[Cite as *In re R.J.G.*, 2009-Ohio-6150.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

IN RE: R.J.G., DELINQUENT CHILD	:	**O P I N I O N**
	:	**CASE NO. 2008-L-187**
	:	
	:	

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 2006 DL 0992.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel,* Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Appellee State of Ohio).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp,* Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Appellant R.J.G.).

MARY JANE TRAPP, P.J.

{¶1} R.J.G., a juvenile sex offender, appeals from a judgment of the Juvenile Division of the Lake County Court of Common Pleas, which denied his petition contesting his reclassification as a Tier III offender. For the following reasons, we affirm the judgment of the court.

{¶2} On August 2, 2006, R.J.G., 15 years old at the time, pled true in the juvenile court, pursuant to a plea bargain,[1] to one count of rape, in violation of R.C.

1. The record reflects that the parties entered into the plea agreement without considering R.J.G.'s sex offender status; the parties subsequently reached a stipulation and recommended to the court that R.J.G. be found a sexually oriented offender.

2907.029(A)(1)(b), and two counts of gross sexual imposition, in violation of R.C. 2907.05. These charges arose from multiple incidents where he engaged in sexual conduct with a six-year-old girl and an eleven-year-old girl. Apparently he committed these offenses as a result of becoming "addicted to sex" after viewing lewd magazines and pornography. The court classified him as a juvenile offense registrant ("JOR"), and labeled him as a sexually oriented offender, for which he was required to register annually for 10 years.

{¶3} On November 29, 2007, the Ohio Attorney General sent his parents notice of his new classification as a Tier III offender under the Adam Walsh Act, which required him to register every 90 days for life. He filed a petition to contest his reclassification. The trial court overruled his constitutional claims and denied his petition. R.J.G. now appeals and raises the following assignments of error for our review:

{¶4} "[1.] Application of S.B. 10 to classify the delinquent child-appellant as a Tier III offender violates the ex post facto clause of the United States Constitution.

{¶5} "[2.] Application of S.B. 10 to classify the delinquent child-appellant as a Tier III offender violates the retroactive laws clause of the Ohio Constitution.

{¶6} "[3.] Application of S.B. 10 to classify the delinquent child-appellant as a Tier III offender violates the separation of powers doctrine of the Ohio Constitution.

{¶7} "[4.] Application of S.B. 10 to classify the delinquent child-appellant as a Tier III offender violates the double jeopardy clause of the United States Constitution and the Retroactivity Clause of Section 28, Article II of the Ohio Constitution.

{¶8} "[5.] Application of S.B. 10 to classify the delinquent child-appellant as a Tier III offender violates the Eighth Amendment to the United States Constitution's prohibition against cruel and unusual punishments."

{¶9} **Senate Bill 10**

{¶10} 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.

{¶11} Prior to Senate Bill 10, when a criminal 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. 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.

{¶12} 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.

{¶13} Under the new statutory scheme, 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.

{¶14} **Juvenile Sex Offenders**

{¶15} Senate Bill 10, as in earlier versions of Ohio's sex offender registration statutes, applies to both adult sex offenders and juvenile sex offenders. See R.C. 2950.01(B)(1) ("sex offender" includes a person who is "adjudicated a delinquent child

for committing, or has been adjudicated a delinquent child for committing any sexually oriented offense"). The classification scheme for juvenile sex offenders is governed by both R.C. Chapter 2152 and R.C. Chapter 2950. As with the earlier version of the law, Senate Bill 10 requires the juvenile court to engage in a two-step process. See *In re C.A.*, 2d Dist. No. 23022, 2009-Ohio-3303, ¶37.

{¶16} First, the court must determine whether the juvenile sex offender should be designated as a juvenile offender registrant ("JOR") and, therefore, subject to classification and the attendant registration requirements. For certain juvenile sex offenders, the JOR designation is mandatory. See R.C. 2152.82 (applicable to juvenile sex offenders 14 or older who had previously committed a sexually oriented offense); R.C. 2152.83(A)(1) (applicable to juvenile offenders 16 or older); and R.C. 2152.86 (applicable to "serious youthful offenders" who are additionally designated as "public registry-qualified juvenile offender registrant"). For juvenile offenders who are 14 or 15 without prior adjudication for a sexually oriented offense and who do not fall within R.C. 2152.86, the trial court has the discretion to determine whether the juvenile offender should be considered a JOR therefore subject to the registration requirement. See R.C. 2152.83(B)(1) and *In re C.A.* at ¶37.

