[Cite as *State v. Marks*, 2009-Ohio-3790.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-A-0048**
- vs -	:	
WAYLON S. MARKS,	:	
Defendant-Appellant.	:	

Appeal from the Court of Common Pleas, Case No. 2007 CR 358.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Joseph A. Humpolick, Ashtabula County Public Defender, Inc., 4817 State Road, Suite 202, Ashtabula, OH 44004-6927 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Waylon S. Marks, appeals the judgment entered by the Ashtabula County Court of Common Pleas. Marks was adjudicated a Tier II sexual offender and sentenced to a one-year prison term for his conviction for attempted unlawful sexual contact with a minor.

{¶2} Marks was living in the home of the victim's mother. According to statements of the victim and her mother, Marks engaged in sexual activity with the victim when she was 13 to 15 years of age. Apparently, this activity repeatedly occurred, and Marks had the "consent" of both the victim and her mother.

{¶3} Marks was indicted on one count of unlawful sexual contact with a minor, in violation of R.C. 2907.04, a fourth-degree felony.

{¶4} A change of plea hearing was held in April 2008. Marks pled guilty to one count of attempted unlawful sexual contact with a minor, in violation of R.C. 2923.02 and 2907.04, a fifth-degree felony.

{¶5} The trial court sentenced Marks to a one-year prison term for his conviction. In addition, the trial court adjudicated Marks a Tier II sexual offender.

{¶6} Marks raises the following assignment of error:

{¶7} "The retroactive application of Senate Bill 10's sanctions upon appellant violated [the] Ex Post Facto Clause of the United States Constitution and the [Ohio Constitution's] prohibitions against retroactive laws."

{¶8} This court has previously rejected challenges to Senate Bill 10 on the grounds it violated the Ex Post Facto Clause and the prohibition against retroactive laws. *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, at ¶63-95. We note that *Swank* is factually similar to the case sub judice, in that the offender committed the crime prior to the enactment of Senate Bill 10 but was originally classified under Senate Bill 10 at the sentencing hearing. Id. at ¶17.

{¶9} Further, in regard to the retroactivity analysis, the Supreme Court of Ohio has held:

{¶10} "[W]e observe that an offender's classification as a sexual predator is a collateral consequence of the offender's criminal acts rather than a form of punishment per se. Ferguson has not established that he had any reasonable expectation of finality in a collateral consequence that *might* be removed. Absent such an expectation, there is no violation of the Ohio Constitution's retroactivity clause." *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, at ¶34. (Emphasis added.)

{¶11} Marks was indicted on October 12, 2007 for a crime that allegedly occurred between October 2005 and April 2007. During that time period, as a result of a conviction of the offense charged, precedent clearly established he could have been classified as a sexually oriented offender (registration required for 10 years), a habitual sex offender (registration required for 20 years), or a sexual predator (potential lifetime registration). See former R.C. 2950.07(B). See, also, e.g., *State v. Cook* (1998), 83 Ohio St.3d 404, 407-408. As a Tier II sex offender, Marks is required to register for 25 years. Had Marks been classified under the former version of R.C. 2950 et seq., he could have been adjudicated a sexual predator, which had a potential lifetime registration requirement. Accordingly, he did not have any expectation of finality in a registration term shorter than 25 years. As a result, the concerns and infirmities noted in this court's opinion in *State v. Ettenger* do not exist, and the precedent of the Supreme Court of Ohio as set out in *State v. Cook* and *State v. Ferguson*, supra, controls. See *State v. Ettenger*, 11th Dist. No. 2008-L-054, 2009-Ohio-3525, at ¶10-59. See, also, *State v. Swank*, 2008-Ohio-6059, at ¶63-95.

{¶12} Marks' assignment of error is without merit.

{¶13} The judgment of the trial court is affirmed.

MARY JANE TRAPP, P.J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

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DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶14} I concur in the judgment reached by the majority, but for the reasons stated below.

{¶15} The registration requirements of the Adam Walsh Act apply to "each offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a sexually oriented offense," and apply "[r]egardless of when the sexually oriented offense was committed ***." R.C. 2950.04(A)(2); cf. R.C. 2950.041(A)(2) ("[r]egardless of when the child-victim oriented offense was committed ***"). The Act took effect on January 1, 2008.

{¶16} In the present case, Marks pled and was found guilty of Attempted Unlawful Sexual Conduct with a Minor on April 17, 2008. Marks was sentenced, and classified as a Tier II Sex Offender/Child Victim Offender, on July 8, 2008. Since Marks was convicted of a sexually oriented offense after the Adam Walsh amendments to R.C. Chapter 2950 became effective, Marks was not sentenced under the former Sex Offender Registration Act. Thus, Marks does not have standing to raise the arguments that the Adam Walsh Act violates the Ex Post Facto and/or retroactivity provisions of the Federal and Ohio Constitutions.

{¶17} This conclusion has been reached by many of our sister appellate districts. See *State v. Hollis*, 8th Dist. No. 91467, 2009-Ohio-2368, at ¶20 (where the

offender was convicted on February 21, 2008, “the trial court lacked any legal basis upon which to refuse to apply the AWA”); *State v. Christian*, 10 Dist. No. 08AP-170, 2008-Ohio-6304, at ¶9 (“Senate Bill 10 was applicable because of appellant’s sentencing date [January 31, 2008], and the trial court had no discretion not to apply the current version of the statute”).