[Cite as *State v. Wade*, 2010-Ohio-6395.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-159 (C.P.C. No. 02CR-09-5493)
David E. Wade,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 28, 2010

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

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, David E. Wade ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, entered upon a plea of guilty to one count of rape, which resulted in a three-year sentence ordered to run concurrently to a previously imposed 15-year sentence, and classification as a Tier III sex offender. For the reasons that follow, we affirm that judgment.

{¶2} Appellant was indicted in September 2002 and charged with aggravated burglary, rape, kidnapping, aggravated robbery, theft of a motor vehicle, theft of property valued at over $500, receiving stolen property, failure to comply with an order or signal of

a police officer, and possession of drugs. Several of these offenses also carried firearm specifications. The charges arose from events which began on August 20, 2002, when C.B. was attacked and raped at her apartment near the Ohio State University campus. C.B.'s car and various personal property items were also stolen.

{¶3} Following a jury trial, appellant was convicted on all counts except the aggravated robbery count. The jury also acquitted appellant of all firearm specifications. The trial court imposed an aggregate sentence of 26 years of incarceration. After a sexual predator hearing was held, appellant was adjudicated a sexual predator.

{¶4} On appeal, this court reversed and remanded, finding the trial court erred in responding to jury questions. *State v. Wade*, 10th Dist. No. 03AP-774, 2004-Ohio-3974. Because appellant was acquitted on the aggravated robbery offense, he was not retried on that count in the second trial.

{¶5} At the second trial, C.B. testified that, on August 20, 2002, she was living in an apartment near the Ohio State University campus. While home from work on her lunch hour, C.B. heard a knock at her door. A man, whom she did not recognize but whom she later identified as appellant, asked to use her phone. C.B. opened the door slightly and gave the man her phone. She then closed and locked the door. When she reopened the door to retrieve her phone, appellant pushed his way into her apartment. He took a gun out of his backpack and ordered her to remove her clothes. Appellant forced her to lie on the floor while he raped her. C.B. testified that the sexual act lasted approximately five or ten minutes.

{¶6} Afterwards, C.B. asked if she could get dressed and was able to put on her shirt. Appellant asked C.B. if she had any money. He removed a dollar and some change from her purse. Appellant then took C.B.'s purse, laptop computer, phone, and

keys before leaving the apartment and driving off in C.B.'s car. C.B. testified the entire incident lasted approximately 20 to 30 minutes.

{¶7} After appellant left, C.B. put on her pants and ran to a neighbor's apartment where she called her mother, the police, and her stepfather. The police arrived within five minutes and she provided a description of appellant. Another neighbor confirmed that she had witnessed appellant outside C.B.'s apartment around the time of the crime but that appellant was gone and the police were there when the neighbor returned 20 or 30 minutes later.

{¶8} That same night, appellant tried to sell C.B.'s phone for drugs to a local crack user, but the deal fell through when appellant pulled a gun on the man.

{¶9} Approximately two weeks later, appellant was driving C.B.'s car when he became involved in a high speed police chase. Appellant crashed the car and ran from police. He was arrested and found with a baggie of crack cocaine. Appellant denied knowing C.B. or anything about the crime. Appellant refused to provide a DNA sample pursuant to a search warrant, so he was physically forced to comply with the order. It was later determined that his DNA matched the DNA found on the vaginal swab taken from C.B.

{¶10} C.B., the crack user, and the neighbor all identified appellant from a photo array that had been completed prior to appellant's arrest.

{¶11} At trial, appellant admitted that he stole numerous items from C.B.'s apartment and that he fled from the police. However, he denied raping C.B. and also denied possessing a weapon. Instead, he testified he had previously met C.B. and that they had consensual sex.

{¶12} Following the second trial, appellant was convicted on all counts submitted to the jury. Appellant received an aggregate sentence of 25 years. Specifically, he was sentenced to ten years on the aggravated burglary, ten years each for the rape and kidnapping (the two offenses were merged for sentencing purposes), 18 months each for the motor vehicle theft and the fleeing, and 12 months each for the possession of cocaine, the receiving stolen property, and the other theft offense. Appellant was again found to be a sexual predator.

{¶13} Appellant filed an appeal from his second conviction. Again, this court reversed. Despite the not guilty findings with respect to the aggravated robbery count and the firearm specifications in the first trial, we determined that the State was not barred from introducing testimony in the second trial to demonstrate that appellant had a gun while committing the offenses. However, we determined a jury instruction was required to inform the jury that it could not consider the gun testimony in determining whether appellant used force in committing the rape. As a result of the court's failure to include such an instruction, we reversed the judgment as to all counts.

{¶14} The State filed an application for reconsideration, and after considering said application, we determined that six of the eight counts were not implicated by the court's error in failing to provide the limiting instruction. We further determined that the limiting instruction should have been provided for both the rape as well as the aggravated burglary. Therefore, we reversed and remanded for trial on those two counts, but affirmed the convictions with respect to the other six counts. The remaining sentence on those six counts, without the aggravated burglary or rape, was 15 years.