{¶17} Second, the statutory scheme for the juvenile sex offenders requires the juvenile court to conduct a hearing to determine the tier in which to classify the juvenile offender. R.C. 2152.831(A); R.C. 2152.83(A)(2). Unlike the adult sex offenders, who are classified based on the offense committed, the tiers for the juveniles are determined somewhat differently. For instance, a Tier III sex offender is defined, in part, as a "sex offender who is adjudicated a delinquent child for committing or has been adjudicated a

delinquent child for committing any sexually oriented offense and who a juvenile court, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier III sex offender/child-victim offender relative to the offense." (Emphasis added.) R.C. 2950.01(G)(3). Unlike the automatic classification of the adult sex offenders, the juvenile court is authorized to exercise its discretion at the classification hearing. Our interpretation of the statute as vesting the juvenile court with discretion in classifying the juvenile offenders is shared by several other appellate districts. See *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076, ¶37 (the statutes vest a juvenile court with full discretion to determine whether to classify a delinquent child as a Tier I, Tier II, or Tier III offender); *In re S.R.P*., 12th Dist. No. CA2007-11-027, 2009-Ohio-11, ¶43 (the appellate court read Senate Bill 10 as giving juvenile courts the discretion to determine which tier level to assign to a delinquent child; regardless of the sexually oriented offense that the child committed, Senate Bill 10 does not forbid a juvenile court from taking into consideration multiple factors, including a reduced likelihood of recidivism); *In re Adrian R*., 5th Dist. No. 08-CA-17, 2008-Ohio-6581, ¶17; *In re J.M.*, 8th Dist. No. 91800, 2009-Ohio-2880, ¶11; *In re C.A.* at ¶68.[2]

{¶18} Another significant distinction between the statutory scheme for the adult and juvenile sex offenders is the multiple opportunities afforded to the juvenile offenders for review and reclassification. A juvenile is entitled to have his classification reviewed "upon completion of the disposition of that child made for the sexually oriented offense." R.C. 2152.84(A)(1). Furthermore, the juvenile may petition the court for a mandatory

2. We are aware the Third District held a contrary view and interpreted the statute as leaving the juvenile court little, if any discretion in the classification. *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234. The Supreme Court of Ohio, however, has accepted a discretionary appeal of that case. *In re Smith*, 120 Ohio St.3d 1416, 2008-Ohio-6166.

hearing to reevaluate his classification after the passage of a designated number of years. R.C. 2152.85(A) and (B); *In re G.E.S.* at ¶26; *In re C.A.* at ¶39.

{¶19} In the instant appeal, R.J.G. raises five constitutional claims. This court has addressed and rejected similar claims regarding the ex post facto clause, the prohibition against retroactive law, and separation of powers in *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, and *State v. Charette*, 11th Dist. No. 2008-L-069, 2009-Ohio-2952. We have also rejected the double jeopardy claim in *State v. Maggy*, 11th Dist. No. 2008-T-0078, 2009-Ohio-3180. As did all other appellate districts in the state,[3] we rejected these constitutional claims, based on the Supreme Court of Ohio's characterization of the prior sex offender registration statutes as civil and remedial rather than criminal. *State v. Cook* (1998), 83 Ohio St.3d, 404; *State v. Williams* (2000), 88 Ohio St.3d 513, 528. We note the Supreme Court of Ohio has not only employed the civil rather than criminal decisional construct in analyzing earlier sexual predator classification and registration statutes, but also in determining the applicable standard of review to be used in sex-offender-classification proceedings. *In State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, the court, citing both *Cook* and *Williams*, held that "[c]onsistent with our jurisprudence in those cases, we find that the sex-offender-classification proceedings under R.C. Chapter 2950 are civil in nature and

3. See *Sewell v. State*, 181 Ohio App.3d 280, 2009-Ohio-872; *State v. Desbiens*, 2d No. 22490, 2008-Ohio-3375; *In re Smith* 3d Dist. No. 1-07-58, 2008-Ohio-3234; *State v. Longpre*, 4th Dist. No. 08CA3017, 2008-Ohio-3832; *State v. Hughes*, 5th Dist. No. 2008-CA-23, 2009-Ohio-2406; *State v. Bodyke*, 6th Dist. Nos. H-07-040, H-07-041, and H-07-042, 2008-Ohio-6387; *State v. Byers,* 7th Dist. No. 07 CO 39, 2008-Ohio-5051; *State v. Holloman-Cross*, 8th Dist. No. 90351, 2008-Ohio-2189; *In re G.E.S.*; *State v. Gilfillan*, 10th Dist. No. 08AP-317, 2009-Ohio-1104; *Ritchie v. State,* 12th Dist. No. CA2008-07-073, 2009-Ohio-1841.

that a court of appeals must apply the civil manifest-weight-of-the-evidence standard in its review of the trial court's findings." Id. at ¶32.

{¶20} Unless and until the Supreme Court of Ohio reverses or modifies this decisional construct we are constrained by the weight of precedent. We are aware the court 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). Therefore, 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. 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*, *Wilson*, and *Ferguson*, as we did in the unanimously decided case in *Swank*. See, also, Charette (O'Toole, J., dissenting). Until the highest court of the state decides otherwise, the principle of stare decisis dictates that we follow our court's precedent thereby creating stability and predictability in our legal system.

