[Cite as *State v. Irvin* , 2009-Ohio-3128.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 08CA3057
	:	
vs.	:	**Released: June 23, 2009**
	:	
JONATHAN L. IRVIN,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Lori J. Rankin, Chillicothe, Ohio, for Defendant-Appellant.

Michael M. Ater, Ross County Prosecuting Attorney, and Matthew S. Schmidt, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for Plaintiff-Appellee.

McFarland, J.:

{¶1} Defendant-Appellant, Jonathan L. Irvin, appeals from the decision and sentence of the Ross County Court of Common Pleas. Appellant contends the court below erred by: 1) sentencing him to two five-year terms for rape when such sentences were not mandatory; and 2) designating him as a Tier III sex offender when his offenses were committed prior to the effective date of the legislation which established such designations. Because Appellant's sentences for rape were neither clearly and convincingly contrary to law nor an abuse of the trial court's discretion,

his first assignment of error is overruled. Because his designation as a Tier III sex offender did not violate his right to due process and did not constitute double jeopardy or an ex post facto law, his second assignment of error also fails. Accordingly, we overrule Appellant's assignments of error and affirm the decision and sentence of the trial court.

I. Facts

{¶2} In December 2007, Appellant was charged in a six-count indictment. The indictment consisted of: three counts of unlawful sexual conduct with a minor, a third degree felony; one count of gross sexual imposition, a third degree felony; and two counts of rape, a first degree felony. The case proceeded to trial and the jury found Appellant guilty on all counts.

{¶3} Subsequent to the jury's verdict, the trial court held a sexual offender classification hearing and, based on his rape convictions, designated Appellant as a Tier III sex offender. At sentencing, the trial court imposed a prison sentence for each conviction as follows: 1) three years on each count of unlawful sexual conduct with a minor; 2) one year for gross sexual imposition; and 3) five years for each rape. The court ordered that the sentences be served consecutively for an aggregate sentence of 20 years.

The trial court further ordered that the 20-year sentence run consecutively to another sentence the court imposed in a separate case, case no. 07 CR 484.

{¶4} Following the trial court's sentencing entry, Appellant timely filed the current appeal.

II. Assignments of Error

I. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT SENTENCED DEFENDANT-APPELLANT TO TWO "MANDATORY" TERMS OF FIVE (5) YEARS ON COUNTS THREE AND FOUR OF THE INDICTMENT WHICH ALLEGED RAPE IN VIOLATION OF R.C. 2907.02(A)(1)(b).

II. THE TRIAL COURT ERRED IN VIOLATION OF THE DEFENDANT-APPELLANT'S CONSTITUTIONAL RIGHTS WHEN THE TRIAL COURT CLASSIFIED THE DEFENDANT AS A TIER III SEX OFFENDER PURSUANT TO SENATE BILL 10 WHEN THE OFFENSES FOR WHICH THE DEFENDANT WAS CONVICTED OCCURRED PRIOR TO ENACTMENT OF THE CURRENT PROVISIONS OF CHAPTER 2905 [sic] OF THE OHIO REVISED CODE AS AMENDED BY SENATE BILL 10.

III. First Assignment of Error

{¶5} In his first assignment of error, Appellant argues the trial court erred in sentencing him to mandatory five-year prison terms for each of his rape convictions. Appellant contends the court misconstrued R.C. 2907.02(A)(1)(b) as requiring it to impose such sentences.

{¶6} We begin with the appropriate standard of review. In the wake of *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, there has been considerable confusion regarding the proper standard of

review of felony sentences. The Supreme Court of Ohio addressed the issue in *State v. Kalish*, 120 Ohio St.3d 23, 896 N.E.2d 124, 2008-Ohio-4912. "Whether Kalish actually clarifies the issue is open to debate. The opinion carries no syllabus and only three justices concurred in the decision. A fourth concurred in judgment only and three justices dissented." *State v. Ross*, 4th Dist. No. 08CA872, 2009-Ohio-877, at FN 2. Nevertheless, until the Supreme Court of Ohio provides further guidance on the issue, we will continue to apply *Kalish* to appeals involving felony sentencing.[1]