{¶15} On remand, a third trial was scheduled to retry the aggravated burglary and rape charges. While awaiting a third trial, appellant's counsel, appellant, and the State

reached a plea agreement with respect to the two remaining counts, pursuant to which appellant agreed to plead guilty to the rape charge and in exchange, the prosecution would request a nolle prosequi as to the aggravated burglary charge. (Tr. 15; R. 675-76.) The following exchange took place during the plea hearing:

> [MS. CANEPA:] Your Honor, upon acceptance of the Defendant's plea to the rape conviction – or to the rape charge, the State would request a nolle prosequi as to Count One of the indictment.
>
> Your Honor, I do have a two-page plea form signed by myself, Mr. Weisman and the Defendant setting forth that a plea in this case is punishable by a prison term of up to ten years.
>
> * * *
>
> Additionally, Your Honor, it's my understanding that he is aware that he is subject to tier registration under 2950.01, and there is a registration form filled out to that end.
>
> And, Your Honor, I would also note for the record that there's a joint recommendation being made between the State and defense, and I would note for the record that I did speak with [the victim] just moments ago, and she is in agreement with this plea, that there be three years to be served concurrently with the Defendant's current 15-year conviction sentence in the same case number, that being 02CR-5493.
>
> * * *
>
> Additionally, Your Honor, I believe there's an agreement that for purposes of this plea that the rape and the kidnapping are not merging but rather be served concurrently.
>
> MR. WEISMAN: That is the spirit of the plea, Your Honor.

(Tr.14-16.)

{¶16} Following the prosecution's recitation of the agreement on the record, the court addressed appellant to confirm that he understood the plea agreement. The following exchange occurred:

> THE COURT: Do you understand that for the rape, which is a felony of the first degree, the Court could impose a sentence of ten years in prison?
>
> THE DEFENDANT: You mean aside –
>
> THE COURT: That is the possible sentence. I understand your attorney and the prosecutor are recommending the three years concurrent, and I have told Mr. Weisman that I will accept this recommendation, but I just have to – I have to go over what the possible consequences are.
>
> THE DEFENDANT: Yes, Your Honor.
>
> * * *
>
> THE COURT: And, as Mr. Weisman explained to you, your plea of guilty to the rape count, you will be designated as a Tier III sex offender, which means that you will have to register for your lifetime and have to provide verification of your address every 90 days.
>
> THE DEFENDANT: Yes, Your Honor.

(Tr. 19-21.)

{¶17} Prior to sentencing, the court asked appellant's counsel if he had any statement he would like to make. Counsel then requested appellant be awarded three years of jail-time credit and further stated, "[w]e would ask the Court to follow the joint recommendation." (Tr. 23.)

{¶18} The trial court then imposed a sentence of three years and ordered it to be served concurrently to the other counts for which appellant was currently serving time. (Tr. 23.) The trial court also awarded three years of jail-time credit as to the rape count. (Tr. 23.) Upon a request from appellant for clarification, the trial court confirmed that the plea and sentence on the rape count would not affect appellant's "outdate." (Tr. 24.)

{¶19} Appellant has now filed an appeal challenging his sentence as well as his sexual offender classification, registration and community notification requirements. He asserts the following assignments of error for our review:

> First Assignment of Error: Retroactive application of the provisions of Senate Bill 10 to those convicted of offenses committed before its January 1, 2008 effective date violates the ban on ex post facto lawmaking by the states set forth in Article I, Section 10 of the United States Constitution.
>
> Second Assignment of Error: Application of the provisions of Senate Bill 10 to those convicted of offenses committed before its January 1, 2008 effective date violates the ban on retroactive laws set forth in Article II, Section 28, of the Ohio Constitution.
>
> Third Assignment of Error: Senate Bill 10's tier system of classification violates the Separation of Powers.
>
> Fourth Assignment of Error: Retroactive application of S.B. 10 violates the Double Jeopardy Clauses of the United States Constitution's Fifth Amendment and Article I, Section 10 of the Ohio Constitution.
>
> Fifth Assignment of Error: Senate Bill 10 as applied to appellant constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.
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> Sixth Assignment of Error: The trial court erred by entering a separate sentence for the allied offenses of rape and kidnapping in violation of Ohio Rev. Code 2941.25, Art. I, 2, 10, and 16, and the 5th, 6th, and 14th Amendments of the Ohio and U.S. Constitutions, ther[e]by violating Wade's right to be free from Double Jeopardy.
>
> Seventh Assignment of Error: Wade's trial counsel was ineffective when he failed to object to the trial court's imposition of multiple sentences for allied offenses of similar import, and he stood idle when the prosecutor attempted to add terms not set forth in Wade's plea agr[e]ement. This deficient performance was unreasonable, and affected the outcome in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments as well as Art. I, 2, 9, 10, and 16 of the Ohio Constitution.

