[Cite as *Boernke v. State*, 2010-Ohio-737.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

THOMAS BOERNKE,	:	
Petitioner-Appellant,	:	CASE NO. CA2009-06-070
	:	O P I N I O N
- vs -		3/1/2010
	:	
STATE OF OHIO,	:	
Respondent-Appellee.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08-CV-70489

George A. Katchmer, 115 Brookside Drive, Yellow Springs, Ohio 45387, for petitioner-appellant

Rachel A. Hutzel, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, OH 45036, for respondent-appellee

POWELL, P.J.

{¶1} Defendant-appellant, Thomas Boernke, appeals the decision of the Warren County Court of Common Pleas denying his petition to contest reclassification.

{¶2} Appellant was convicted of four counts of sexual battery on March 25, 1999, in Greene County. He was classified as a sexually-oriented offender. On

November 26, 2007, appellant was reclassified by the Ohio Attorney General's Office as a Tier III sex offender. Appellant filed a petition to contest his reclassification, which was denied by the Warren County Common Pleas Court. Appellant timely appeals the decision, asserting six assignments of error.

{¶3} Assignment of Error No. 1:

{¶4} "THE RECLASSIFICATION OF A SEXUALLY ORIENTED OFFENDER TO THAT OF A TIER III OFFENDER BEARS NO RATIONAL RELATIONSHIP TO THE GOAL IT PURPORTS TO ACHIEVE AND IS THEREFORE UNCONSTITUTIONAL AND VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OT THE UNITED STATES CONSTITUTION."

{¶5} Appellant argues that Senate Bill 10, also known as the Adam Walsh Act, violates the Due Process Clause of the United States Constitution. This court has already held that Senate Bill 10 does not violate the Due Process Clause. *State v. Bell*, Clermont App. No. CA2008-05-044, 2009-Ohio-2335, at ¶104. Appellant, however, makes an additional argument as to his specific classification from a sexual-oriented offender to a tier III sex offender.

{¶6} Appellant contends that his original classification as a sexually-oriented offender reflects "a recognition of rehabilitation" and "concomitant lack of danger to the public." Therefore, he claims that the added notification and extension of reporting requirements for those previously classified as sexually-oriented offenders bears no rational relationship to the stated intent of the new statutory provisions. We disagree.

{¶7} Under the former version of R.C. Chapter 2950, first-time sex offenders were ordinarily labeled by trial courts as either "sexually-oriented offenders" or

"sexual predators." *State v. King*, Miami App. No. 08-CA-02, 2008-Ohio-2594, at ¶25. In order to classify an offender as a sexual predator, the court was required to find, by clear and convincing evidence, that the defendant was likely to reoffend. Id., citing *State v. Eppinger*, 91 Ohio St.3d 158, 2001-Ohio-247. Absent such a finding, the trial courts classified the offenders as sexually-oriented offenders. Id. Therefore, the sexually-oriented offender's classification was not the result of a judicial determination that he or she was not dangerous. Instead, it was the result of a lack of an affirmative finding, by clear and convincing evidence, that the offender *was* dangerous. Id.

{¶8} This distinction undermines appellant's argument that there lacks a rational relationship between Senate Bill 10 and the reclassification of sexually-oriented offenders. Senate Bill 10 was enacted to protect the public from sex offenders. The General Assembly's decision to categorize sex offenders based upon the crime committed rather than to require individual determinations of dangerousness bears a rational relationship with the statute's intended purpose. *Sewell v. State*, 181 Ohio App.3d 280, 2009-Ohio-872, at ¶22; *King* at ¶23.

{¶9} Within the argument that Senate Bill 10 is irrational, appellant asserted at oral argument that the tier scheme under Senate Bill 10 is, in effect, a criminal sentencing scheme. Appellant, however, omitted any discussion of this subject in his brief. In addition, appellant did not cite, and we have not found, any authority to support this claim or reverse the trial court's decision on this basis. But cf. *Smith v. Doe* (2003), 538 U.S. 84, 100-101, 123 S.Ct. 1140 (In addressing the constitutionality of Alaska's sex offender registration act, which is similar to Senate Bill 10, the United States Supreme Court held that Alaska's act does not resemble the punishment of

imprisonment and is not parallel to probation in terms of the restraint imposed).

{¶10} Accordingly, appellant's assignment of error is without merit, and we reaffirm our holding that Senate Bill 10 does not violate the Due Process Clause of the United States Constitution.

{¶11} Assignment of Error No. 2:

{¶12} "THE RECLASSIFICATION OF THE APPELLANT CONSTITUTES AN ILLEGAL EX POST FACTO LAW."

{¶13} Assignment of Error No. 3:

{¶14} "THE RECLASSIFICATION OF THE APPELLANT IS RETROACTIVE AND VIOLATES SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION."

{¶15} Assignment of Error No. 4:

{¶16} "THE RECLASSIFICATION OF THE APPELLANT CONSTITUTES DOUBLE JEOPARDY."

{¶17} Assignment of Error No. 5:

{¶18} "THE RECLASSIFICATION OF THE APPELLANT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT."

{¶19} Assignment of Error No. 6:

{¶20} "THE RECLASSIFICATION OF THE APPELLANT VIOLATES THE RIGHT TO CONTRACT."

{¶21} For ease of discussion, we will address appellant's remaining assignments of error together. This court has previously addressed the constitutionality of Senate Bill 10 in *State v. Williams*, Warren App. No. CA2008-02-029, 2008-Ohio-6195, and in *State v. Ritchie*, Clermont App. No. CA2008-07-073, 2009-Ohio-1841. In *Williams*, this court held that Senate Bill 10 does not violate the

Ex Post Facto Clause, the prohibition of cruel and unusual punishment, or the Double Jeopardy Clause of the Ohio and United States Constitutions. Id. at ¶75, 102, 106, 111. Also, in *Ritchie*, this court determined that Senate Bill 10 does not violate the Retroactivity Clause of the Ohio Constitution and the Contract Clauses of the United States and Ohio Constitutions. Id., at ¶13, ¶16. Accordingly, we find appellant's remaining assignments of error without merit.

{¶22} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.