[Cite as *State v. Hill*, 2010-Ohio-2834.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 23171

v. : T.C. NO. 96 CR 1412

JOE HILL III : (Criminal appeal from Common Pleas Court)

Defendant-Appellant :

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OPINION

Rendered on the 18th day of June, 2010.

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DOUGLAS M. TROUT, Atty. Reg. No. 0072027, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

JOE HILL III, #569047, London Correctional Institution, 1580 State Route 56, P. O. Box 69, London, Ohio 43140
Defendant-Appellant

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the pro se Notice of Appeal of Joe Hill III, filed December 30, 2008. Hill appeals from the denial of his pro se "Motion and Objection to Decision and Entry and Request for Reconsideration for Appointment of Counsel and Rehearing Requested."

{¶ 2} On January 27, 1997, pursuant to a negotiated plea agreement, in case no. 1996-CR-1412, Hill pled no contest to kidnaping (sexual activity), in violation of R.C.2905.01(A)(4) ; he pled no contest to aggravated burglary in case no. 1996-CR-1017; and he pled no contest to vandalism in case no. 1996-CR-1960. Several other charges were dismissed. The State recommended concurrent sentences on all three counts for a total sentence of 6 to 25 years, and the State also agreed to recommend shock probation after Hill served five years of his sentence. Hill received a concurrent sentence of 6 to 25 years.

{¶ 3} On August 1, 2001, Hill filed a Motion for Shock Probation. Hill's motion was granted following a judicial release hearing on September 24, 2001, and he was released under special conditions. On September 25, 2001, an "Explanation of Duties to Register as a Sex Offender" was filed by the court, and Hill was required to register as a sexually oriented offender, due to the violation of R.C. 2905.01(A)(4), for a period of 10 years, with annual address verification.

{¶ 4} On March 28, 2004, Hill was arrested on multiple charges, and following a violation hearing, Hill's shock probation was revoked and he was reinstitutionalized on his 6 to 25 year term.

{¶ 5} On April 22, 2008, while imprisoned, Hill received a "Notice of New Classification and Registration Duties" from the Office of the Ohio Attorney General. The Notice provides in part,"This letter is to notify you of changes to Ohio's Sex Offender Registration and Notification Act (Ohio Revised Code Chapter 2950, 'SORN'). Your classification and registration duties have changed due to Ohio Senate Bill 10, passed to implement the federal Adam Walsh Child Protection and Safety Act of 2006." Beginning

January 1, 2008, Hill's new classification was Tier II Sex Offender, and he was required to register personally with the local sheriff's office every 180 days for 25 years.

{¶ 6} On May 6, 2008, Hill filed a "Petition to Contest Reclassification," arguing that his reclassification violates multiple provisions of the U.S. and Ohio Constitutions. Hill also filed a "Motion for Appointment of Counsel," seeking representation on the petition. The State filed a Motion to Dismiss, arguing that the trial court lacked jurisdiction to rule on Hill's petition. On October 7, 2008, the trial court issued a "Decision and Entry Regarding Constitutionality of S.B. 10 & Overruling Motion for Appointment of Counsel." After determining that Hill did not have a right to counsel in connection with his petition, and that S.B. 10 does not violate the U.S. and Ohio Constitutions, the trial court indicated, "Should the Defendant still request a hearing, pursuant to R.C. 2950.031(E) or R.C. 2950.032(E), the Defendant must file a separate motion regarding this issue on or before **November 7, 2008**." On November 14, 2008, Hill filed his pro se "Motion and Objection to Decision and Entry and Request for Reconsideration for Appointment of Counsel and Rehearing Requested."

{¶ 7} In its "Decision and Entry Overruling Motion and Objection by Defendant on November 14, 2008," the court noted Hill's untimely filing and stated, "The court has reviewed this motion and is not persuaded. The Court's prior decision, filed on October 7, already addressed and overruled these arguments. The Defendant has neither presented any new arguments to the Court, nor stated a basis for a hearing under R.C. 2950.031(E) and R.C. 2950.032(E). As such the Defendant's motion is overruled."