{¶20} Because several of appellant's assignments of error are intertwined, we shall address them together. Furthermore, for ease of discussion, we shall address them out-of-order.

{¶21} Appellant's first, second, fourth, and fifth assignments of error challenge the constitutionality of the S.B. No. 10 amendments and raise claims asserting double jeopardy, cruel and unusual punishment, retroactivity, and ex post facto violations.

{¶22} Although the Supreme Court of Ohio recently struck down the reclassification scheme set forth under S.B. No. 10, see *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, that ruling is not dispositive of the issues here.

{¶23} In *Bodyke*, the court determined that the new statutory scheme set forth in S.B. No. 10, which required the attorney general to reclassify sexual offenders who were previously classified by court order under former law, violated the separation of powers doctrine on the grounds that it impermissibly instructed the executive branch to review past decisions of the judicial branch and required opening of final judgments. Id. at paragraphs one and two of the syllabus. However, the court did not address the constitutionality of S.B. No. 10 under the separation of powers doctrine as it applied to offenders who were not classified as sex offenders before the enactment of S.B. No. 10. *Green v. State*, 1st Dist. No. C-090650, 2010-Ohio-4371, ¶8, citing *Bodyke* at ¶15; *Boswell v. State*, 12th Dist. No. CA2010-01-006, 2010-Ohio-3134. Furthermore, the court declined to address various other constitutional challenges to S.B. No. 10 asserting the new scheme violated the ban against ex post facto laws, was retroactive, violated the double jeopardy clause, and constituted cruel and unusual punishment. In the case subjudice, appellant has not been "reclassified" under the new three tier system. Instead,

appellant has been classified under the three tier system for the first time. Thus, *Bodyke* is not applicable here.

{¶24} Appellant challenges the constitutionality of S.B. No. 10 on numerous grounds. Specifically, appellant argues that under the new scheme, the duty to register applies regardless of when the offense was committed, and thus there is no exception for those whose convictions arose from offenses committed prior to the effective date. Therefore, he asserts S.B. No. 10 is impermissibly retroactive and constitutes an impermissible ex post facto law. Appellant submits he is entitled to be sentenced and subjected to the consequences that were in effect at the time he committed the alleged offense, rather than being held to the more onerous sentencing provisions which became effective after the commission of the offense.

{¶25} Next, appellant argues the intent of the amended statutory scheme is criminal, not civil, in nature, as it constitutes punishment, rather than a remedial intention. As evidence of this, appellant points to the replacement of the previously imposed "narrowly tailored" approach with an automatic tier system. He states this approach makes the scheme a direct consequence of the conviction and thus a part of the sentence. Regardless of the legislative intent, appellant further submits the scheme as amended is punitive in purpose and effect because it imposes affirmative disabilities, restraints and burdens, including significant restraints upon liberty not shared by the general population or by others convicted of serious offenses.

{¶26} Appellant also maintains that the new scheme subjects offenders to historical forms of punishment and furthers the traditional aims of punishment, which include retribution and deterrence, as well as public shaming. Citing to the new residency

restrictions and the expanded disclosure provisions, he also argues the new statutory scheme is substantive rather than remedial and therefore it is unconstitutional.

{¶27} Additionally, appellant points out that the new classification, registration and notification scheme substantially increases the registration requirements, imposes much harsher notification requirements, and includes new categories of personal information which must be divulged, most of which will be available for public viewing at the sheriff's office and/or on the Internet.

{¶28} Finally, appellant argues S.B. No. 10's automatic classification, which does not consider or determine the likelihood of reoffending, along with the harsher registration and dissemination requirements and the more expansive residency ban, subjects offenders to excessive sanctions and violates the Eighth Amendment protection against cruel and unusual punishment.

{¶29} On the other hand, the State argues the changes from the old scheme to the new scheme are neither retroactive nor punishment. The State submits that the Supreme Court of Ohio has repeatedly upheld registration and community notification under previous schemes. Like the old system, the State argues the new system has a valid, remedial and non-punitive purpose and regulates current conditions and ongoing events, but does not attach new consequences to old events. The State submits that the new scheme serves the remedial purpose of protecting the community and allows law enforcement to monitor offenders and decrease recidivism.

{¶30} The State further argues convicted felons lack a reasonable right to expect that their conduct will never be made the subject of future legislation. Although the notification requirements may be a detriment or result in a "stigma," the State asserts these requirements do not convert a remedial statute into a punitive one, even if they

seem harsh to the offender. The State also asserts the risks of recidivism justify the collection and/or dissemination of information, as the scheme is designed to protect the public, and argues the requirement of additional information is consistent with *Smith v. Doe* (2003), 538 U.S. 84, 123 S.Ct. 1140, because it demonstrates a rational relationship to the scheme's non-punitive purpose.

