

[Cite as *State v. Houston*, 2010-Ohio-4374.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| | : | |
| Plaintiff-Appellant/ Cross-Appellee, | : | No. 09AP-592 |
| | : | (C.P.C. No. 89CR-6033) |
| v. | : | |
| | : | (REGULAR CALENDAR) |
| Brett D. Houston, | : | |
| | : | |
| Defendant-Appellee/ Cross-Appellant. | : | |

D E C I S I O N

Rendered on September 16, 2010

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for
plaintiff-appellant/cross-appellee.

Yeura R. Venters, Public Defender, and *David L. Strait*, for
defendant-appellee/cross-appellant.

APPEALS from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} This is an appeal by plaintiff-appellant, State of Ohio ("the state"), from a judgment of the Franklin County Court of Common Pleas granting in part and denying in part a petition filed by defendant-appellee, Brett D. Houston ("Houston"), to contest his reclassification under Senate Bill No. 10 ("S.B. 10"), Ohio's "Adam Walsh" law. Houston has filed a cross-appeal.

{¶2} In 1990, Houston pled guilty to one count of a child rape under 13 without force and was sentenced to an indefinite sentence of 8 to 25 years. In May 2000, the trial

court classified Houston as a sexual predator. As such, he was subject to a lifetime duty to register and quarterly periodic verification, as well as community notification. Houston was released from prison in June of 2004, and his parole for the offense expired in November 2007.

{¶3} The General Assembly amended R.C. Chapter 2950 ("Megan's Law") in Am.Sub.S.B. No. 5 ("S.B. 5"), 150 Ohio Laws, Part IV, 6558, 6687-6702 (effective July 31, 2003). One provision that was enacted in S.B. 5 was R.C. 2950.031, which prohibited sexually oriented offenders from living within 1,000 feet of a school.

{¶4} In 2006, Congress passed the Adam Walsh Child Protection and Safety Act ("Adam Walsh Act"), P.L. No. 109-248, 120 Stat. 587, codified at 42 U.S.C.16901 et seq. The Adam Walsh Act created national standards for sex-offender registration, community notification, and classification. In 2007, the General Assembly enacted S.B. 10, Ohio's version of the "Adam Walsh Act" ("AWA"). S.B. 10 repealed Megan's Law and reorganized Ohio's sex-offender registration scheme by replacing the tri-level designation system (i.e., sexually oriented offenders, habitual sex offenders, and sexual predators) with the three-tier system required by Congress. R.C. Chapter 2950. Under S.B. 10, R.C. 2950.031 was recodified as R.C. 2950.034; it also expanded the reach of the 1,000-foot residency restriction to include daycare and preschool centers.

{¶5} With the enactment of S.B. 10, Houston received notice from the office of the Ohio Attorney General that he would be designated a "Tier I offender" under the provisions of the AWA. On August 8, 2008, Houston filed a petition to contest reclassification under S.B. 10, asserting various constitutional challenges to the newly enacted provisions of the AWA, including a separation of powers challenge. The state

filed a memorandum contra Houston's petition. That same day, Houston filed a motion to stay the enforcement of the residency restrictions of R.C. 2950.034. The trial court conducted a hearing on January 15, 2009. On June 3, 2009, the trial court issued a decision that overruled his challenges to the reclassification but sustained his challenge to the residency restrictions.

{¶6} On appeal, the state raises the following assignment of error:

THE COMMON PLEAS COURT ERRED IN RULING ON THE APPLICABILITY OF THE 1,000-FOOT RESIDENCE RESTRICTION IN R.C. 2950.034, AS SUCH RESTRICTION WAS NOT A "NEW REGISTRATION REQUIREMENT" THAT COULD BE CHALLENGED IN DEFENDANT'S PETITION CONTESTING RECLASSIFICATION UNDER R.C. 2950.031(E).

{¶7} Houston raises the following seven cross-assignments of error:

FIRST ASSIGNMENT OF ERROR

The trial court erred in failing to find that retroactive application of all provisions of S.B. 10 violates the Retroactivity Clause contained in Section 28, Article II, of the Ohio Constitution.