{¶ 8} Hill asserts two assignments of error, which are as follows:

{¶ 9} "THE IMPOSITION OF THE SENATE BILL 10 REQUIREMENTS IS IN VIOLATION OF HILL'S ORIGINAL PLEA AGREEMENT WHEN PLACED UPON 'SUPER SHOCK' PROBATION AND MAKES THE ORIGINAL PLEA AGREEMENT VOID FOR BREACH OF THE PLEA AGREEMENT." And,

{¶ 10} "TO IMPOSE THE REQUIREMENTS OF SENATE BILL 10 UPON APPELLANT IS ERROR FOR IT IS IN VIOLATION OF HIS RIGHT OF DUE PROCESS, AND ALSO AGAINST THE WEIGHT OF THE EVIDENCE."

{¶ 11} By way of background, in 2006, Congress passed the Adam Walsh Child Protection and Safety Act ("A.W.A.") which created national standards for sex-offender registration, community notification, and classification. In 2007, the Ohio General Assembly enacted Senate Bill 10 ("S.B.10") in response to the A.W.A. S.B. 10 repealed former legislation, replacing it with a retroactive scheme that includes a three-tiered system dividing sex offenders into three categories. S.B. 10 abolished the previous classifications of sexually oriented offender, habitual sex offender, and sexual predator, and it required the attorney general to reclassify offenders instead as Tier I, Tier II, or Tier III sex offenders, based upon the offender's offense. S.B.10 required the attorney general to send official notification to existing offenders regarding their new tier classification and attendant duties.

{¶ 12} The Ohio Supreme Court recently determined that R.C. 2950.031 and 2950.032 violate the separation of powers doctrine, and the Court severed those sections from the statutory scheme. *State v. Bodyke*, Slip Opinion No. 2010-Ohio-2424, ¶ 66. Those sections governed the reclassification by the attorney general of sex offenders already classified by judges under a prior version of R.C. Chapter 2950.

{¶ 13} According to *Bodyke*, "Our Constitution and case law make undeniably clear that the judicial power resides exclusively in the judicial branch. (Citation omitted). The judicial power of the state is vested exclusively in the courts. (Citation omitted). The power to review and affirm, modify, or reverse other court's judgments is strictly limited to appellate courts. (Citation omitted). The AWA intrudes on that exclusive role and thus violates the separation-of-powers doctrine.

{¶ 14} "Moreover, once the final judgment has been opened, the AWA requires that the attorney general 'shall determine' the new classifications of offenders * * * who were classified by judges under the former statutes. R.C. 2950.031(A)(1); 2950.032(A)(1)(a) and (b). In doing so, it violates a second prohibition by assigning to the executive branch the authority to revisit a judicial determination.

{¶ 15} "Thus, we conclude that 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.

{¶ 16} "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." Id., at ¶ 58- 61.

{¶ 17} The Supreme Court concluded that "severance of R.C. 2950.031 and 2950.032, the reclassification provisions in the AWA, is the proper remedy. By excising the unconstitutional component, we do not 'detract from the overriding objectives of the General

Assembly,' i.e., to better protect the public from the recidivism of sex offenders, and the remainder of the AWA, 'which is capable of being read and of standing alone, is left in place.' (Citation omitted). We therefore hold that R.C. 2950.031 and 2950.032 are severed and, that after severance, they may not be enforced. R.C. 2950.031 and 2950.032 may not be applied to offenders previously adjudicated by judges * * * , and the classifications and community-notification and registration orders imposed previously by judges are reinstated." Id., at ¶ 66.

{¶ 18} The trial court's determination that S.B. 10 does not violate the separation-of-powers doctrine is reversed pursuant to *Bodyke.* Regarding Hill's assigned errors, his initial classification was not a condition of his original plea agreement as he argues but was a condition of his judicial release. Although his shock probation was revoked, he retained his status as a sexually oriented offender. He was then reclassified pursuant to S.B. 10. *Bodyke* is dispositive of Hill's arguments addressed to his reclassification; R.C. 2950.031 and 2950.032 have been excised from the statutory scheme. Accordingly, Hill's reclassification by the Attorney General is unconstitutional. The judgment which overruled Hill's constitutional challenge to the Attorney General's reclassification, finding no violation of the separation of powers doctrine, is reversed, and the classification and registration order imposed previously by the trial judge is reinstated.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

Douglas M. Trout
Joe Hill III