{¶31} Finally, because the changes to the statutory scheme under S.B. No. 10 do not constitute punishment, the State argues the new requirements do not constitute cruel and unusual punishment nor violate double jeopardy.

{¶32} Ohio has had a sex offender registration statute since 1963. However, in 1996, the General Assembly rewrote R.C. Chapter 2950 as part of Am.Sub.H.B. No. 180, 146 Ohio Laws, Part II, 2560, 2601, and enacted Ohio's version of Megan's Law, which provided for offender registration, classification, and community notification. See *State v. Cook*, 83 Ohio St.3d 404, 407, 1998-Ohio-291; see also Section 3 of Am.Sub.H.B. No. 180, 146 Ohio Laws, Part II, 2668 and Section 5 of Am.Sub.H.B. No. 180, 146 Ohio Laws, Part II, 2669. Additional significant amendments were made pursuant to S.B. No. 5 and became effective July 31, 2003. See former R.C. Chapter 2950.

{¶33} Under Megan's Law, sexual offenders who committed a sexually oriented offense that was not registration-exempt were labeled based on one of three classifications: (1) sexually oriented offender; (2) habitual sexual offender; or (3) sexual predator. These classifications were based upon the crime committed and the findings of the trial court, based on a sexual offender classification hearing.

{¶34} Then, in 2006, Congress passed the Adam Walsh Child Protection and Safety Act, codified at 42 U.S.C. 16901 et seq., which created national standards for sexual offender classification, registration, and community notification. As a result, Ohio

reorganized its sexual offender registration scheme in 2007 by enacting its version of the Adam Walsh Act, also known as S.B. No. 10, which became effective on July 1, 2007 and January 1, 2008. S.B. No. 10 repealed the three-level scheme set forth under Megan's Law (sexually oriented offender, habitual sexual offender, and sexual predator), and replaced it with a new three-tier system (Tier I, Tier II, and Tier III). Under this new version of R.C. Chapter 2950, sexual offenders are assigned to a particular tier based solely upon the offense for which they were convicted, without any judicial determination. See R.C. 2950.01(E), (F), and (G).

{¶35} For more than a decade, the Supreme Court of Ohio, as well as the United States Supreme Court, have repeatedly upheld sex offender registration schemes against claims of unconstitutionality. See *Cook*; *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824; *State v. Williams*, 88 Ohio St.3d 513, 2000-Ohio-428; and *Smith*, supra. Although the classification and registration scheme at issue is different, as the *Bodyke* court recognized, we believe we are bound to reach the same conclusion here, based upon the rulings of the Ohio and United States Supreme Courts involving prior registration and notification schemes. See generally *State v. Ryan*, 10th Dist. No. 08AP-481, 2009-Ohio-3235, ¶48 (as a court which is inferior in jurisdiction to the Supreme Court of Ohio, an appellate court must follow its mandates, as we lack the jurisdictional authority to declare a mandate of the Supreme Court of Ohio to be unconstitutional).

{¶36} Futhermore, "all legislative enactments must be afforded a strong presumption of constitutionality." *State v. Collier* (1991), 62 Ohio St.3d 267, 269, citing *State v. Anderson* (1991), 57 Ohio St.3d 168. "[I]f at all possible, statutes must be construed in conformity with the Ohio and United States Constitutions." *Collier* at 269, citing *State v. Tanner* (1984), 15 Ohio St.3d 1. Additionally, the party who challenges a

statute as unconstitutional is required to prove this assertion beyond a reasonable doubt. *Collier*, citing *Anderson*.

{¶37} As noted above, previous amendments to Ohio's sexual offender registration scheme have been consistently upheld pursuant to *Cook*, *Ferguson*, and *Williams*.

{¶38} *Cook* involved ex post facto challenges to the 1997 version of R.C. Chapter 2950. Although it found the statutory scheme was intended to be applied retrospectively, the Supreme Court of Ohio held that the classification, registration, and notification provisions of Megan's Law served a remedial purpose of protecting the public, and as a result, were remedial in nature, rather than punitive. The court looked at the "intent-effects" test to determine whether the statutory scheme was civil or criminal for the purpose of analyzing whether the sex offender registration and notification statutes violated ex post facto laws. The court determined the intent of the General Assembly was not punitive and therefore, the statutory scheme was civil in nature.

{¶39} The *Cook* court also found that the scheme served the remedial purpose of enabling law enforcement to monitor offenders, thereby lowering recidivism, and that the notification provisions allowed the dissemination of pertinent information to the public for its protection. *Cook* at 421. While acknowledging that government dissemination of information may damage an offender's reputation or create a "social stigma," the court determined that, in itself, did not violate a constitutional right. Id. at 413.

