[Cite as *McCostlin v. State*, 2009-Ohio-4097.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

DANIEL MCCOSTLIN,	:	**O P I N I O N**
Petitioner-Appellant,	:	**CASE NO. 2008-L-117**
- vs -	:	
STATE OF OHIO,	:	
Respondent-Appellee.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 08 M 000032.

Judgment: Reversed.

William T. McGinty, 614 Superior Avenue, #1300, Cleveland, OH 44113 (For Petitioner-Appellant).

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Respondent-Appellee).

DIANE V. GRENDELL, J.

{¶1} Appellant, Daniel McCostlin, appeals the judgment of the Lake County Court of Common Pleas, denying his Petition to Contest Application of the Adam Walsh Act. The fundamental principle of the "separation of powers" doctrine, as propounded by our forefathers in the United States Constitution and expressed in the Ohio Constitution, is inviolate, and, therefore, mandates reversal of the decision of the court below. However, McCostlin must still comply with the notification and registration requirements of a sexually oriented offender as mandated in his original sentence.

{¶2} On February 2, 2007, McCostlin was convicted in Case No. CR-06-477700-A of the Cuyahoga County Court of Common Pleas of Sexual Battery, a felony of the third degree, in violation of R.C. 2907.03.

{¶3} McCostlin was sentenced to serve a one-year prison term, and ordered to register annually for a period of ten years as a sexually oriented offender.

{¶4} On or about December 1, 2007, McCostlin received a Notice of New Classification and Registration Duties from the Office of the Attorney General. McCostlin was advised that, under the provisions of the Adam Walsh Act, he is now classified as a Tier III Sex Offender.

{¶5} On January 24, 2008, McCostlin filed a Petition to Contest Application of the Adam Walsh Act in the Lake County Court of Common Pleas, the county in which he resides and currently registers. McCostlin argued that his reclassification as a Tier III Sex Offender under the Adam Walsh Act was unconstitutional.

{¶6} On June 30, 2008, an oral hearing was held before the trial court on McCostlin's Petition.

{¶7} On July 2, 2008, the trial court issued its Judgment Entry, denying McCostlin's Petition and advising him of his duty to register as a Tier III Sexual Offender with the sheriff of the county in which he resides, works, and/or has established a place of education, with in-person verification for the remainder of his life.

{¶8} On July 21, 2008, McCostlin filed his Notice of Appeal and raised the following assignment of error: "The trial court erred by denying defendant-appellant [sic] his petition and ordering the reclassification of his 'sexual offender' status to a Tier III status under the unconstitutional retroactive application of the Adam Walsh Act."

{¶9} Within this sole assignment of error, McCostlin challenges the constitutionality of amended Revised Code Chapter 2950 on the following grounds: "the retroactive application of Ohio's Adam Walsh Act violates the prohibition on *ex post facto* laws in Article I, Section 10 of the United States Constitution"; "the retroactive application of the Adam Walsh Act violates the prohibition on retroactive laws in Article II, Section 28 of the Ohio Constitution which forbids the enactment of certain retroactive laws"; "the reclassification of [McCostlin] constitutes a violation of the separation of powers' [sic] doctrine by removing the judiciary's authority to classify sexual offenders as the courts saw fit"; and "reclassification of [McCostlin] constitutes a breach of contract and a violation of the right to contract under the Ohio and United States Constitutions."

{¶10} We shall consider the separation of powers argument first, as it is determinative of this appeal.

{¶11} "Although the Ohio Constitution does not contain explicit language establishing the doctrine of separation of powers, it is inherent in the constitutional framework of government defining the scope of authority conferred upon the three separate branches of government." *State v. Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790, at ¶22. "The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others." *State ex rel. Bryant v. Akron Metro. Park Dist.* (1929), 120 Ohio St. 464, 473.

{¶12} The separation of powers doctrine limits the ability of the General Assembly to exercise the powers of and exert an influence over the judicial branch of government. "The 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." *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, at paragraph one of the syllabus. "It is well settled that the legislature has no right or power to invade the province of the judiciary, by annulling, setting aside, modifying, or impairing a final judgment previously rendered by a court of competent jurisdiction." *Cowen v. State ex rel. Donovan* (1920), 101 Ohio St. 387, 394; *Bartlett v. Ohio* (1905), 73 Ohio St. 54, 58 ("it is well settled that the legislature cannot annul, reverse or modify a judgment of a court already rendered"); *Gompf v. Wolfinger* (1902), 67 Ohio St. 144, at paragraph three of the syllabus ("[a] judgment which is final by the laws existing when it is rendered cannot constitutionally be made subject to review by a statute subsequently enacted").[1]

{¶13} The United States Supreme Court has demonstrated a similar understanding of the import of Section 1, Article III of the federal Constitution. The Court reviewed the history of separation of powers doctrine in *Plaut v. Spendthrift Farm, Inc.* (1995), 514 U.S. 211:

