[Cite as *Clager v. State*, 2010-Ohio-6074.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CHARLES G. CLAGER, JR.	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Petitioner-Appellant	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
STATE OF OHIO, ET AL.	:	Case No. 10-CA-49
	:	
Respondents-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2008CV00167
JUDGMENT:	Reversed
DATE OF JUDGMENT ENTRY:	December 8, 2010

APPEARANCES:

For Petitioner-Appellant

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Farmer, P.J.

{¶1} On February 9, 2001, appellant, Charles Clager, Jr., was convicted in Texas of possessing child pornography. Appellant moved to Ohio in 2003.

{¶2} On November 26, 2007, the Ohio Attorney General sent appellant a notice of new classification pursuant to the Adam Walsh Child Protection and Safety Act of 2006. Appellant was classified as a Tier II sex offender and was required to register with the local sheriff's office every one hundred eighty days for twenty-five years.

{¶3} On January 23, 2008, appellant filed a petition to contest the reclassification and a declaratory judgment action, claiming he was incorrectly reclassified and the Adam Walsh Act (hereinafter "AWA") was unconstitutional. Following a stay on AWA petition hearings, a hearing was held on April 12, 2010. By judgment entry filed April 13, 2010, the trial court dismissed the petition, finding it had addressed and rejected similar constitutional arguments, including a challenge under the separation of powers doctrine.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶5} "THE TRIAL COURT ERRED IN DISMISSING PETITIONER-APPELLANT'S PETITION AND DECLARATORY JUDGMENT ACTION BECAUSE THE RECLASSIFICATION PROVISIONS OF OHIO'S ADAM WALSH ACT VIOLATE THE SEPARATION-OF-POWERS DOCTRINE."

I

{¶6} Appellant claims the trial court erred in dismissing his petition and declaratory judgment action because his reclassification under the AWA violated the separation of powers doctrine. Specifically, appellant claims the Supreme Court of Ohio's ruling in *State v. Bodyke,* 126 Ohio St.3d 266, 2010-Ohio-2424, should be applied to him despite the fact that he was an out-of-state offender and was never classified in Ohio under Megan's Law. Appellant claims his reclassification as a Tier II offender pursuant to R.C. 2950.01(F)(1)(g) is barred by *Bodyke* and its progeny. We agree.

{¶7} In *Bodyke* at paragraphs two and three of the syllabus, the Supreme Court of Ohio held the following:

{¶8} "R.C. 2950.031 and 2950.032, which require the attorney general to reclassify sex offenders who have already been classified by court order under former law, impermissibly instruct the executive branch to review past decisions of the judicial branch and thereby violate the separation-of-powers doctrine.

{¶9} "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."

{¶10} After a thorough discussion on Ohio's evolving law governing the registration and classification of sex offenders and the ensuing community-notification requirements, along with the separation of powers doctrine, Justice O'Connor explained the precise holding of the *Bodyke* case at ¶54 and 60-61:

{¶11} "With these principles in mind, we turn to a key aspect of the AWA-the reclassification scheme. That scheme requires the attorney general to reclassify offenders who previously were classified by Ohio judges according to the provisions in Megan's Law and its precursor.

{¶12} "Thus, we conclude that R.C. 2950.031 and R.C. 2950.032, which require the attorney general to reclassify sex offenders who have already been classified by court order under former law, impermissibly instruct the executive branch to review past decisions of the judicial branch and thereby violate the separation-of-powers doctrine.

{¶13} "We further conclude that 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."

{¶14} Using these statements as a template, we could easily conclude that the Supreme Court of Ohio did not speak to the out-of-state offender who had never been classified by court order under Ohio's Megan Law. Appellant argues this conclusion would be incorrect because within the numerous cases reviewed in *In re Sexual Offender Reclassification Cases,* 126 Ohio St.3d 322, 2010-Ohio-3753, ¶15 and 63, there is in fact a reversal of a case "as to those portions of the judgments that rejected constitutional challenges to the Adam Walsh Act on separation-of-powers grounds" involving an out-of-state offender namely, "2010-0100. *Robinson v. State,* Hamilton App. No. C-090002."