{¶40} Relying on *Cook*, the Supreme Court of Ohio, in deciding *Williams*, found that R.C. Chapter 2950, as a civil statute, did not violate the constitutional rights protected by the double jeopardy clauses of the United States and Ohio Constitutions, because the threshold question in a double jeopardy analysis is whether the government's conduct

involves criminal punishment. *Williams* at 528. See also *Hudson v. United States* (1997), 522 U.S. 93, 101, 118 S.Ct. 488, 494.

{¶41} More recently, in *Ferguson*, which involved challenges to the 2003 amendments to R.C. Chapter 2950, the Supreme Court of Ohio held the new amendments were remedial in effect. Ferguson challenged the statutory amendments set forth in S.B. No. 5, claiming that as applied to him, they violated the ex post facto clause of the United States Constitution and the retroactivity clause of the Ohio Constitution because they were enacted after he committed his crimes and was adjudicated. Despite the imposition of more demanding registration duties, as well as expanded community notification requirements, expanded residency restrictions, and the elimination of an avenue which allowed for the possibility of removing a predator classification, the majority of the court continued to find the statute was remedial, rather than punitive.

{¶42} "R.C. Chapter 2950 is replete with references to the legislature's intent to 'protect the safety and general welfare of the people of this state' and to 'assur[e] public protection[.]' " *Ferguson* at ¶28. "In light of that legislative intent, we have held consistently that R.C. Chapter 2950 is a remedial statute." Id. at ¶29.

{¶43} The court further stated "Ohio retroactivity analysis does not prohibit all increased burdens; it prohibits only increased punishment." Id. at ¶39. A statutory scheme which serves a regulatory purpose " 'is not punishment even though it may bear harshly upon one affected.' " Id. at ¶39, quoting *Flemming v. Nestor* (1994), 363 U.S. 603, 614, 80 S.Ct. 1367.

{¶44} Just a few months ago, in *State v. Clayborn*, 125 Ohio St.3d 450, 2010-Ohio-2123, the Supreme Court of Ohio reaffirmed that sex offender classification

proceedings are civil in nature and require a civil manifest weight of the evidence standard.

{¶45} Furthermore, the United States Supreme Court, in upholding a sexual offender registration act in Alaska, previously rejected the challenges of convicted sex offenders who claimed the act constituted an unconstitutional ex post facto law. In *Smith*, the court determined the act was not punitive, despite the fact that it required offenders to register, provide a wide range of personal information,[1] and notify the state of any changes in their registration information. Despite the fact that Alaska's sex offender scheme applied to all convicted sex offenders without considering the likelihood to reoffend in the future, the court concluded "[t]he State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the Ex Post Facto Clause." Id. at 104; 1153.

{¶46} In response to an argument that the statutory scheme was not narrowly tailored to accomplish its stated purpose, the United States Supreme Court found "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." Id. at 103; 1152. The court went on to determine that the dissemination of accurate information about a criminal record was not punishment. "Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." Id. at 98; 1150. The court further held the fact that Alaska posted its information on the Internet did not alter its decision.

[1] The wide range of personal information to be provided includes, inter alia, providing one's name, aliases, and information about vehicles to which one has access, as well as advising authorities after one changed his facial features (such as by growing a beard), borrowed a car, or sought psychiatric treatment.

{¶47} Admittedly, the classification, registration, and notification scheme set forth under S.B. No. 10 is different from the previous scheme imposed under Megan's Law, and the Supreme Court of Ohio has yet to consider the constitutionality of this new scheme outside of its ruling in *Bodyke*, which was limited to a separation of powers challenge as applied to those who had been previously classified under Megan's Law. In fact, some of the very challenges asserted in this appeal are currently pending before the Supreme Court of Ohio. See *State v. Williams*, S.Ct. No. 2009-0088. See also *In re Darian Smith*, S.Ct. No. 2008-1624, and *In re A.R.*, S.Ct. No. 2009-0189 (addressing the constitutionality of S.B. No. 10 as applied to juvenile offenders).

{¶48} Prior to the issuance of the Supreme Court of Ohio's decision in *Bodyke* on June 3, 2010, several appellate courts rejected assertions that S.B. No. 10 is an impermissible ex post facto law which also violates the prohibition against retroactive laws, violates the separation of powers doctrine, constitutes cruel and unusual punishment, and/or violates the double jeopardy clause. These courts also determined that S.B. No. 10 is civil and non-punitive. See *State v. Barker*, 2d Dist. No. 22963, 2009-Ohio-2774; *State v. Hall*, 2d Dist. No. 22969, 2009-Ohio-3020; *State v. Desbiens*, 2d Dist. No. 22489, 2008-Ohio-3375; *Sewell v. Ohio*, 181 Ohio App.3d 280, 2009-Ohio-872; *State v. Hughes*, 5th Dist. No. 2008-CA-23, 2009-Ohio-2406; *State v. Omiecinski*, 8th Dist. No. 90510, 2009-Ohio-1066; *State v. Honey*, 9th Dist. No. 08CA0018-M, 2008-Ohio-4943; *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195.

