[Cite as *State v. Durben*, 2009-Ohio-3977.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 09-CA-0003
COREY RAYMOND DURBEN	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Coshocton County Court of Common Pleas, Case Nos. 08-CI-0650 & 08-CI-0054
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 10, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JASON W. GIVEN Coshocton County Assistant Prosecutor 318 Chestnut Street Coshocton, OH 43812	JEFFREY A. MULLEN Coshocton County Public Defender 239 N. Fourth Street Coshocton, OH 43812

Gwin, P.J.

{¶1} Defendant-appellant Cory Raymond Durben appeals from the trial court's denial of the petition contesting his reclassification as a Tier II sex offender under R.C. 2950.01, et seq., as amended by Senate Bill ["S.B.]10, also known as the "Adam Walsh Act" ["AWA"] a law which was in effect on the date the trial court re-classified appellant, but which was not in effect on the date he committed the sexual offense in question. Appellant now challenges the constitutionality of S.B. 10, effective January 1, 2008, which eliminated the prior sex offender classifications and substituted a three-tier classification system based on the offense committed. Appellant maintains that R.C. Chapter 2950, as amended by S.B. 10, violates the federal and Ohio constitutional prohibitions against ex post facto or retroactive laws, the doctrine of separation of powers and amounts to double jeopardy. Briefly, the relevant facts of this case are as follows.

{¶2} On November 19, 2004, appellant was convicted of one count of Importuning, pursuant to R.C. 2907.07(A), and one count of Attempted Unlawful Sexual Conduct with a Minor, pursuant to R.C. 2923.02(A) in Coshocton County Common Pleas Court case number 2004-CR-430. As a result, appellant was classified as a sexually oriented offender and ordered to adhere to the reporting requirements set forth for that classification.

{¶3} On or about December 1, 2007, appellant received a Notice of New Classification and Registration Duties, based on Ohio's Adam Walsh Act, from the Office of the Attorney General.

{¶4} On January 22, 2008, appellant timely filed a Petition to Contest Application of the Adam Walsh Act with the Court of Common Pleas pursuant to R.C. 2950.031(E) and 2950.032(E), challenging both the level of his classification and the application of the Act itself.

{¶5} On October 2, 2008 appellant further filed a Complaint for Declaratory Judgment and Injunctive Relief, as a supplement to his prior filing. Appellant incorporated the earlier filing within his complaint, and the new filing was assigned case number 08-CI-0650.

{¶6} By Judgment Entry filed January 8, 2009, the court denied the relief requested in each of appellant's petitions.

{¶7} It is from the trial court's January 8, 2009 Judgment Entry that appellant now appeals, raising the following five assignments of error:

{¶8} "I. THE COURT ERRED IN DENYING APPELLANT'S PETITION IN THAT THE *FERGUSON* CASE DID NOT APPLY TO THE ADAM WALSH ACT.

{¶9} "II. THE COURT ERRED IN DENYING APPELLANT'S PETITION IN THAT THE ADAM WALSH ACT AS RETROACTIVELY APPLIED IS AN IMPERMISSIBLE *EX POST FACTO* LAW.

{¶10} "III. THE COURT ERRED IN DENYING APPELLANT'S PETITION AS APPLICATION OF OHIO'S AWA IN HIS CASE IS A RETROACTIVE LAW.

{¶11} "IV. THE COURT ERRED IN DENYING APPELLANT'S PETITION IN THAT HIS RECLASSIFICATION VIOLATES THE SEPARATION OF POWERS DOCTRINE.

{¶12} "V. THE COURT ERRED IN DENYING APPELLANT'S PETITION IN THAT APPLICATION OF THE AWA IN HIS CASE REPRESENTED A DOUBLE JEOPARDY VIOLATION."

I, II, & III

{¶13} In his first assignment of error appellant maintains that the trial court erred in basing its decision to overrule appellant's petition upon the Ohio Supreme Court's decision in *State v. Ferguson*, 120 Ohio St.3d 7, 896 N.E.2d 110, 2008-Ohio-4824. Appellant argues that the decision in *Ferguson* was decided prior to the enactment of S.B. 10. According to appellant, this renders the trial court's decision invalid. We disagree.