{¶15} In addition, appellant points to another case within *In re Sexual Offender Reclassification Cases,* under the same reversal as *Robinson, Gildersleeve v. State,*

Cuyahoga App. Nos. 91515, 91516, 91517, 91518, 91519, 91521, 91522, 91523, 91524, 91525, 91526, 91527, 91528, 91529, 91530, 91531, and 91532, 2009-Ohio-2031. Within *Gildersleeve* is the case of Robert Zamora, an offender convicted of a sexual offense in California.

{¶16} On August 27, 2010, the state filed a motion for reconsideration with the Supreme Court of Ohio in Mr. Zamora's case, noting that Mr. Zamora did not have a H.B. 180 hearing or judicial order of classification and arguing the following:

{¶17} "In short, *State v. Bodyke* does not apply to sex offenders who did not have a prior judicial order of classification because those particular sex offenders have not been previously 'adjudicated' by a court. They were classified by statute or operation of law."

{¶18} The state requested the following:

{¶19} "With regard to Robert Zamora, a Tier II sex offender, this Honorable Court should reconsider the August 17, 2010 disposition of this case and hold that reclassification of out-of-state offenders whose duty to register arose by operation of law does not violate the separation of powers doctrine. This Court should consider the remaining propositions of law raised in the appeal."

{¶20} On October 13, 2010, the Supreme Court of Ohio denied the motion. See, *Gildersleeve v. State,* Case No. 2009-1086.

{¶21} However, as the state points out, Zamora's assignment of error to the Eighth District Court of Appeals was: "The trial court erred in dismissing appellants Mark Patterson and Robert Zamora's petitions with prejudice for failing to appear at the April 23, 2008 hearing." *Gildersleeve v. State,* Cuyahoga App. Nos. 91515, 91519, 91521,

and 91532, 2009-Ohio-2031, ¶12. The *Gildersleeve* court agreed, noting "[t]he trial court erred by not giving prior notice to counsel that it would dismiss the appellants' petition involuntarily, and with prejudice." Id. at ¶86. The court ordered the trial court to "reinstate the two petitioners it dismissed for failure to appear at the hearing." Id. at ¶88.

{¶22} In *In re Sexual Offender Reclassification Cases* at ¶15, the Supreme Court of Ohio reversed the *Gildersleeve* case "as to those portions of the judgments that rejected constitutional challenges to the Adam Walsh Act on separation-of-powers grounds." Mr. Zamora's appeal did not involve a constitutional challenge to the AWA therefore, his case does not shed any light on the issue presented sub judice.

{¶23} However, let us return to the *Robinson* case cited supra. A review of the First District's judgment entry in *Robinson* leads us to the conclusion that the defendant was an out-of-state offender, was never classified in Ohio under Megan's Law, and the assignments of error involved constitutional challenges, including the separation of powers doctrine:

{¶24} "Robinson's second, third, and fourth assignments of error are overruled because the retroactive application of Senate Bill 10's tier-classification and registration requirements does not violate the prohibition on retroactive laws contained in Section 28, Article II of the Ohio Constitution, the Double Jeopardy Clause of the Ohio Constitution, or the separation-of-powers doctrine.***Robinson's arguments under the United States Constitution are also overruled on *Sewell's* [181 Ohio App.3d 280, 2009-Ohio-872] reasoning." (Footnote omitted.)

{¶25} We therefore concur with appellant's position that out-of-state offenders are not subject to the Ohio Attorney General's reclassification as it violates the separation of powers doctrine.

{¶26} The sole assignment of error is granted.

{¶27} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby reversed.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

_s/ Sheila G. Farmer_____

_s/ John W. Wise_____

_s/ Patricia A. Delaney_____

JUDGES

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IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

CHARLES G. CLAGER, JR.	:	
Petitioner-Appellant	:	
-vs-	:	JUDGMENT ENTRY
STATE OF OHIO, ET AL.	:	
Respondents-Appellees	:	CASE NO. 10-CA-49

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio is reversed. Costs to appellees.

s/ Sheila G. Farmer

s/ John W. Wise

s/ Patricia A. Delaney

JUDGES