{¶49} While many of the judgments in these cases were likely vacated by the ruling in *Bodyke* on the grounds that S.B. No. 10's reclassification provisions violated the separation of powers doctrine by requiring the opening of final judgments, *Bodyke*, as previously noted, is not applicable here. Moreover, the reasoning of these various

appellate courts as to S.B. No. 10's constitutionality with respect to the challenges raised involving ex post facto laws, retroactivity, cruel and unusual punishment, and the double jeopardy clause is still sound, as such reasoning was based upon the Supreme Court of Ohio's analysis in *Cook*, *Ferguson*, and *Williams*.

{¶50} Furthermore, since *Bodyke*, at least a few appellate courts have determined that S.B. No. 10's application of the tier classification and registration requirements did not violate the constitutional ban on ex post facto laws.

{¶51} In *State v. Green*, 1st Dist. No. C-090650, 2010-Ohio-4371, the First District, citing to *Sewell*, held that the tier classification and registration provisions of S.B. No. 10 are civil and remedial, rather than criminal and punitive, and therefore, they do not have the effect of converting a remedial statute into a punitive statute. *Green* at ¶13. The court also rejected the claim that S.B. No. 10 violated the prohibition on retroactive laws based on the reasoning set forth in *Sewell*. Under that rationale, the court determined the legislature had enacted S.B. No. 10 to establish a remedial regulatory scheme for the purpose of protecting the public, and as a result, the new provisions did not violate the constitutional ban on retroactive laws.

{¶52} The *Green* court also overruled the constitutional challenge on double jeopardy grounds as well, again relying upon the analysis used in *Sewell*. That court found the new requirements did not impose a new disability or restraint, were not excessive in relation to the statutes' non-punitive purpose under *Smith*, were not analogous to historical shaming punishments, and did not promote retribution and deterrence. The *Sewell* court further stated that the additional registration requirements of S.B. No. 10 were not penalties but were analogous to the "numerous requirements

placed on all citizens whenever governmental mandates require that additional action be taken in the arena of regulated activity." *Sewell* at ¶26.

{¶53} In addition to the First District, the Eighth District has also rejected, post-*Bodyke*, the claims of a sexual offender asserting constitutional challenges to the statutory scheme set forth in S.B. No. 10 on the grounds that the new requirements violate the ban against retroactivity and ex post facto laws. See *State v. Felton*, 8th Dist. No. 92295, 2010-Ohio-4105.

{¶54} Significantly, we have also recently rejected challenges to the constitutionality of S.B. No. 10 on the grounds that the new requirements violated the ban against ex post facto laws, retroactivity, and cruel and unusual punishment as it applied to juvenile offenders. In analyzing those challenges, we held "Senate Bill 10 is meant to allow law enforcement to protect the general public from persons who have committed serious sexual offenses and who are deemed likely to commit such offenses again. The purpose is remedial." *In re A.H.*, 10th Dist. No. 09AP-186, 2010-Ohio-5434, ¶16. We further determined that, "[i]n light of the holdings of the United States Supreme Court on the ex post facto clause, Senate Bill 10 cannot be found to violate the clause." Id. at ¶20. Finally, based upon the history of the Eighth Amendment, we determined the classification and registration requirements set forth under S.B. No. 10 do not constitute cruel and unusual punishment, as applied to juveniles. Id. at ¶11.

{¶55} As previously stated, statutes in Ohio are presumed to be constitutional, and this presumption remains unless it is proven beyond a reasonable doubt that the statute is clearly unconstitutional. *Williams* at 521. Given the authority cited above, appellant has not met his burden here.

{¶56} Thus, based upon the foregoing authority, we reject appellant's challenges to S.B. No. 10 on the grounds that it is an impermissibly retroactive and ex post facto scheme that exposes offenders to double jeopardy and imposes cruel and unusual punishment. Accordingly, we overrule appellant's first, second, fourth, and fifth assignments of error.

{¶57} In his third assignment of error, appellant argues S.B. No. 10 improperly strips trial courts of vested authority, in violation of the separation of powers doctrine.

{¶58} At the time appellant committed his offenses, classification of sexual offenders was a matter determined pursuant to judicial proceedings. Because the new statutory scheme removes the judiciary's vested authority to classify sexual offenders by ordering courts to place offenders in a particular tier, appellant contends it violates the separation of powers doctrine, since the legislative branch has no right to limit these inherent powers of the judiciary.