{¶7} Under *Kalish*, appellate courts are required to apply a two-step approach when reviewing felony sentences. "First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." *Kalish* at ¶4. "As to the first step, the *Kalish* court did not clearly specify what 'pertinent laws' we are to consider to ensure that the sentence 'clearly and

[1] As the *Kalish* decision is a plurality, not a majority opinion, the Eighth District Court of Appeals has announced that it will not follow the decision and will instead continue to apply the same standard the district had used prior to *Kalish*. *State v. Harris*, 8th Dist. No. 90699, 2008-Ohio-5873, at ¶99, fn. 1. Conversely, though the Ninth District has recognized the questionable precedential value of *Kalish*, it has applied the new standard regardless. *State v. Jenkins*, 9th Dist. No. 24166, 2008-Ohio-6620, at ¶10, fn. 1. We will do the same.

convincingly' adheres to Ohio law. The only specific guideline is that the sentence must be within the statutory range * * *." *Ross* at ¶10.

{¶8} Here, in analyzing whether the court complied with the applicable rules and statutes, we first look to the trial court's statements, both during the sentencing hearing and in its judgment entry. After sentencing Appellant in a separate case, case no. 07 CR 484, the trial court turned to sentencing in the case sub judice and stated the following:

{¶9} "Again, having considered Mr. Irvin's lack of a prior criminal record and noting that sentences for rape are in fact mandatory and may not be reduced. As to count one, the defendant is sentenced to a definite term of imprisonment of three years in an Ohio penal facility; count two, three years in an Ohio penal facility; count three, rape, five years in an Ohio penal facility; count four, rape, five years in an Ohio penal facility; count five, gross sexual imposition, one year in an Ohio penal facility; and count six, unlawful sexual conduct with a minor, three years in an Ohio penal facility."

{¶10} The trial court stated in its judgment entry, in pertinent part:

{¶11} "It is therefore the ORDER of the Court that as to Counts Three and Four, Rape, Ohio Revised Code Section 2907.02, both felonies of the First Degree, defendant is hereby sentenced to an Ohio penal institution for a mandatory term of five (5) years on each count to be served

consecutively to Counts One, Two, Five and Six of this indictment and consecutively to the sentences imposed in Case No. 07 CR 484."

{¶12} The court also stated that it had considered the principles and purposes of sentencing under R.C. 2929.11, balanced the seriousness and recidivism factors under R.C. 2929.12, and also considered the felony sentence guidance provided by R.C. 2919.13. The court also found Appellant was not amenable to community control and that a prison sentence was consistent with the purposes and principles of felony sentencing.

{¶13} Appellant's rape convictions resulted from his violation of R.C. 2907.02(A)(1)(b). In his brief, Appellant correctly notes that subsection (B) of R.C. 2907.02 gives sentencing provisions for violations of subsection (A). Subsection (B) first states that "[w]hoever violates this section is guilty of rape, a felony of the first degree." The section then goes on to list conditional sentencing provisions, none of which apply in the case sub judice.[2] Appellant notes that subsection (B) requires a minimum five-year prison term for certain violations of subsection (A)(1)(a). Appellant argues that the trial court mistakenly applied that provision in his sentencing, though he was convicted of violating subsection (A)(1)(b), not (A)(1)(a).

[2] In his brief, Appellant quotes current R.C. 2907.02, which became effective on January 2, 2007. As Appellant committed his first rape offense sometime between March 14, 2003 and March 14, 2004, and his second offense sometime between August 1, 2001, and June 30, 2002, prior R.C. 2907.02 applies.

{¶14} Under R.C. 2929.13(F)(2), a prison sentence for a rape conviction is mandatory. Accordingly, because rape is a first-degree felony, Appellant was subject to a mandatory term of three to ten years for each conviction. Appellant seemingly construes the trial court's statements, both in its journal entry and during the sentencing hearing, as meaning that the trial court believed it had to impose a five-year sentence, and only a five-year sentence, for each rape conviction. If that were, in fact, the case, the trial court would have been in error. However, the language of the trial court may also be construed as correctly stating that a prison term for rape is mandatory and, in the case sub judice, a five-year term for each conviction was appropriate. As such, we cannot say that the two mandatory five-year prison sentences, both within the statutory sentencing range, are clearly and convincingly contrary to law.[3]

{¶15} Accordingly, we find the trial court complied with all applicable rules and statutes in imposing Appellant's sentences. As the first prong of the *Kalish* test is satisfied, we now turn to the second prong, whether the trial court abused its discretion in imposing the sentences.

