

[Cite as *State v. Butler*, 2010-Ohio-4619.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	
-vs-	:	Case No. 10 CA 5
	:	
	:	
LONNIE W. BUTLER	:	<u>OPINION</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING: Criminal Appeal from Ashland County Court of Common Pleas Case No. 08 IND 001

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: September 24, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

RAMONA FRANCESCONI ROGERS
Ashland County Prosecutor

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Edwards, P.J.

{¶1} Defendant-appellant, Lonnie Butler, appeals from the January 15, 2010, Judgment Entry of the Ashland County Court of Common Pleas dismissing his Petition to Challenge New Classification and Registration Requirements. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} In 1996, appellant was convicted of one count of felonious sexual penetration and one count of gross sexual imposition in violation of R.C. 2907.12(A)(1)(B) and R.C. 2907.05(A)(4) respectively. Pursuant to an Opinion filed in *State v. Wade* (Jan. 29, 1997), Lorain App. No. 96CA006343, 1997 WL 66217, appellant's convictions were affirmed. During his incarceration, appellant was classified as a sexually oriented offender.

{¶3} Subsequently, the United States District Court for the Southern District of Ohio granted appellant's petition for a writ of habeas corpus on the conditional basis that he be released unless his appeal was reopened in state court within 90 days of the mandate, which was issued on April 17, 2001. See *Butler v. Mohr*, (6th Cir. 2001), 8 Fed. Appx. 359. When the court refused to reinstate appellant's appeal, the district court issued an unconditional writ on July 12, 2001, and appellant was released from custody on July 16, 2001. On March 26, 2003, the United States Court of Appeals for the Sixth Circuit affirmed such decision. See 65 Fed Appx. 923.

{¶4} On or about November 26, 2007, appellant, who was residing in Ashland County, received a Notice of New Classification and Registration Duties, based on Ohio's Adam Walsh Act. Ohio Senate Bill 10 was passed to implement the federal

Adam Walsh Act. S.B. 10 became effective January 1, 2008. The notice indicated that appellant was being classified as a Tier III sex offender.

{¶5} On January 10, 2008, appellant filed a Petition to Challenge New Classification and Registration Requirements pursuant to R.C. 2950.031(E). Appellant, in his Petition, argued that application of the Adam Walsh Act to him violated the prohibitions against retroactive and ex post facto laws. Appellant also argued that “he should have no reporting requirements for the reason that his unlawful imprisonment was terminated by habeas corpus.” In a supplemental memorandum filed on April 23, 2008, appellant argued that application of the Adam Walsh Act to him violated the separation of powers doctrine, constituted a double jeopardy violation and violated both procedural and substantive due process.

{¶6} Appellee filed a Motion to Dismiss appellant’s petition on May 27, 2009. Pursuant to a Judgment Entry filed on January 15, 2010, the trial court dismissed appellant’s petition.

{¶7} Appellant now raises the following assignments of error on appeal:

{¶8} “I. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE STATE HAD THE POWER TO CLASSIFY MR. BUTLER AS A TIER III SEX OFFENDER.

{¶9} “II. THE TRIAL COURT ERRED WHEN IT FOUND THAT SENATE BILL 10 WAS CONSTITUTIONAL AS APPLIED TO MR. BUTLER.”

I, II

{¶10} Appellant, in his first assignment of error, argues that the trial court erred in finding that appellee had the power to classify appellant as a Tier III sex offender. In

his second assignment of error, appellant argues that the trial court erred when it found that Senate Bill 10 was constitutional as applied to appellant.

{¶11} On June 3, 2010, the Supreme Court, in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424 , held in paragraph three of the syllabus as follows: "R.C. 2950.031 and 2950.032, which require the attorney general to reclassify sex offenders whose classifications have already been adjudicated by a court and made the subject of a final order, violate the separation-of-powers doctrine by requiring the opening of final judgments." The Ohio Supreme Court also found that R.C. 2950.031 and 2950.032 "impermissibly instruct the executive branch to review past decisions of the judicial branch and thereby violate the separation-of-powers doctrine." *Id.* at paragraph two of the syllabus. In accordance with the Supreme Court's pronouncement in *Bodyke*, this Court sustains appellant's first assignment of error on the basis that there was no authority to reclassify appellant, who was convicted prior to the enactment of Senate Bill 10. We note that appellee, in its response to appellant's brief, conceded that such case was dispositive and stated that it did not oppose appellant's brief.

{¶12} Moreover, appellee also concedes that the order of the United States District Court for the Southern District of Ohio in *Butler v. Mohr* (May 3, 2010), S.D. Ohio No. 2:98-CV-504 is dispositive.¹ Such order was issued after the United States District Court was asked to clarify its July 12, 2001 order. In its May 3, 2010, the court stated, in relevant part, as follows:

{¶13} "This Court makes clear that because the conditional writ which it issued became unconditional upon the state court's failure to reopen petitioner's appeal, and

¹ The United States District Court, in such order, stated that "[t]he status of the underlying conviction has apparently become an issue because the State of Ohio is seeking to use that conviction as a basis for ordering petitioner to register as a Tier III sex offender."

because he was released from custody as a result, his state conviction is a nullity. The Court further clarifies that the issuance of the writ was not and is not a bar to petitioner’s re-trial.” (Emphasis added).

{¶14} Thus, appellant’s convictions for felonious sexual penetration and gross sexual imposition, which were the basis for his classification, were nullified. As noted by appellant, “[h]e cannot be required to register for a non-existent conviction.”

{¶15} Based on the foregoing, appellant’s two assignments of error are sustained.

{¶16} Accordingly, the judgment of the Ashland County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings.

By: Edwards, P.J.
Gwin, J. and
Farmer, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/Sheila G. Farmer

JUDGES

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
LONNIE W. BUTLER	:	
	:	
Defendant-Appellant	:	CASE NO. 10 CA 5

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

s/Julie A. Edwards

s/W. Scott Gwin

s/Sheila G. Farmer

JUDGES