{¶59} Appellant also argues, in the alternative, that past judgment entries in this case have reflected that he was judicially classified as a sexual predator. As a result, appellant argues that he could have been classified as a sexual predator based upon the kidnapping count, which was upheld on appeal after the second trial, rather than upon the rape count, and as such, he has previously been judicially classified as a sex offender. Based upon the authority of *Bodyke*, appellant submits his "reclassification" is unconstitutional.

{¶60} In response, the State first argues appellant failed to object to his Tier III classification in the trial court, and as a result, he has waived or forfeited the issue and cannot raise the separation of power argument here. Next, the State submits that because appellant's prior judicial classification as a sexual predator was reversed, he

cannot rely upon the separation of powers determination in *Bodyke*, as he has not been previously judicially classified. Third, the State asserts the *Bodyke* court's concern about "un-doing" a prior judicial order is not at issue here, and therefore, there is no separation of power violation. Instead, the State asserts the General Assembly has simply made a legislative change regarding how newly convicted sexual offenders should be classified and that such, a change does not invade judicial authority or create a separation of powers conflict. The State further submits that appellant misunderstood the court's role under the prior system, which was simply to be a fact finder, rather than to regulate or define the scope and breadth of the registration duties and community notification requirements.

{¶61} We reject appellant's argument that he was previously adjudicated as a sexual predator, and as a result, that he was "reclassified" in violation of *Bodyke*. Because there is no prior judicial classification in effect, appellant's "classification" is not governed by *Bodyke*. While appellant submits that his sexual predator classification could have been imposed as a result of his kidnapping conviction, which was not reversed after the second appeal, the record demonstrates otherwise. See April 15, 2008 decision on application for reconsideration, at ¶21 (in addressing appellant's contention that his sexual predator classification was not supported by sufficient evidence, we held that "[b]ecause we have reversed appellant's rape conviction and remanded that count for a new trial, this assignment of error is moot."). See also *Green* at ¶10 (because defendant was never adjudicated by a court under Megan's Law, there is no final judicial order classifying him and *Bodyke* does not apply to him).

{¶62} We also disagree with appellant's assertion that S.B. No. 10 violates the separation of powers doctrine notwithstanding the decision in *Bodyke*. As argued by the

State, under former R.C. Chapter 2950, a sexual offender who committed a sexually oriented offense which was not registration-exempt was classified by operation of law as a sexually oriented offender. Such a classification did not require judicial action. Furthermore, courts had no discretion or authority to determine that a sex offender was not a sexually oriented offender. Under the new scheme set forth in S.B. No. 10, sexual offenders are placed into tiers by operation of law based upon the crimes committed and courts have no discretion to determine that an offender should not be placed into a particular tier. Under both schemes, offenders are essentially classified based upon the offenses committed. See *Green* at ¶10; *Sewell* at ¶29.

{¶63} Furthermore, " '[t]he enactment of laws establishing registration requirements for, e.g., motorists, corporations, or sex offenders, is traditionally the province of the legislature and such laws do not require judicial involvement.' " *Sewell* at ¶30, quoting *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, ¶99. Plus, "the classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts." *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234, ¶39.[2] "[W]e cannot find that sex offender classification is anything other than a creation of the legislature, and therefore, the power to classify is properly expanded or limited by the legislature." Id. See also *State v. Hughes*, 5th Dist. No. 2008-CA-23, 2009-Ohio-2406, ¶18 (classification of sex offenders is a creature and mandate of the legislature and does not implicate the inherent power of the courts); *Smith*, supra.

{¶64} Accordingly, we overrule appellant's third assignment of error.

[2] This case is currently on appeal and is pending before the Supreme Court of Ohio.

{¶65} In his sixth and seventh assignments of error, appellant argues the trial court erred in imposing a separate sentence for the allied offenses of rape and kidnapping, and that his counsel was ineffective in failing to object to said sentence.

{¶66} Appellant argues that the rape and kidnapping counts were previously determined to be allied offenses of similar import which were not committed with a separate animus following sentencing after the first and second trials. As a result, the two offenses were found to have merged for sentencing purposes. Appellant argues the trial court's acceptance of the plea agreement and its subsequent imposition of separate sentences for the rape and kidnapping counts violates his right to be free from double jeopardy because he should have been convicted of only one count, pursuant to R.C. 2941.25.

{¶67} Appellant further argues the record fails to demonstrate that he waived his rights or stipulated that the offenses were committed with a separate animus. In addition, appellant submits the trial court did not make a finding that the offenses were committed with a separate animus. Appellant also argues that imposition of multiple sentences for allied offenses of similar import constitutes plain error and requires remand. Furthermore, appellant contends his counsel was ineffective in failing to object to the trial court's imposition of multiple sentences for allied offenses of similar import, and in allowing the State to add additional terms to the plea agreement. Appellant asserts he was prejudiced as a result of this, as his counsel cannot waive his right to be free from double jeopardy.