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[3] The dissent states that "[i]f the court had merely stated that the sentences were mandatory, then this sentence would be ambiguous. But by indicating that the five year sentences the court imposed for the two rapes 'may not be reduced [,]' the trial court clearly indicated, in my view, that it mistakenly believed that it was required by law to impose a mandatory statutory minimum sentence of five years for each offense." However, the same statutory provision which makes rape sentences mandatory also specifically states that a trial court "shall not reduce" such terms. See R.C. 2929.13(F).

{¶16} "An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, unreasonable, arbitrary or unconscionable." *State v. Horner*, 4th Dist. No. 02CA5, 2003-Ohio-126, at ¶8, citing *State v. Herring*, 94 Ohio St.3d 246, 255, 2002-Ohio-796, 762 N.E.2d 940; *State v. Clark*, 71 Ohio St.3d 466, 470, 1994-Ohio-43, 644 N.E.2d 331; *State v. Adams* (1980), 60 Ohio St.2d 151, 157, 404 N.E.2d 144. When an appellate court applies this standard, it can not substitute its judgment for that of the trial court. *State v. Jeffers*, 4th Dist. No. 08CA7, 2009-Ohio-1672, at ¶12.

{¶17} Post-*Foster*, trial courts have full discretion to impose sentences within the statutory range and determine whether a sentence satisfies the overriding purposes of Ohio's sentencing statutes. In order for there to be an abuse of discretion, the trial court's decision must be "* * * so palpably and grossly violative of fact or logic that it evidences not the exercise of will, but perversity of will; not the exercise of judgment, but defiance of judgment; and not the exercise of reason, but, instead, passion or bias." *Jeffers* at ¶12.

{¶18} Nothing in the record below indicates the trial court abused its discretion in sentencing Appellant. Appellant's rape convictions resulted from the calculated and repeated victimization of two young boys who were

under his supervision and who looked upon him as a trusted family friend. Appellant puts forth no argument, beyond that discussed above, that the combined ten years he received for the two rape convictions was unwarranted. As such, there is no basis for asserting that the trial court's sentence was unreasonable, arbitrary or unconscionable. Because we find the trial court's five-year sentences for each of Appellant's rape convictions were neither clearly and convincingly contrary to law nor an abuse of discretion, Appellant's first assignment of error is overruled.

IV. Second Assignment of Error

{¶19} In his second assignment of error, Appellant argues the trial court violated his constitutional rights when it classified him as a Tier III sex offender, pursuant to amended R.C. Chapter 2950. Because he committed his offenses prior to the effective date of amended R.C. 2950, Appellant argues that the application of the amended statutes violated his constitutional rights. Instead, Appellant contends the trial court should have held a sexual offender evidentiary hearing under the provisions of R.C. 2950 which were in effect at the time he committed his offenses. As shown in the following, Ohio courts have consistently rejected this argument.

{¶20} Senate Bill 10 significantly revised the Ohio Revised Code Chapter pertaining to sexual offenders, Chapter 2950. Prior to Senate Bill

10, sexual offenders were placed into one of three categories: 1) sexually oriented offender; 2) habitual sex offender, or; 3) sexual predator. How an offender was categorized depended both upon the crime committed and the trial court's findings in each particular case.

{¶21} Current Chapter 2950, as amended by Senate Bill 10, severely limits the discretion of the trial court. Now, trial courts must categorize offenders based solely upon the type of offense committed. The sexually oriented offender, habitual offender and sexual predator classifications were replaced by new designations: Tier I, Tier II, and Tier III sex offenders, each requiring specific registration and community notification requirements. When a defendant is convicted of rape, as was Appellant, the trial court must designate the offender as a Tier III sex offender, the highest tier, with registration every 90 days for life. Appellant argues that applying amended R.C. 2950 in his case was unconstitutional on three grounds: 1) due process; 2) double jeopardy, and; 3) ex post facto law. We address each argument in turn.

