[Cite as *State v. Miliner*, 2010-Ohio-6117.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-643 (C.P.C. No. 99CR-05-2758)
Michael K. Miliner,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 14, 2010

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

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Petitioner-appellant, Michael K. Miliner ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas denying his petition to contest his sexual offender reclassification under Ohio's Adam Walsh Act ("AWA"). Based upon the decision of the Supreme Court of Ohio in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, in which the court determined the reclassification provisions set forth in R.C. 2950.031 and 2950.032 were unconstitutional, we sustain appellant's first assignment of error and therefore reverse and remand this matter with instructions.

{¶2} Appellant was indicted on May 21, 1999 on two counts of kidnapping and three counts of rape. On March 3, 2000, appellant entered guilty pleas to two counts of rape. At sentencing, the trial court imposed a sentence of seven years on each count and ordered the counts to run concurrently. In addition, the trial court also held a sexual offender classification hearing and found appellant to be a sexual predator pursuant to Megan's Law. This classification subjected appellant to a lifetime duty to register upon release from prison and quarterly periodic verification, as well as community notification.

{¶3} 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 AWA, 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 S.B. No. 10 repealed the three level scheme set forth under Megan's Law ("sexually oriented offender," "habitual sexual offender," and "sexual predator"), and replaced it with a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).

{¶4} Under this new version of R.C. Chapter 2950, sexual offenders are assigned to a particular tier based upon the offense for which they were convicted. See R.C. 2950.01(E), (F), and (G). Under R.C. 2950.031, the attorney general was required to reclassify sexual offenders who had a registered address, while R.C. 2950.032 mandated that the attorney general also reclassify sexual offenders who were serving a prison term. These sections specifically instructed the attorney general to make a classification determination of Tier I, Tier II, or Tier III for all of these sexual offenders.

R.C. 2950.031 and 2950.032 also required the attorney general to send notification letters by December 1, 2007, to the offenders regarding their new tier classifications and duties.

{¶5} As a result of the enactment of the AWA, appellant was notified by the attorney general that he had been reclassified as a Tier III offender. Under this classification, appellant was required to personally register with the local sheriff every 90 days for life and was also subject to community notification provisions. On February 11, 2008, appellant filed a "petition to contest reclassification and application of 2950.01, et seq.," citing to R.C. 2950.031(E), and/or 2950.032(E), and/or 2950.11(F)(2), and raised a variety of constitutional challenges. On that same date, appellant also filed a motion to stay enforcement of community notification. That motion was granted by the trial court on February 15, 2008, pending the outcome of the petition.

{¶6} On February 19, 2009, the trial court held a hearing on the petition, but took the matter under advisement. On June 3, 2009, the trial court dismissed the petition contesting reclassification, finding appellant's constitutional challenges to be without merit. However, the trial court's decision and entry did not expressly address the February 15, 2008 stay placed on the enforcement of community notification. On July 2, 2009, appellant filed a timely appeal. Appellant now raises four assignments of error for our review:

> ASSIGNMENT OF ERROR NUMBER ONE
>
> THE TRIAL COURT ERRED WHEN IT HELD THAT THE RECLASSIFICATION PROVISIONS IN THE ADAM WALSH ACT DID NOT VIOLATE THE SEPARATION-OF-POWERS DOCTRINE. *STATE v. BODYKE*, [126] OHIO St.3d [266], 2010-OHIO-2424, [933] N.E.2d [753], APPROVED AND FOLLOWED.

ASSIGNMENT OF ERROR NUMBER TWO

THE TRIAL COURT ERRED WHEN IT HELD THAT SENATE BILL 10, AS APPLIED TO THOSE CONVICTED OF OFFENSES COMMITTED BEFORE ITS EFFECTIVE DATE, BUT SENTENCED AFTER THAT DATE, DID NOT VIOLATE THE EX POST FACTO PROHIBITION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION.

ASSIGNMENT OF ERROR NUMBER THREE

THE TRIAL COURT ERRED WHEN IT HELD THAT THE APPLICATION OF THE PROVISIONS OF SENATE BILL 10 TO THOSE CONVICTED OF OFFENSES COMMITTED BEFORE ITS EFFECTIVE DATE, BUT SENTENCED AFTER THAT DATE, DID NOT VIOLATE THE BAN ON RETROACTIVE LAWS SET FORTH IN ARTICLE II, SECTION 28, OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NUMBER FOUR

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.

{¶7} Appellant's first assignment of error asserts the trial court erred in dismissing his petition to contest reclassification because the application of the AWA tier classification system to sexual offenders who were previously judicially classified pursuant to former versions of R.C. Chapter 2950 offends the separation-of-powers doctrine under the Ohio and United States Constitutions. Appellant cites to *Bodyke*, in support of his position.