{¶14} We begin our analysis of the trial court's decision in the case at bar by noting a reviewing court is not authorized to reverse a correct judgment merely because it was reached for the wrong reason*. State ex rel. Sawicki v. Court of Common Pleas of Lucas Cty*, 121 Ohio St.3d 507, 905 N.E.2d 1192, 2009 -Ohio- 1523 at ¶ 21; *State v. Lozier* (2004), 101 Ohio St.3d 161, 166, 2004-Ohio-732 at ¶46, 803 N.E.2d 770, 775. [Citing State *ex rel. McGinty v. Cleveland City School Dist. Bd. of Edn.* (1998), 81 Ohio St.3d 283, 290, 690 N.E.2d 1273]; *Helvering v. Gowranus* (1937), 302 U.S. 238, 245, 58 S.Ct. 154, 158.

{¶15} Accordingly, the fact that the trial court analogized the so-called Adam Walsh Act with the previous version of the statute known popularly as Megan's Law, is not necessarily dispositive. We will turn our attention to appellant's remaining assignments of error to determine whether the trial court erred by denying appellant's petitions.

{¶16} In his second and third assignments of error, appellant maintains that his classification as a tier two sex offender pursuant to the Adam Walsh Act violates the prohibitions against ex post facto and retroactive laws that impair vested, substantive rights provided in the United States and Ohio Constitutions.

{¶17} This court has examined identical arguments and has rejected them. *State v. Gooding*, 5th Dist. No. 08 CA 5, 2008-Ohio-5954 at ¶37; See also, *Sigler v. State*, Richland App. No. 08-CA-79, 2009-Ohio-2010. Virtually every Appellate District in the State has upheld the AWA against the identical challenges raised by appellant. See, *State v. Graves*, 179 Ohio App.3d 107, 2008-Ohio-5763; *Holcomb v. State*, Third Dist. Nos. 8-08-23, 8-08-25, 8-08-26, 8-08-24, 2009-Ohio-782; *State v. Bodyke*, 6th Dist. Nos. H-07-040, H07-041, H07-042, 2008-Ohio-6387; *State v. Byers*, 7th Dist. No. 07CO39, 2008-Ohio-5051; *State v. Ellis*, 8th Dist. No. 90844, 2008-Ohio-6283; *State v. Honey*, 9th Dist. No. 08CA0018-M, 2008-Ohio-4943; *State v. Christian*, 10th Dist. No. 08AP-170, 2008-Ohio-6304; *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059; *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195.

{¶18} Upon thorough review of appellant's arguments, we shall follow the law set forth in our decisions in *Gooding* and *Sigler.* On the authority of the foregoing decisions, appellant's first, second and third assignments of error are not well taken.

IV & V

{¶19} In his fourth assignment of error, appellant maintains that the legislative enactment of Senate Bill 10 unconstitutionally infringes on the power of the judiciary by stripping it of the right to determine the classification of sexual offenders. In his fifth assignment of error, appellant argues that Senate Bill 10 violates the Double Jeopardy

Clause contained in the Fifth Amendment of the United States Constitution and in Section 10, Article I of the Ohio Constitution. Specifically, appellant argues that because Senate Bill 10 is punitive in its intent and effect, the registration and community notification provisions of the statute unconstitutionally inflict a second punishment upon a sex offender for a singular offense.

{¶20} In *State ex rel. Bray v. Russell* (2000), 89 Ohio St.3d 132, 729 N.E.2d 359 the Ohio Supreme Court explained the doctrine of separation of powers: "[t]his court has repeatedly affirmed that the doctrine of separation of powers is 'implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government's. *Euclid v. Jemison* (1986), 28 Ohio St. 3d 157, 158-159, 28 OBR 250, 251, 503 N.E.2d 136, 138; *State v. Warner* (1990), 55 Ohio St.3d 31, 43-44, 564 N.E.2d 18, 31. See *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, 475, 715 N.E.2d 1062, 1085; *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 463, 668 N.E.2d 457, 465-466. See also, *State v. Firouzmandi*, 5th Dist. No. 2006-CA-41, 2006-Ohio-5823 at ¶46.

{¶21} "'The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others.' *State ex rel. Bryant v. Akron Metro. Park Dist.* (1929), 120 Ohio St. 464, 473, 166 N.E. 407, 410. See, also, *Knapp v. Thomas* (1883),

39 Ohio St. 377, 391-392; *State ex rel. Finley v. Pfeiffer* (1955), 163 Ohio St. 149, 56 O.O. 190, 126 N.E.2d 57, paragraph one of the syllabus." *Id.* at 134,729 N.E.2d 361.