{¶68} The State, on the other hand, argues the invited error and plain error doctrines bar review of appellant's merger claim. The State asserts that pursuant to the oral recitation of the plea agreement placed on the record, appellant agreed to forego raising the argument that merger applied. The State also points to the joint

recommendation recited in the written plea entry, which clearly abandoned any merger argument. Together, the State contends these actions demonstrate the parties agreed there would be no merger and the invited error doctrine bars appellant from obtaining relief.

{¶69} Even if the invited error doctrine is not applicable, the State argues the concept of waiver and/or forfeiture should apply, and further submits no plain error occurred here. Furthermore, the State contends that the merger claim fails on its merits because a separate animus exists for the kidnapping under the facts of this case, due to the prolonged restraint of the victim's freedom. The State asserts any previous decision by the trial court to merge the rape and kidnapping counts was not binding upon the court at the time the plea was entered.

{¶70} Based upon these assertions, the State argues appellant cannot demonstrate that his counsel was ineffective in failing to pursue the merger argument, nor can he demonstrate there is a reasonable probability that he would have received a more favorable outcome if his counsel had objected to the agreement regarding the lack of merger.

{¶71} Pursuant to R.C. 2941.25(A), when the same conduct by a defendant can be construed to constitute two or more allied offenses of similar import, the indictment may contain counts for all offenses, but the defendant may be convicted of only one offense. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶6. At sentencing, the prosecution elects which of the allied offenses to pursue. Id. at ¶20.

{¶72} We disagree with appellant's contention that he did not waive his rights with respect to any merger argument and/or that he did not stipulate that the offenses were committed with a separate animus. The record reflects otherwise.

{¶73} The prosecutor specifically advised the trial court there was an agreement or understanding that the rape and kidnapping would not be merged, but instead would be run concurrently. Appellant's counsel then confirmed that agreement by stating, "[t]hat is the spirit of the plea, Your Honor." (Tr. 16.) Because the State and a defendant can stipulate in a plea agreement that offenses were committed with a separate animus, a defendant can be subjected to more than one conviction and sentence. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶29. Therefore, we find that, pursuant to the terms of the plea agreement, which also included a joint recommendation for a concurrent sentence, the parties agreed that appellant's sentence on the rape charge would not merge with his prior sentence on the kidnapping offense. Under the invited error doctrine, reversal is not warranted here. See *Lester v. Leuck* (1943), 142 Ohio St. 91, paragraph one of the syllabus.

{¶74} Even if the invited error doctrine does not apply and the joint recommendation and plea agreement are not dispositive of the issue, we further note there is evidence, including testimony presented at trial, which demonstrates the existence of a separate animus for the two offenses. Here, the kidnapping was not merely incidental to the rape, which lasted five or ten minutes, but also involved prolonged restraint of 20 to 30 minutes, thus supporting a reasonable finding that the two crimes were committed with a separate animus. See *State v. Hairston*, 10th Dist. No. 06AP-420, 2007-Ohio-143.

{¶75} Furthermore, we reject appellant's assertion that the trial court's earlier decisions to merge the rape and kidnapping counts were binding at the time the sentencing took place following the plea to the rape charge. Our June 12, 2008 memorandum decision on appellant's application for reconsideration, makes it clear that

the merger issue would need to be decided by the trial court if appellant was convicted of the rape upon retrial. (R. 517, at ¶7.)

{¶76} Finally, because appellant did not object to the lack of merger at the time of the sentencing hearing, our review of this matter would be subject to a plain error standard. Based upon the circumstances here, we find no plain error.

{¶77} Accordingly, we overrule appellant's sixth assignment of error.

{¶78} Appellant's seventh assignment of error is directly tied to his sixth assignment of error, as appellant argues his counsel was ineffective in failing to pursue the merger argument.

{¶79} In order to succeed on a claim of ineffective assistance of counsel, appellant must satisfy a two-prong test. First, he must demonstrate that his trial counsel's performance was deficient. *Strickland v. Washington* (1984), 466 U.S. 686, 104 S.Ct. 2052. This requires a showing that his counsel committed errors which were "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. If he can show deficient performance, he must next demonstrate that he was prejudiced by the deficient performance. Id. To show prejudice, he must establish there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one sufficient to erode confidence in the outcome. Id.

{¶80} The terms of the joint recommendation required appellant's counsel to abandon the merger argument. In exchange, appellant received a substantial benefit by pleading to the rape and receiving a nolle prosequi as to the aggravated burglary, along with a three-year minimum concurrent sentence, which greatly reduced his potential prison sentence. As such, appellant has not demonstrated a reasonable probability that

he would have received a more favorable outcome or sentence if his counsel had objected. Therefore, we overrule appellant's seventh assignment of error.

{¶81} In conclusion, we overrule appellant's first, second, third, fourth, fifth, sixth, and seventh assignments of error. The judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

SADLER and McGRATH, JJ., concur.

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