SECOND ASSIGNMENT OF ERROR

The trial court erred in failing to find that retroactive application of all provisions of S.B. 10 violates the Ex Post Facto Clause of Section 10, Article I of the United States Constitution.

THIRD ASSIGNMENT OF ERROR

The trial court erred in failing to find that S.B. 10 violates the separation of powers doctrine of the Ohio Constitution.

FOURTH ASSIGNMENT OF ERROR

The trial court erred in failing to find that retroactive application of S.B. 10 violates the Double Jeopardy Clauses

of the Fifth Amendment to United States Constitution and Section 10, Article I, of the Ohio Constitution.

FIFTH ASSIGNMENT OF ERROR

The trial court erred in failing to find that the lifetime reporting and registration requirements imposed upon the Petitioner under S.B. 10 violate procedural due process rights under the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution.

SIXTH ASSIGNMENT OF ERROR

The trial court erred in failing to find that S.B. 10's residency restrictions violate the Due Process Clause of the United States Constitution and Section 16, Article I of the Ohio Constitution.

SEVENTH ASSIGNMENT OF ERROR

The trial court erred in failing to find that S.B. 10 violates Section 16, Article VIII of the Ohio Constitution as it invalidated the terms of a valid contract – the plea agreement – which involved a lesser classification, ten years of reporting, fewer restrictions on conduct, no residential restrictions, and substantially reduced impact on his life.

We will begin by addressing Houston's cross-assignments of error, which, together, assert certain portions of the AWA are unconstitutional. Because disposition of Houston's third cross-assignment of error resolves his appeal, we first address it. We then address the state's sole assignment of error.

{¶8} Houston's third cross-assignment of error asserts the trial court erred in denying his petition to contest reclassification because application of the AWA's tier system of classification to offenders who were judicially classified under former versions of R.C. Chapter 2950 is unconstitutional. Houston argues that because the AWA gives the Attorney General of Ohio the power to reclassify convicted sex offenders who earlier

were judicially classified, the AWA violates the separation of powers doctrine by allowing the executive branch to encroach on the powers of the judicial branch.

{¶9} Statutes enjoy a strong presumption of constitutionality, and a party seeking to have a statute declared unconstitutional must prove its unconstitutionality beyond a reasonable doubt. *In re Brayden James*, 113 Ohio St.3d 420, 2007-Ohio-2335, ¶13; *State v. Anderson* (1991), 57 Ohio St.3d 168, 171. An appellate court's review of the constitutionality of a statute is de novo. See *State v. Cook* (1998), 83 Ohio St.3d 404.

{¶10} R.C. 2950.031 and 2950.032 are the portions of the AWA involving reclassification of offenders previously judicially classified under former versions of Ohio's sex offender registration laws. R.C. 2950.031 sets out the framework for the attorney general to reclassify offenders having a registered address, while R.C. 2950.032 allows the attorney general to reclassify offenders serving a prison term. Both sections provide "[t]he attorney general shall make the determinations" of whether the offender should be classified as a Tier I, Tier II, or Tier III offender under the AWA. R.C. 2950.031(A)(3); R.C. 2950.032(A)(3).

{¶11} After the trial court denied Houston's petition to contest reclassification and he appealed, the Supreme Court of Ohio issued its decision in *State v. Bodyke*, ___ Ohio St.3d ___, 2010-Ohio-2424. In considering a challenge to the constitutionality of the AWA, *Bodyke* concluded "R.C. 2950.031 and 2950.032, the reclassification provisions in the AWA, are unconstitutional because they violate the separation-of-powers doctrine." *Id.* at ¶2.

