

[Cite as *Barkimer v. State*, 2009-Ohio-4431.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KYLE C. BARKIMER

Petitioner-Appellee

-vs-

STATE OF OHIO

Respondent-Appellant

JUDGES:

Hon. John W. Wise, P. J.

Hon. Julie A. Edwards, J.

Hon. Patricia A. Delaney, J.

Case No. 08 CA 174

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 07 CV 1900D

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

August 24, 2009

APPEARANCES:

For Petitioner-Appellee

KRIEG J. BRUSNAHAN
158-A Lear Road
Avon lake, Ohio 44012

For Respondent-Appellant

FRANK ARDIS, JR.
KIRSTEN PSCHOLKA-GARTNER
ASSISTANT PROSECUTORS
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Wise, P. J.

{¶1} Respondent-Appellant, the State of Ohio, through the Richland County Prosecutor's Office, appeals the Richland County Court of Common Pleas ruling finding Senate Bill [S.B.] 10, Ohio's sexual offender classification and registration scheme, to be unconstitutional in its entirety.

{¶2} Defendant-Appellee, Kyle Barkimer, contested his reclassification as a Tier III sex offender under R.C. 2950.01, et seq., as amended by S.B.10, also known as the "Adam Walsh Act" a law which was in effect on the date the State re-classified Appellee, but which was not in effect on the date he committed the sexual offense in question. Appellee challenged the constitutionality of Ohio's 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. Appellee argued that R.C. Chapter 2950, as amended by S.B. 10, violates the prohibition against ex post facto laws, that it interferes with his right to contract because it required the state to breach his plea agreement, that it violates the separation of powers doctrine and constitutes a double jeopardy violation, and that it violates both procedural and substantive due process. Briefly, the relevant facts of this case are as follows.

{¶3} Appellee was convicted of sexual battery and unlawful sexual conduct with a minor in February, 2004. He was further classified a sexually oriented offender and ordered to adhere to the reporting requirements set forth for that classification.

{¶4} On or about November 30, 2007, Appellee received a Notice of New Classification and Registration Duties, based on Ohio's Adam Walsh Act, from the

Office of the Attorney General. The Notice indicated that he was being classified as a Tier III Offender.

{¶5} On December 24, 2007, Appellee, through counsel, timely filed a Motion for Immediate Relief from Community Notification Pursuant to R.C. 2950.11(F)(2) therein challenging the Attorney General's Sex Offender Classification with the Richland County Court of Common Pleas pursuant to Ohio Rev. Code 2950.031(E) and 2950.032(E), challenging both the level of his classification and the application of the Act itself.

{¶6} The trial court found that Senate Bill 10 was unconstitutional both facially and as applied to Appellee because it violated the prohibitions against both retroactive and ex post facto laws. The trial court relying upon its decision in *Sigler v. State*, Richland County Court of Common Pleas, Case No. 07 CV 1863 granted judgment in favor of Appellee.

{¶7} Appellant, State of Ohio, through the Richland County Prosecuting Attorney's Office, filed a notice of appeal, raising four assignments of error.

{¶8} On January 14, 2009, this Court *sua sponte* stayed all further proceedings in this, as well as numerous other Richland County Adam Walsh cases, pending our decision in *Sigler v. State*, Richland App. No. 08-CA-79.

{¶9} On April 27, 2009, this Court reversed the trial court's decision in *Sigler*. On May 20, 2009, this Court *sua sponte* assigned this case to the accelerated calendar.

{¶10} Appellant's four Assignments of Error are as follows:

ASSIGNMENTS OF ERROR

{¶11} "I. WHETHER, BEYOND A REASONABKE [sic] DOUBT, SENATE BILL 10 AND THE CONSTITUTIONAL PROVISIONS CITED BY THE TRIAL COURT ARE

CLEARLY INCOMPATIBLE, AND WHETHER THERE IS NO SET OF CIRCUMSTANCES UNDER WHICH THE SENATE BILL 10 WOULD BE VALID. THE TRIAL COURT PURPORTED TO INVALIDATE THE LEGISLATION, RATHER THAN THE STATUTORY PROVISIONS ACTUALLY AT ISSUE IN THIS MATTER. HENCE, BY INVALIDATING THE "ADAM WALSH ACT," THE COURT APPARENTLY PURPORTED TO INVALIDATE EVERY STATUTE [sic] AMENDED BY THE SB 10, DESPITE THE NARROW CLAIM BEFORE IT. THE COURT BELOW DID NOT PROPERLY APPLY, OR SUBSTANTIATE DIVERGENCE FROM, THE PRESUMPTION OF CONSTITUTIONALITY.