{¶22} In our constitutional scheme, the judicial power resides in the judicial branch. Section 1, Article IV of the Ohio Constitution. The determination of guilt in a criminal matter and the sentencing of a defendant convicted of a crime are solely the province of the judiciary. See *State ex rel. Atty. Gen. v. Peters* (1885), 43 Ohio St. 629, 648, 4 N.E. 81, 86. See, also, *Stanton v. Tax Comm.* (1926), 114 Ohio St. 658, 672, 151 N.E. 760, 764 ("the primary functions of the judiciary are to declare what the law is and to determine the rights of parties conformably thereto"); *Fairview v. Giffee* (1905), 73 Ohio St. 183, 190, 76 N.E. 865, 867 ("It is indisputable that it is a judicial function to hear and determine a controversy between adverse parties, to ascertain the facts, and, applying the law to the facts, to render a final judgment.").

{¶23} The classification of sex offenders, however, is a creature and mandate of the legislature that does not implicate the inherent power of the courts. *State v. Bodyke,* 6th Dist. Nos. H-07-040, H-07-041, H-07-042, 2008-Ohio-6387, at ¶ 22. For this reason, several courts of appeals, including this court, have concluded that the Adam Walsh Act does not violate the separation of powers doctrine. See: *In re Smith,* 3d Dist. No. 01-07-58, 2008-Ohio-3234, at ¶ 39; State *v. Messer,* 4th Dist. No. 08CA3050, 2009-Ohio-312, at ¶ 23-26; *In re A.R.,* 5th Dist. No. 08-CA-17, 2008-Ohio-6581, at ¶ 34; *State v. Byers,* 7th Dist. No. 07CO39, 2008-Ohio-5051, at ¶ 73-74; *State v.* Reinhardt, 9th Dist. 08CA0012-M, 2009-Ohio-1297 at ¶29 *State v. Williams,* 12th Dist. No. CA2008-02-029, 2008-Ohio-6195, at ¶ 99-102; This Court agrees with the rationale offered by other

districts and concludes that the Adam Walsh Act does not violate the separation of powers doctrine.

{¶24} Appellant's final argument under the fifth assignment of error asserts that Ohio's Adam Walsh Act constitutes a second punishment in violation of the Double Jeopardy Clause of the United States Constitution and a similar provision in the Ohio Constitution.

{¶25} Ohio's Adam Walsh Act is not a criminal, punitive statutory scheme and does not constitute punishment for purposes of the double jeopardy clauses. *Sewell v. State,* 1st Dist. No. C-080503, 2009-Ohio-872, at ¶ 16-27; *State v. Byers,* 7th Dist. No 07 CA 39, 2008-Ohio-5051, at ¶ 100-103; *Brooks v. State,* 9th Dist. NO., 2008CA009452, 2009-Ohio-1825 at ¶21-25 ; *State v.* Reinhardt, 9th Dist. 08CA0012-M, 2009-Ohio-1297 at 28; *State v. Williams,* 12th Dist. No. CA2008-02-029, 2008-Ohio-6195 at ¶ 107-111.

{¶26} This Court agrees with the rationale offered by other districts and concludes that the Adam Walsh Act does not violate the Double Jeopardy Clause of the United States Constitution or the Ohio Constitution.

{¶27} Appellant’s fourth and fifth assignments of error are overruled.

{¶1} Senate Bill 10 is constitutional and, as courts across the Ohio have repeatedly held, does not violate substantive or procedural due process, nor does it violate prohibitions against retroactive or ex post facto laws.

{¶28} The decision of the Coshocton County Court of Common Pleas is therefore affirmed.

By Gwin, P.J.,

Hoffman, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. PATRICIA A. DELANEY

WSG:clw 0717

[Cite as *State v. Durben*, 2009-Ohio-3977.]

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
COREY RAYMOND DURBEN	:	
Defendant-Appellee	:	CASE NO. 09-CA-0003

For the reasons stated in our accompanying Memorandum-Opinion, The judgment of the Coshocton County Court of Common Pleas is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. PATRICIA A. DELANEY