{¶21} We also recognize that in the previous cases we have reviewed the constitutional challenges on Senate Bill 10 in the context of adult sex offenders, but we fail to see how the nature of the registration requirements would transform from civil to criminal when applied to a juvenile sex offender.

{¶22} **Cruel and Unusual Punishment**

{¶23} R.J.G. raises an additional argument based on his juvenile status. He argues that subjecting him to the onerous Tier III registration and classification requirements similar to adult sex offenders constitutes cruel and unusual punishment, maintaining that the courts in Ohio have long recognized the fundamental differences between juvenile and adult offenders and have traditionally treated them differently.

{¶24} The cruel and unusual punishment claim is only cognizable in the criminal or punitive context. *Powell v. Texas* (1968), 392 U.S. 514, 532; see, also, *Hiscox v. Hiscox*, 7th Dist. No. 07 CO 7, 2008-Ohio-5209, ¶76 (the constitutional protection against cruel and unusual punishment applies only to criminal proceedings); *Buemi v. Ohio Insulation & Acoustics* (Sept. 21, 1995), 8th Dist. No. 68460, 1995 Ohio App. LEXIS 4107, *10. Given the Supreme Court of Ohio's prior determination that the sex offender registration statutes are civil and remedial, rather than criminal, the Eighth Amendment prohibition against cruel and unusual punishment is not implicated, whether applied to adult or juvenile sex offenders. *In re Smith* at ¶37.

{¶25} R.J.G. argues the application of Senate Bill 10 to juvenile sex offenders is particularly cruel because juveniles have an inherent amenability to rehabilitation. We note that the sexual offender registration statutes do take into account the juvenile sex offenders' ages and treat them differently. For example, the juvenile sex offenders have multiple opportunities for reclassification, R.C. 2152.84(A)(1) and R.C. 2152.85(A)-(B); the court has discretion to impose victim and community notification provisions, R.C. 2152.83(C)(2); and the delinquent children are required to register their information on a public database only if the court determines they are "public registry-qualified

juveniles" (a designation applicable to those with one prior sexually oriented offense). R.C. 2950.13(A)(11). The juvenile sex offender scheme allows the juvenile offenders to prove their rehabilitation to the court and authorizes the court to exercise its discretion to lower or remove their sexual offender status.

{¶26} For all the foregoing reasons, we join the Third, Fifth, Eighth, Ninth, and Twelfth Appellate Districts and uphold the constitutionality of Senate Bill 10 regarding the juvenile offenders. See *In the Matter of Copeland*, 3d Dist. No. 1-08-40, 2009-Ohio-190; *Andrian R.*; *In re J.M.*; *In re G.E.S.*; *In re A.R.*, 12th Dist. No. CA2008-03-036, 2008-Ohio-6566. R.J.G.'s assignments of error are overruled.

{¶27} The judgment of the Juvenile Division of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

TIMOTHY P. CANNON, J., concurs with Concurring Opinion.

TIMOTHY P. CANNON, J., concurring.

{¶28} I concur with the majority's opinion upholding the constitutionality of Senate Bill 10 with respect to its application to juvenile offenders.

{¶29} I write separately, however, to distinguish my position on Senate Bill 10 as it applies to juvenile sex offenders, to that stated in *State v. Ettenger*, 11th Dist. No. 2008-L-054, 2009-Ohio-3525. In *Ettenger*, I determined Senate Bill 10 as applied to Ettenger violated, inter alia, the Ex Post Facto Clause of the United States Constitution,

the Retroactivity Clause of the Ohio Constitution, and the Double Jeopardy Clauses of the Ohio and United States Constitutions. Id. at ¶10-74. In arriving at this conclusion, I noted that under Senate Bill 10, an adult offender is no longer classified upon his or her threat to the community, but solely on crimes he or she committed, and that trial courts are no longer authorized to engage "in an independent classification hearing to determine an offender's likelihood of recidivism[.]" Id. at ¶27.

{¶30} Alternatively, as noted by the majority, Senate Bill 10, as applied to juvenile sex offenders, *requires* the juvenile court to engage in a hearing and to exercise discretion when determining his or her classification. See R.C. 2152.831(A). In addition, Senate Bill 10 entitles a juvenile sex offender to have his or her classification reviewed and grants the juvenile court discretion to continue or modify the juvenile's classification. R.C. 2152.84(A)(1). In a remarkable contrast, Senate Bill 10 *requires* the trial court to *substantially* increase the reporting requirements for adults in certain instances *without any meaningful hearing*. However, a juvenile court is prohibited from increasing the classification of a juvenile sex offender even *after* a hearing. R.C. 2152.84(A)(2)(c).