{¶22} There is a presumption that laws enacted in Ohio are constitutional. *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, at ¶12. That presumption remains until the challenger shows beyond a reasonable doubt that the statute in question is unconstitutional.

Id.; *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7,13, 465 N.E.2d 421. Further, the presumption applies to R.C. Chapter 2950. *State v. Cook* (1998), 83 Ohio St.3d 404, 409, 700 N.E.2d 570. As Appellant's assignment of error challenges the interpretation of constitutional provisions, it is a matter of law and our standard of review is de novo. *State v. Messer*, 4th Dist. No. 08CA3050, 2009-Ohio-312, at ¶5.

A. Due Process

{¶23} "Due process under the Ohio and United States Constitutions demands that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner where the state seeks to infringe a protected liberty or property interest." *State v. Hochhausler*, 76 Ohio St.3d 455, 1996-Ohio-374, 668 N.E.2d 457, at 459.

{¶24} Initially, we note while due process arguments may be asserted on a number of grounds, Appellant does not specify the manner in which his due process rights were violated. As such, it is difficult to directly address his argument. If his argument is one of procedural due process, which is implied by his statement that "under the provisions of Senate Bill 10, no evidentiary hearing is held to determine the classification of the sexual oriented offender * * *," it has no merit. The record clearly shows

that Appellant was given notice and an opportunity to be heard at his sexual offender classification hearing.

{¶25} In any event, to trigger due process protection under the federal and state constitutions, "* * * a sexual offender must show that he was deprived of a protected liberty or property interest as a result of the registration requirement." *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, at ¶6. In *Hayden*, the Supreme Court of Ohio held that the imposition of a sex offender registration requirement on a defendant without holding a hearing did not deprive the defendant of any protected liberty interest. *Hayden* at ¶18.

{¶26} Further, the Court has held that a convicted felon has no reasonable expectation that his or her criminal conduct will not be subject to future legislation. *Cook* at 412-413. In *Cook*, the Court concluded that a former version of R.C. 2950 could be applied to sex offenders who committed their crimes before the legislation took effect. Id. The Court further held that convicted sex offenders have no "settled expectations" or vested rights as to the registration obligations imposed upon them. As such, Appellant has not demonstrated that he was deprived of any protected liberty or property interest which would trigger due process protection.

B. Ex Post Facto Law

{¶27} We have repeatedly addressed the issue of whether the retroactive application of Senate Bill 10 is an unconstitutional ex post facto law. Each time we have addressed the issue, we have determined that it is not. See, *State v. Messer*, 4th Dist. No. 08CA3050, 2009-Ohio-312; *State v. Coburn*, 4th Dist. No. 08CA3062, 2009-Ohio-632; *State v. Linville*, 4th Dist. No. 08CA3051, 2009-Ohio-313; *State v. Randlett*, 4th Dist. No. 08CA3046, 2009-Ohio-112. Other Ohio courts have found similarly. See, e.g., *State v. Ohler*, 6th Dist. No. H-08-010, 2009-Ohio-665; *State v. Rabel*, 8th Dist. No. 91280, 2009-Ohio-350; *In re Copeland*, 3rd Dist. No. 1-08-40, 2009-Ohio-190.

{¶28} A retroactive statute is "unconstitutional if it retroactively impairs vested substantive rights, but not if it is merely remedial in nature." *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899, at ¶7, citing *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163. Ohio courts have consistently determined that the classification of sexual offenders, as mandated in Senate Bill 10, is remedial in nature and not punitive. See, e.g., *Messer* at ¶11-12. Nothing in the case sub judice requires us to readdress the issue. As such, we find R.C. 2950, as amended by Senate Bill 10, does not constitute an ex post facto law.

