

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RICHARD FUTO	:	JUDGES:
	:	William B. Hoffman, P.J.
	:	Julie A. Edwards, J.
Petitioner-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 08-CA-164
	:	
	:	
STATE OF OHIO	:	<u>OPINION</u>
	:	
Respondent-Appellant		

CHARACTER OF PROCEEDING: Civil Appeal from Richland County Court of Common Pleas Case No. 08-CV-407D

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: August 24, 2009

APPEARANCES:

For Petitioner-Appellee

For Respondent-Appellant

RICHARD FUTO
Inmate #A524444
Mansfield Correctional Institution
P.O. Box 788
Mansfield, Ohio 44901

FRANK ARDIS, JR.
KIRSTEN PSCHOLKA-GARTNER
Assistant Prosecuting Attorney's
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Edwards, J.

{¶1} Appellant, the State of Ohio, appeals a judgment of the Richland County Common Pleas Court finding Senate Bill 10, Ohio's Adam Walsh Act, to be unconstitutional. Appellee is Richard Futo.

STATEMENT OF FACTS AND CASE

{¶2} In 2007, appellee Richard Futo was found guilty by a jury of two counts of rape with force specifications, two counts of gross sexual imposition and two count of kidnapping with sexual motivation specifications in Cuyahoga County, Ohio. Appellee is incarcerated in Richland County. While incarcerated, appellee received notice that effective January 1, 2008, he would be reclassified for purposes of sex offender registration as a Tier III sex offender pursuant to Senate Bill 10, the Adam Walsh Act effective July 1, 2007. On February 15, 2008, appellee filed a petition in the Richland County Common Pleas Court to contest his sex offender registration reclassification, alleging that the Act is unconstitutional.

{¶3} The trial court found that based on *Sigler v. State of Ohio*, Case Number 07 CV 1863, in which the trial court had found the Adam Walsh Act to be an unconstitutional violation of the ex post facto clause and the prohibition on retroactive laws, application of the Act to appellee was barred because he had been previously sentenced and classified under the law in existence when he was sentenced.

{¶4} The state assigns four errors on appeal:

{¶5} "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 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.

{¶6} "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.

{¶7} "III. WHETHER SENATE BILL 10'S LEGISLATIVE 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.

{¶8} “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.”

I, II, III, IV

{¶9} The first three assignments of error raised by appellant are identical to those raised by the State of Ohio in *Sigler v. Ohio*, Richland App. No. 08-CA-79, 2009-Ohio-2010. In *Sigler*, we sustained all of such assignments of error, finding that the trial court erred in finding the Adam Walsh Act facially unconstitutional, and erred in finding the Act is unconstitutionally retroactive and violates the ex post facto clause.

{¶10} With respect to appellant’s fourth assignment of error, we note that appellee, in the case sub judice, did not enter a plea, but rather was convicted following a jury trial. Therefore, said assignment is moot.

{¶11} For the reasons stated in *Sigler*, supra, we sustain the first three of appellant's assignments of error. Appellant's fourth assignment of error is moot.

{¶12} The judgment of the Richland County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings.

By: Edwards, J.
Hoffman, P.J. and
Delaney, J. concur

JUDGES

JAE/d0729

[Cite as *Futo v. State*, 2009-Ohio-4745.]

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

RICHARD FUT0

Petitioner-Appellee

-vs-

STATE OF OHIO

Respondent-Appellant

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JUDGMENT ENTRY

CASE NO. 08-CA-164

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings. Costs assessed to appellee.

JUDGES