

[Cite as *State v. Bernthold*, 2010-Ohio-2775.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee/ Cross-Appellant,	:	
	:	
v.	:	No. 09AP-642 (C.P.C. No. 97CR-12-6709)
	:	
Mark K. Bernthold,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant/ Cross-Appellee.	:	

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D E C I S I O N

Rendered on June 17, 2010

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*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

*Tyack, Blackmore & Liston, Co., L.P.A.*, and *Thomas M. Tyack*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Mark K. Bernthold, from a judgment of the Franklin County Court of Common Pleas, denying appellant's petition to contest reclassification. Plaintiff-appellee, state of Ohio, has filed a cross-appeal.

{¶2} On December 8, 1997, appellant was indicted on two counts of rape, in violation of R.C. 2907.02, and two counts of gross sexual imposition, in violation of R.C.

2907.05. On March 17, 1998, appellant entered a guilty plea to one count of sexual battery and one count of gross sexual imposition. By entry filed May 22, 1998, the trial court imposed a sentence of five years community control. Further, the trial court conducted a hearing, pursuant to R.C. 2950.09, and made a determination that appellant was a "sexually oriented offender."

{¶3} In December 2007, appellant received notice from the office of the Ohio Attorney General that he would be designated a "Tier II offender" under the provisions of Senate Bill No. 10 ("S.B. 10"), Ohio's version of the Adam Walsh Act ("AWA"), which amended provisions of R.C. Chapter 2950. On January 30, 2008, appellant filed a petition to contest reclassification under S.B. 10, asserting various constitutional challenges to the newly enacted provisions of AWA, including a separation of powers challenge. The state filed a memorandum contra appellant's petition.

{¶4} The trial court conducted a hearing on February 19, 2009. During the hearing, appellant raised constitutional challenges with respect to his reclassification, while the state argued that appellant should have been classified as a Tier III offender (rather than a Tier II offender) under S.B. 10. On June 4, 2009, the trial court issued a decision and entry denying appellant's petition to contest reclassification.

{¶5} Appellant filed a notice of appeal, and the state filed a notice of cross-appeal. On appeal, appellant raises the following assignment of error for this court's review:

I. THE TRIAL COURT ERRED, ITS DECISION VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHTS BY THE FOLLOWING:

1. Adam Walsh constitutes an *ex post facto* law, is proscribed by Article I, Section X of the United States Constitution.
2. The retroactive application of the Ohio Adam Walsh Act violates prohibition on retroactive laws in Article II, Section 28 of the Ohio Constitution.
3. The reclassification of the Petitioner constitutes a violation of the Separation of Powers Doctrine.
4. The reclassification constitutes impermissible multiple punishments under the Double Jeopardy Clause of the Constitution of the United States and the Ohio Constitution.
5. The residency restrictions violate the Defendant's right to due process.

{¶6} The state has raised the following cross-assignment of error:

THE COMMON PLEAS COURT ERRED UNDER R.C. 2950.031(E) IN FAILING TO SPECIFY THE MANNER IN WHICH THE NEW REGISTRATION REQUIREMENTS APPLY TO DEFENDANT, INASMUCH AS DEFENDANT CONCEDED THAT HE WAS CONVICTED OF SEXUAL BATTERY, A TIER III OFFENSE, REQUIRING LIFETIME REGISTRATION AND QUARTERLY VERIFICATION, NOT JUST BI-ANNUAL VERIFICATION FOR 25 YEARS AS APPLICABLE TO TIER II OFFENDERS.

{¶7} Following oral argument, this court entered an order staying this appeal pending resolution by the Supreme Court of Ohio of the constitutionality of S.B. 10. On June 3, 2010, the Supreme Court issued its decision in *State v. Bodyke*, \_\_\_ Ohio St.3d \_\_\_, 2010-Ohio-2424 (slip opinion), holding in paragraph three of the syllabus: "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 Supreme Court concluded that severance of those two statutory

provisions was the appropriate remedy and, thus, the court held: "R.C. 2950.031 and 2950.032 may not be applied to offenders previously adjudicated by judges under Megan's Law, and the classifications and community-notification and registration orders imposed previously by judges are reinstated." *Id.* at ¶66.

{¶8} In accordance with the Supreme Court's pronouncement in *Bodyke*, this court sustains appellant's assignment of error with respect to his contention that S.B. 10 violates the separation-of-powers doctrine; the remaining arguments raised under appellant's assignment of error are rendered moot, and the issue raised by the state in its cross-assignment of error is also rendered moot in light of the holding in *Bodyke*.

{¶9} Based upon the foregoing, the judgment of the Franklin County Court of Common Pleas is reversed, appellant's previous classification, community notification and registration orders are reinstated, pursuant to *Bodyke*, and this matter is remanded to that court for further proceedings in accordance with law and consistent with this decision.

*Judgment reversed and cause remanded.*

FRENCH and CONNOR, JJ., concur.

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