C. Double Jeopardy

{¶29} Under the same rationale, neither does amended R.C. 2950 violate the prohibition against double jeopardy. Again, this court and others have repeatedly addressed the issue. See, e.g., *Messer* at ¶29-31; *Randlett* at ¶24-25; *In re S.R.P*., 12th Dist. No. CA2007-11-027, 2009-Ohio-11, at ¶30; *State v. Ware*, 6th Dist. No. L-08-1050, 2008-Ohio-6944, at ¶24-25; *In re Adrian R*., 5th Dist. No. 08-CA-17, 2008-Ohio-6581, at ¶32.

{¶30} "Although the Double Jeopardy Clause was commonly understood to prevent a second prosecution for the same offense, the United States Supreme Court has applied the clause to prevent a state from punishing twice, or from attempting a second time to criminally punish for the same offense. (Internal citations omitted.) The threshold question in a double jeopardy analysis, therefore, is whether the government's conduct involves criminal punishment." *State v. Williams*, 88 Ohio St.3d 513, 528, 2000-Ohio-428, 728 N.E.2d 342. Because the provisions of Chapter 2950, as amended in Senate Bill 10, are remedial in nature, not punitive, the reclassification of sexual offenders under R.C. 2950 does not constitute additional criminal punishment. Accordingly, the statute is not a violation of double jeopardy.

{¶31} As none of Appellant's constitutional challenges to R.C. 2950 are warranted, we overrule his second assignment of error.

V. Conclusion

{¶32} For the foregoing reasons, we overrule both of Appellant's assignments of error. His first assignment of error fails because Appellant has not shown that the trial court's decision was either clearly and convincingly contrary to law or an abuse of discretion. Because none of the constitutional challenges to his designation as a Tier III sex offender have merit, we also overrule his second assignment of error. Accordingly, Appellants assignments of error are overruled and the decision and sentence of the trial court is affirmed.

JUDGMENT AFFIRMED.

Kline, P.J., dissenting, in part:

{¶33} I concur in judgment and opinion as to the second assignment of error. However, I respectfully dissent as to the first assignment of error for the following reasons.

{¶34} Irvin contends that his two rape sentences are clearly and convincingly contrary to law because the trial court erroneously thought each rape conviction required a mandatory five year prison sentence. The

two rape convictions under R.C. 2907.02(A)(1)(b) are first degree felonies, and carry a mandatory prison sentence of three to ten years. R.C. 2929.14(A)(1); R.C. 2929.13(F)(2).

{¶35} Irvin maintains that the trial judge erroneously applied the mandatory statutory minimum of five years to each rape conviction, which is required when a defendant is found guilty of violating R.C. 2907.02(A)(1)(a). However, as stated above, Irvin was found guilty of violating R.C. 2907.02(A)(1)(b), not R.C. 2907.02(A)(1)(a).

{¶36} The majority opinion states that a term of imprisonment was mandatory, and the trial court used language that could just as easily mean that the court had to impose some prison sentence rather than meaning it had to impose a five year sentence. I agree that if the language the court used was ambiguous, then Irvin would have failed to demonstrate that his sentence was clearly and convincingly contrary to law. However, in my view, the trial court clearly believed that Irvin was subject to a mandatory minimum sentence of five years for each offense.

{¶37} The trial court made several statements, some of which were arguably ambiguous. However, the trial court stated the following after sentencing Irvin to five years in prison for each offense: "the sentences for rape are in fact mandatory and *may not be reduced*." (emphasis added). If

the court had merely stated that the sentences were mandatory, then this sentence would be ambiguous. But by indicating that the five year sentences the court imposed for the two rapes "may not be reduced[,]" the trial court clearly indicated, in my view, that it mistakenly believed that it was required by law to impose a mandatory statutory minimum sentence of five years for each offense.

{¶38} Therefore, for the above reasons, I would sustain Irvin's first assignment of error; vacate the two rape sentences; and remand this cause to the trial court for re-sentencing.

{¶39} Accordingly, I dissent, in part.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Kline, P.J.: Concurs in Judgment and Opinion as to Assignment of Error II and Dissents with Opinion as to Assignment of Error I.
Abele, J.: Concurs in Judgment and Opinion.

For the Court,

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.