{¶12} As part of its decision, the Supreme Court reiterated the history of Ohio's sex offender registration laws, emphasizing the importance of separation of powers and

noting the court has "held that '[t]he administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers.' " Id. at ¶45, quoting *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, paragraph one of the syllabus. In that context, the Supreme Court concluded the portions of the AWA governing reclassification of sex offenders already judicially classified under Megan's Law violate the separation of powers doctrine for two reasons: (1) "the reclassification scheme vests the executive branch with authority to review judicial decisions," and (2) "it interferes with the judicial power by requiring the reopening of final judgments." Id. at ¶55. Having concluded R.C. 2950.031 and 2950.032 are unconstitutional, the Supreme Court chose severance as the proper remedy. Id. at ¶66. The court thus held "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 under Megan's Law." Id. The Supreme Court ordered "the classifications and community-notification and registration orders imposed previously by judges are reinstated." Id.

{¶13} As Houston was no longer in prison at the time he received notification of his reclassification under the AWA, the attorney general used R.C. 2950.031 to reclassify him. Based on the Supreme Court's decision in *Bodyke*, R.C. 2950.031 and 2950.032 are unconstitutional, severed, and may not be enforced. Accordingly, we sustain Houston's third cross-assignment of error; the disposition of which renders moot his first, second, fourth, fifth, sixth, and seventh cross-assignments of error. See *State v. Watkins*, 10th Dist. No. 09AP-669, 2010-Ohio-4187.

{¶14} In its appeal, the state does not challenge the trial court's declaration that the residency restriction set forth in R.C. 2950.034 cannot be applied to Houston. Instead, the state only argues Houston's challenge to the residency restriction could not be brought in the same proceeding as Houston's R.C. 2950.031 petition challenging his reclassification. Premising its argument on the statutory language in R.C. 2950.031 that addresses only challenges to "new registration requirements," the state points out the residency restriction is not such a requirement.

{¶15} In *Bodyke*, the Supreme Court held the attorney general's reclassification of a sexual offender whom a trial court order previously had classified under prior law violated the separation of powers doctrine. As part of its conclusion, the court severed R.C. 2950.031 and 2950.032 and held that those provisions no longer could be enforced. *Bodyke* at ¶66.

{¶16} More recently, the court clarified the effect of the severance remedy in *Chojnacki v. Cordray*, ___Ohio St.3d ___, 2010-Ohio-3212, which involved an offender whom the trial court had classified as a sexually oriented offender. The offender subsequently filed a petition challenging his reclassification by the attorney general, along with a request for appointment of counsel for purposes of the hearing on his petition. The Twelfth District Court of Appeals held that the order denying his request for appointed counsel was not a final appealable order and dismissed the appeal. On a certified conflict, the Supreme Court considered whether the order denying appointment of counsel constituted a final appealable order.

{¶17} The Supreme Court, however, dismissed the appeal as moot based on its earlier *Bodyke* decision that severed the statutory provisions governing petitions

challenging reclassification. In so concluding, the Supreme Court stated "[t]he reclassification hearing which has resulted in this appeal and the related certified question arose under the now-severed provisions of R.C. 2950.031 and 2950.032. Accordingly, these causes no longer present a justiciable case or controversy, and as a result, the appeal is dismissed as moot and the certified conflict is dismissed because a conflict no longer exists." *Chojnacki* at ¶6.

{¶18} In this case, the only issue the state raises in its appeal arose from R.C. 2950.031 because the only issue the state argued is whether R.C. 2950.031 limits a court's consideration of a petition filed, pursuant to that statute, to the matters enumerated in the statute, thus making the trial court's declaration on a matter not set forth in R.C. 2950.031 an improper exercise of the court's jurisdiction. However, with the severance of R.C. 2950.031, no petition process exists, and any error regarding the court's exercise of jurisdiction within that petition process is moot.

{¶19} Accordingly, the state's assignment of error is moot.

{¶20} Having sustained Houston's third cross-assignment of error pursuant to the decision of the Supreme Court of Ohio in *Bodyke*, rendering moot his six other cross-assignments of error, and having rendered moot the state's assignment of error, we affirm in part and reverse in part the decision of the Franklin County Court of Common Pleas, and dismiss the state's appeal.

Judgment affirmed in part, reversed in part, and state's appeal dismissed.

BRYANT and BROWN, JJ., concur.