{¶14} Judicial decisions in the period immediately after ratification of the Constitution confirm the understanding that it forbade [legislative] interference with the final judgments of courts. *** The state courts of the era showed a similar understanding of the separation of powers, in decisions that drew little distinction between the federal and state constitutions. To choose one representative example

1. In this respect, the separation of powers doctrine as a limit to legislative action is comparable to the principle of res judicata, typically used as a bar to further litigation by the parties. Cf. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, at paragraph one of the syllabus ("a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action").

from a multitude: In *Bates* v. *Kimball*, 2 Chipman 77 (Vt. 1824), a special Act of the Vermont Legislature authorized a party to appeal from the judgment of a court even though, under the general law, the time for appeal had expired. The court, noting that the unappealed judgment had become final, set itself the question "Have the Legislature power to vacate or annul an existing judgment between party and party?" *Id.*, at 83. The answer was emphatic: "The necessity of a distinct and separate existence of the three great departments of government … had been proclaimed and enforced by … Blackstone, Jefferson and Madison," and had been "sanctioned by the people of the United States, by being adopted in terms more or less explicit, into all their written constitutions." *Id.*, at 84. The power to annul a final judgment, the court held (citing *Hayburn's Case*, 2 Dall., at 410), was "an assumption of Judicial power," and therefore forbidden.

{¶15} Id. at 223-224.

{¶16} A determination of an offender's classification under former R.C. Chapter 2950 constituted a final order. *State v. Washington*, 11th Dist. No. 99-L-015, 2001-Ohio-8905, 2001 Ohio App. LEXIS 4980, at *9 ("a defendant's status as a sexually Oriented offender *** arises from a finding rendered by the trial court, which in turn adversely affects a defendant's rights by the imposition of registration requirements"); *State v. Dobrski*, 9th Dist. No. 06CA008925, 2007-Ohio-3121, at ¶6 ("[i]nasmuch as a sexual predator classification is an order that affects a substantial right in a special proceeding, it is final and appealable"). Accordingly, if either party failed to appeal such a determination within thirty days, as provided for in App.R. 4(A), the judgment became settled.

{¶17} Subsequent attempts to overturn such judgments have been barred under the principles of res judicata. See *State v. Lucerno*, 8th Dist. No. 89039, 2007-Ohio-5537, at ¶9 (applying res judicata where the State failed to appeal the lower court's determination that House Bill 180/Megan's Law was unconstitutional: "the courts have barred sexual predator classifications when an initial classification request had been dismissed on the grounds that the court believed R.C. Chapter 2950 to be

unconstitutional") (citation omitted); *State v. Hobbs*, 4th Dist. No. 05CA3011, 2006-Ohio-3121, at ¶14 ("[appellant] could have raised his claim that the court improperly ordered him to register as a sex offender in a direct appeal to this court ***[;] [t]hus, res judicata bars [appellant] from now arguing that the court improperly ordered him to register as a sex offender").

{¶18} Since McCostlin's classification as a sexually oriented offender with definite registration requirements constituted a final order of the lower court, McCostlin cannot, under separation of powers and res judicata principles, now be reclassified under the provisions of the amended Act with differing registration requirements.

{¶19} The State responds by arguing that the authority to create sex offender classifications with their attendant registration and notification requirements resides with the legislature and is not one of the inherent powers of the judicial branch of government. The State relies on authority that "the General Assembly has not abrogated final judicial decisions without amending the underlying applicable law. *** Application of this new law does not order the courts to reopen a final judgment, but instead simply changes the classification scheme." *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051, at ¶73, quoting *Slagle v. State*, 145 Ohio Misc.2d 98, 2008-Ohio-593, at ¶21. This response fails to address the fundamental problem that the reclassification of sex offenders, such as McCostlin, whose prior classifications were rendered as part of final sentencing judgments rendered by courts of competent jurisdiction, effectively voids portions of those judgments.

{¶20} The General Assembly's authority to enact and alter legislation imposing registration and notification requirements and residency restrictions upon convicted sex

offenders is neither denied nor disputed. The fact remains that the General Assembly "cannot annul, reverse or modify a judgment of a court already rendered." *Bartlett*, 73 Ohio St. at 58. McCostlin's reclassification, as a practical matter, nullifies that part of the court's February 2, 2007 Judgment ordering him to register for a period of ten years as a sexually oriented offender. To assert that the General Assembly has authority to create a new system of classification does not solve the problem that McCostlin's original classification constituted a final judgment.

{¶21} It is not "simply" the case that the classification system has been changed. Rather, a final judicial decision has been abrogated. Following the expiration of the period for filing an appeal, the February 2, 2007 Judgment Entry became a settled judgment, immune to direct or collateral challenge by McCostlin as well as the State.[2] The United States Supreme Court has stated that the principle of separation of powers is violated by legislation which "depriv[es] judicial judgments of the conclusive effect that they had when they were announced" and "when an individual final judgment is legislatively rescinded for even the *very best* of reasons." *Plaut*, 514 U.S. at 228 (emphasis sic). To the extent the Adam Walsh Act requires the modification of existing final sentencing judgments, such as McCostlin's sentence, it violates the doctrine of separation of powers based on the finality of judicial judgments.