{¶8} "[A]ll 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. Furthermore, the party who challenges a statute as unconstitutional is required to prove this assertion beyond a reasonable doubt. *Collier*, citing *Anderson*.

{¶9} After the trial court dismissed appellant's petition in the case sub judice, the Supreme Court of Ohio considered the constitutionality of the AWA in *Bodyke*. In considering the constitutionality of these provisions, the court examined the history of Ohio's sexual offender registration laws and reiterated the importance of the separation-of-powers doctrine, stating: "We have 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.' " *Bodyke* at ¶45, quoting *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, paragraph one of the syllabus. Therefore, the court 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.

{¶10} Specifically, the court found that the reclassification scheme, which required the attorney general to reclassify offenders who had previously been classified by Ohio judges under the provisions set forth pursuant to Megan's Law and its predecessors, violated the separation-of-powers doctrine for two reasons. *Bodyke* at ¶54-55. First, the court determined the reclassification scheme improperly granted authority to the executive branch to review judicial decisions. Id. at ¶55. Second, the court found the reclassification scheme interfered with judicial power by requiring that final judgments be reopened and revised. Id.

{¶11} After concluding that R.C. 2950.031 and 2950.032 were unconstitutional, the Supreme Court of Ohio determined the remedy was to sever those provisions. "R.C. 2950.031 and 2950.032 are severed and * * * 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, and the classifications and community-notification and registration orders imposed previously by judges are reinstated." *Bodyke* at ¶66.

{¶12} Appellant, who was incarcerated at the time of his reclassification, was reclassified pursuant to R.C. 2950.032. However, pursuant to the Supreme Court of Ohio's holding in *Bodyke*, both R.C. 2950.031 and 2950.032 are unconstitutional and, as a result, they have been severed and are unenforceable, thereby making appellant's reclassification as a Tier III offender pursuant to R.C. 2950.032 unconstitutional.

{¶13} However, the State of Ohio argues that, in light of the Supreme Court of Ohio's subsequent decision in *Chojnacki v. Cordray*, 126 Ohio St.3d 321, 2010-Ohio-3212, R.C. 2950.031 and 2950.032 were facially severed in their entirety, leaving no part of either statute to be enforced. As a result, the State of Ohio argues the petition contest procedures created under R.C. 2950.031 and 2950.032 have also been severed, thereby leaving the trial court without authority to rule on the reclassification, and thus leaving this court with only authority to vacate the trial court's ruling with respect to the reclassification.

{¶14} In addition, although the State concedes the trial court's ruling should be vacated to the extent the petition was based upon R.C. 2950.032(E), the State claims that, to the extent the petition requested relief from community notification pursuant to

R.C. 2950.11(F)(2), that portion of the petition was properly denied, and appellant's assignment of error should be overruled to the extent it addresses community notification.

{¶15} Despite the State's assertions, we find appellant's reclassification under the severed statute must be vacated and his prior judicial classification must be reinstated. See *State v. Hickman*, 10th Dist. No. 09AP-617, 2010-Ohio-5548, ¶5. See also *State v. Watkins*, 10th Dist. No. 09AP-669, 2010-Ohio-4187; *State v. Houston*, 10th Dist. No. 09AP-592, 2010-Ohio-4374; *State v. Jackson*, 10th Dist. No. 09AP-687, 2010-Ohio-4375; and *Bodyke* at ¶66.

{¶16} Furthermore, we point out that appellant's assignment of error does not expressly assign error to or expressly address the issue of community notification. In addition, the trial court's decision and entry did not expressly address the issue either. To the extent that this issue is implicitly contained within the trial court's reclassification decision and entry ruling on appellant's constitutional challenges and within appellant's arguments challenging the reclassification provisions of the AWA, we note that *Bodyke* determined "the classifications and *community-notification* and registration *orders imposed previously by judges are reinstated*." (Emphasis added.) Id. at ¶66. We further note that, as a sexual predator, appellant was subject to community notification pursuant to former R.C. 2950.11.

{¶17} Accordingly, we sustain appellant's first assignment of error. Given this determination, his remaining three assignments of error are rendered moot and we need not address them. See App.R. 12(A)(1)(c). Therefore, we reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court with instructions to: (1) vacate appellant's Tier III sexual offender classification pursuant to the

AWA, and (2) reinstate his prior classification as a sexual predator and his prior community notification and registration orders.

Judgment reversed;
cause remanded with instructions.

FRENCH and McGRATH, JJ., concur.