{¶12} "II. WHETHER SENATE BILL 10'S LEGISLATIVE ADJUSTMENT TO THE FREQUENCY AND DURATION OF APPELLE'S [sic] PRE-EXISTING DUTY TO REGISTER RENDERED THE STATUTE UNCONSTITUTIONALLY RETROACTIVE. A STATUTE FOUND TO BE RETROACTIVE IS ONLY UNCONSTITUTIONAL IF IT SIGNIFICANTLY BURDENS A VESTED SUBSTANTIVE RIGHT, BUT NOT IF IT IS REMEDIAL. AS THE OHIO SUPREME COURT HAS CONSISTENTLY HELD UNDER THE STATUTORY FRAMEWORK AMENDED BY THE SENATE BILL 10, THAT FRAMEWORK IS REMEDIAL IN NATURE. THE GENERAL ASSEMBLY EXPRESSED ITS INTENT THAT R.C. CHAPTER 2950, AS AMENDED, REMAIN REMEDIAL IN NATURE.

{¶13} "III. WHETHER SENATE BILL 10'S ADJUSTMENT TO THE FREQUENCY AND DURATION OF APPELLEE'S PRE-EXISTING DUTY TO REGISTER CONSTITUTED SUCCESSIVE PUNISHMENT IN VIOLATION OF THE *EX POST FACTO* CLAUSE. IT WAS, INSTEAD, A REMEDIAL, CIVIL STATUTE THAT DID

NOT IMPACT OFFENDERS' SENTENCES [sic] FOR THE CRIMES THEY COMMITTED.

{¶14} "IV. WHETHER A PLEA AGREEMENT BETWEEN AN OFFENDER AND THE PROSECUTING ATTORNEY CREATED A VESTED, SETTLED EXPECTATION THAT THE OFFENDER'S CLASSIFICATION WOULD NEVER CHANGE. THE CLASSIFICATIONS OF SB 10, AND PRIOR CLASSIFICATIONS IMPOSED PURSUANT TO STATUTE BY THE COURT, DO NOT, AND DID NOT, CREATE THE EXPECTATION THAT CONVICTED SEX OFFENDERS WOULD NEVER AGAIN BE THE SUBJECT OF LEGISLATIVE ACTION."

STANDARD OF REVIEW

{¶15} This case comes to us on the accelerated calendar. App. R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

{¶16} "(E) Determination and judgment on appeal. The appeal will be determined as provided by App. R. 11. 1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusory form. The decision may be by judgment entry in which case it will not be published in any form."

{¶17} One of the important purposes of accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Assn.* (1983), 11 Ohio App.3d 158.

{¶18} This appeal shall be considered in accordance with the aforementioned rules.

I, II & III

{¶19} In Appellant's first, second, and third assignments of error, Appellant contends that the trial court erred in finding Senate Bill 10 to be unconstitutional on multiple grounds. We agree.

{¶20} This Court has examined identical arguments that were accepted by the trial court in order to find S.B. 10 unconstitutional; we have rejected those arguments. *State v. Gooding*, 5th Dist. App. No. 08 CA 5, 2008-Ohio-5954; 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 that the trial court relied upon to find S.B. 10 unconstitutional. 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.

{¶21} 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 well taken.

IV.

{¶22} In its fourth assignment of error, Appellant argues that the trial court erred by finding Senate Bill 10 to be unconstitutional on the basis that it violates the right to contract pursuant to Article II, Section 28 of the Ohio Constitution. We agree.

{¶23} This Court has examined identical arguments that the trial court relied upon to find S.B. 10 unconstitutional and has rejected them. *Sigler v. State*, Richland App. No. 08-CA-79, 2009-Ohio-2010 at ¶ 88. Upon thorough review of Appellant's arguments, we shall follow the law set forth in our decision in *Sigler*. On the authority of the foregoing decision, Appellant's fourth assignment of error is well taken.

{¶24} For the foregoing reasons, we find Appellant's arguments to be meritorious and sustain all four assignments of error. Senate Bill 10 is constitutional and, as courts across the State of Ohio have repeatedly held, does not violate prohibitions against retroactive or ex post facto laws.

{¶25} The judgment of the Richland County Court of Common Pleas is therefore reversed and this case is remanded for proceedings in accordance with our opinion and the law.

By Wise, P. J.
Edwards, J., and
Delaney, J., concur.

JUDGES

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KYLE C. BARKIMER

Petitioner-Appellee

-vs-

STATE OF OHIO

Respondent-Appellant

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JUDGMENT ENTRY

Case No. 08 CA 174

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio, is reversed and remanded for further proceedings consistent with this opinion.

Costs assessed to Appellee.

JUDGES