{¶22} Having concluded that McCostlin's reclassification is constitutionally prohibited, it is unnecessary to address the other arguments raised. These arguments, nonetheless, have been considered and rejected in prior decisions of this court. See *Spangler v. State*, 11th Dist. No. 2008-L-062, 2009-Ohio-3178, at ¶¶55-64.

2. As a final judgment, McCostlin's sentence is also beyond the authority of the courts to vacate or modify. *State v. Smith* (1989), 42 Ohio St.3d 60, at paragraph one of the syllabus; *Jurasek v. Gould Elecs., Inc.*, 11th Dist. No. 2001-L-007, 2002-Ohio-6260, at ¶15 (citations omitted).

{¶23} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, reclassifying McCostlin as a Tier III Sex Offender, is reversed. McCostlin shall continue registering as a sexually oriented offender pursuant to the trial court's February 2, 2007 Judgment Entry. Costs to be taxed against appellee.

TIMOTHY P. CANNON, J., concurs in judgment only with a Concurring Opinion,

MARY JANE TRAPP, P.J., dissents with a Dissenting Opinion.

TIMOTHY P. CANNON, J., concurring in judgment only.

{¶24} I concur in the ultimate judgment reached by the majority, albeit for different reasons. I would follow this court's opinion in *State v. Ettenger*, 11th Dist. No. 2008-L-054, 2009-Ohio-3525. I do not believe that the application of the Adam Walsh Act to McCostlin violates the doctrine of separation of powers. Id. at ¶75-79. Instead, I would hold that application of the Adam Walsh Act to McCostlin violates the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution. Id. at ¶10-59. McCostlin had an expectation of finality that his prior adjudication as a sexually oriented offender would result in a finite, ten-year reporting period.

{¶25} I note that this court has found merit to an argument that reclassification under the Adam Walsh Act constituted a breach of contract, violating the offender's right to contract under the Ohio and United States Constitutions. Id. at ¶60-67. However, the record in this matter does not contain any evidence to support McCostlin's assertion

that the state agreed to a sexually oriented offender classification. There is no copy of the prior plea agreement from the underlying case in Cuyahoga County in the record before this court. Nor does the record contain a transcript of the plea hearing showing the state's purported agreement. This court has consistently held that "'an appellate court's review is strictly limited to the record that was before the trial court, no more and no less.'" *Condron v. Willoughby Hills*, 11th Dist. No. 2007-L-105, 2007-Ohio-5208, at ¶38. (Citation omitted.) Thus, McCostlin cannot demonstrate his claimed error that the application of the Adam Walsh Act violates his right to contract.

{¶26} The judgment of the trial court should be reversed.

MARY JANE TRAPP, P.J., dissents with a Dissenting Opinion.

{¶27} The majority rejected most of the constitutional challenges to Senate Bill 10, as this court had done in *Swank*; *State v. Charette*, 11th Dist. No. 2008-L-069, 2009-Ohio-2952; and *State v. Maggy*, 11th Dist. No. 2008-T-0078, 2009-Ohio-3180; but it reversed the trial court's judgment based on Mr. McCostlin's contention that his original classification as a sexually oriented offender constituted a final judgment and, as such, could not be vacated or modified by the legislature without a violation of the separation of powers doctrine.

{¶28} The majority cited *State v. Washington* and *State v. Dobrski* for the proposition that a court's determination of a sex offender's classification constitutes a final order or judgment, and therefore the separation of powers doctrine precludes a reclassification. The majority's reliance on these cases is misplaced, because these

cases only concluded such determinations are final orders *for the purposes of appealability*. *Washington* at 8-9 (this court held that the classification of a defendant as a sexually oriented offender was a final appealable order and therefore properly appealable); *Dobrski* at ¶6 ("[i]nasmuch as a sexual predator classification is an order that affects a substantial right in a special proceeding, it is final and appealable").

{¶29} I do not believe Senate Bill 10 abrogates final judicial determinations in violation of the doctrine of the separation of powers. I agree with the Fourth Appellate District's view expressed in *State v. Linville*, 4th Dist. No. 08CA3051, 2009-Ohio-313, that the sex offender classification is nothing more than a collateral consequence arising from the underlying criminal conduct, id. at ¶24, citing *Ferguson* at ¶34, and that a sex offender has no reasonable expectation that his criminal conduct would not be subject to future versions of R.C. Chapter 2950. Id., citing *State v. King*, 2d Dist. No. 08-CA-02, 2008-Ohio-2594, ¶33. Reclassification does not abrogate final court judgments, because "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.

{¶30} For these reasons, I respectfully dissent.