherd receiving notice of his classification, thus it was timely. R.C. 2950.032(E).

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

{¶28} "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.)

{¶29} 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:

{¶30} "[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*. ***

{¶31} "*** 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.)

{¶32} The "non-oral hearing" that occurred in this matter did not give Shepherd an opportunity to be heard or to present testimony.

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

{¶34} "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.)

{¶35} The state of Ohio 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 state of Ohio also maintains 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.

{¶36} 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*. The legislature did not intend for a court to use a rule of civil procedure or a local rule to supersede its unambiguous directive that a hearing occur.

{¶37} 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 suspect due process picture. Whatever the reason, the legislature did not

suggest a hearing, nor did it make the hearing an option. The clear language, no matter how empty a right it supports, can only be read to mandate a hearing. As a result, the legislature did not intend for a court to use a rule of civil procedure or a local rule to supersede its unambiguous directive that a hearing occur.

{¶38} The statute calls for a hearing that, pursuant to R.C. 2950.032(E), should occur by video conferencing, if such technology is available, unless the trial court determines that "the interests of justice" require Shepherd to be physically present. Shepherd did not receive a hearing, and this matter shall be remanded to the trial court in order for the trial court to provide Shepherd with his statutory right to a hearing.

{¶39} Accordingly, Shepherd's second assignment of error is with merit.

{¶40} Based on the disposition of Shepherd's second assignment of error, the third and fourth assignments of error are not ripe for review.

{¶41} It is the order and judgment of this court that the judgment of the Trumbull County Court of Common Pleas is hereby reversed and this matter is remanded for proceedings consistent with this opinion.

CYNTHIA WESTCOTT RICE, J., concurs,

MARY JANE TRAPP, P.J., dissents with Dissenting Opinion.

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{¶42} I respectfully dissent from the majority's determination of Mr. Shepherd's second assignment of error that he was entitled to a "mandatory" hearing pursuant to

R.C. 2950.032(E). As we held in *State v. Dehler*, 11th Dist. No. 2008-T-0061, 2009-Ohio-5059, nothing in R.C. 2950.032(E) requires the court to hold an oral hearing upon the petitioner's request for a reclassification hearing.

{¶43} "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." Id. at ¶51 (emphasis added).

{¶44} Firstly, the docket reflects that the court sent proper notice on July 22, 2008, that a hearing was scheduled for August 22, 2008, on Mr. Shepherd's motion for summary judgment.

{¶45} 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 a motion *without oral hearing* upon brief written statements of reasons in support and opposition." (Emphasis added.) Local Rule 9.06 of the Trumbull County Court of Common Pleas further provides that "[e]very motion shall state its nature with specificity, and be submitted and determined upon the papers hereinafter referenced. *Oral arguments may be permitted on application and proper showing*. ***." (Emphasis added.)

{¶46} 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).'" *Dehler* at ¶54, quoting *Marino v. Oriana House, Inc.*, 9th Dist. No. 23389, 2007-Ohio-1823, ¶12.

{¶47} Quite simply, this is not a case where the court must determine at an evidentiary hearing whether Mr. Shepherd was properly classified. Mr. Shepherd was convicted of one count of rape in violation of R.C. 2907.02, as well as one count of attempted kidnapping in violation of R.C. 2905.01. Thus, 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.

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

{¶49} "***.

{¶50} "*A violation of section 2907.02 *** of the Revised Code.*"

{¶51} 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, or conspiracy. See R.C. 2950.01.

{¶52} The very fact that Mr. Shepherd was convicted 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. Thus, I respectfully dissent from this portion of the majority's opinion.