[Cite as *State v. Rice*, 2009-Ohio-6999.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Respondent-Appellee,	:	**CASE NO. 2008-L-105**
- vs -	:	
CAPTAIN P. RICE,	:	
Defendant-Petitioner-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 08 MS 000062.

Judgment: Affirmed.

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

Paul R. Malchesky, Cannon, Stern, Aveni & Loiacono Co., L.P.A., 41 East Erie Street, Painesville, OH 44077 (For Defendant-Petitioner-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Captain P. Rice, appeals the judgment of the Lake County Court of Common Pleas denying his petition to contest his reclassification as a Tier II Sex Offender under Am. Sub. Senate Bill 10, Ohio's enactment of the federal Adam Walsh Act, incorporated into Ohio law at R.C. Chapter 2950, following his conviction of gross sexual imposition and unlawful sexual conduct with a minor. For the reasons that follow, we affirm.

{¶2} On November 4, 2002, appellant was convicted, following his guilty plea, of two counts of gross sexual imposition, felonies of the fourth degree, in violation of R.C. 2907.05, and two counts of attempted unlawful sexual conduct with a minor, felonies of the fourth degree, in violation of R.C. 2923.02 and R.C. 2907.04. Appellant was sentenced to 16 months in prison. Also, following a sexual predator hearing, appellant was found to be a sexually oriented offender requiring him to register for ten years, pursuant to R.C. Chapter 2950.

{¶3} Appellant served 13 months in prison and was then released under judicial release. S.B. 10 was enacted in July of 2007 and made effective on January 1, 2008. The statute, which enacted the federal sex offender registration and notification act ("SORNA"), expressly provides that its registration and notification provisions are retroactive. R.C. 2950.033. On November 26, 2007, pursuant to S.B.10, the Ohio Attorney General notified appellant that he had been reclassified as a Tier II Sex Offender. This classification requires registration for 25 years.

{¶4} On March 7, 2008, appellant filed a petition to contest the application of the Adam Walsh Act to him.

{¶5} Following a hearing on appellant's petition, on June 13, 2008, the trial court denied appellant's petition, finding he had failed to prove by clear and convincing evidence that the new registration requirements did not apply to him. R.C. 2950.031(E). The trial court also found that appellant was properly reclassified as a Tier II Sex Offender, requiring him to register every 180 days for 25 years.

{¶6} Appellant appeals the trial court's judgment regarding his reclassification as a Tier II Sex Offender, and asserts seven assignments of error. Because we have

previously ruled on appellant's third, fourth, fifth, and seventh assignments of error, we shall address them together. For these assigned errors, appellant asserts the following:

{¶7} "[3.] The Trial Court erred in the retroactive/reclassification of Mr. Rice and constitutes a violation of the Separation of Powers' Doctrine. Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Sections 10 and 16, Article I of the Ohio Constitution.

{¶8} "[4.] The Trial Court erred in the retroactive/reclassification of Mr. Rice and constitutes a violation of the Prohibition on Retroactive Laws.

{¶9} "[5.] The Trial Court erred in the retroactive/reclassification of Mr. Rice and constitutes a violation of the Ex Post Facto Laws, Article I, Section 10 of the United States Constitution.

{¶10} "[7.] The Trial Court erred in the retroactive/reclassification of Mr. Rice and constitutes a violation of his Due Process Rights, in violation of the right to contract under the Ohio and United States Constitutions."

{¶11} Appellant argues S.B. 10 violates the constitutional prohibitions against ex post facto laws and retroactive legislation, his procedural and substantive due process rights, and the principle of separation of powers.

{¶12} We unanimously rejected these arguments and held S.B. 10 is constitutional in *State v. Swank,* 11th Dist. No. 2008-L-019, 2008-Ohio-6059, at ¶71-89 (no ex post facto violation); ¶90-97 (no retroactive legislation violation), ¶98-100 (no separation of powers violation); ¶101-107 (no procedural due process violation); ¶108-111 (no substantive due process violation).

{¶13} By operation of stare decisis, appellant's third (separation of powers), fourth (retroactive legislation), fifth (ex post facto law), and seventh (procedural and substantive due process) assignments of error are not well taken and are overruled.

{¶14} For his first assigned error, appellant contends:

{¶15} "The Trial Court erred in the retroactive/reclassification of Mr. Rice as a Tier II Sex Offender pursuant to Ohio's SB 10 and ordered him to comply with registration duties pursuant to R.C. 2905.041, 2950.05 and 2950.06 as it violates the Doctrine of *Res Judicata* and Collateral Estoppel."

{¶16} Appellant argues that his original classification as a sexually oriented offender was a final order and that S.B. 10 violates principles of res judicata. We note that while S.B. 10 authorizes the Ohio Attorney General to reclassify offenders previously classified under H.B. 180, see R.C. 2950.031, such reclassification does not vacate or modify a prior final judgment of the court.

{¶17} While there is no doubt that a judicial determination of a sex offender's classification under H.B. 180 is a final judgment for purposes of appeal, *State v. Washington*, 11th Dist. No. 99-L-015, 2001-Ohio-8905, 2001 Ohio App. LEXIS 8905, *9, such a judgment does not deprive the legislature of its constitutional authority to classify sex offenders.

{¶18} "[T]he classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts. *** Without the legislature's creation of sex offender classifications, no such classification would be warranted. Therefore, *** we 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." *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234 at ¶39.

{¶19} Put simply, S.B. 10 does not require the Attorney General (via legislative mandate) to reopen final judicial judgments. The new scheme merely changes the classification and registration requirements for sex offenders and mandates that new procedures be applied to sex offenders currently registered under the former law. In *State v. Cook,* 83 Ohio St.3d 404, 1998-Ohio-291, the Court pointed out that "where no vested right has been created, 'a later [legislative] enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, unless the past transaction or consideration *** created at least a reasonable expectation of finality." Id. at 412, quoting *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281. With the exception to the constitutional protection against ex post facto laws, which, as discussed above, S.B. 10 does not violate, "'*felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation*.'" (Emphasis sic.) *Cook,* supra, quoting *Matz,* supra, at 281-282. Accordingly, because convicted sex offenders have no reasonable "settled expectation" or vested rights concerning the registration obligations imposed on them, S.B. 10 does not function to abrogate a final prior judicial adjudication. *State v. King*, 2d Dist. No. 08-CA-02, 2008-Ohio-2594, at ¶33; *State v. Linville*, 4th Dist. No. 08CA3051, 2009-Ohio-313; *Ritchie v. State*, 12th Dist. No. CA2008-07-03, 2009-Ohio-1841. supra. As the Twelfth District recently held in *Ritchie*, "application of Ohio's Adam Walsh Act does not order the courts to reopen a final judgment, but instead simply changes the classification scheme, which is not an encroachment on the power of Ohio's judicial branch. Id. at ¶15.

{¶20} Further, the Ohio Supreme Court in *State v. Ferguson,* 120 Ohio St.3d 7, 2008-Ohio-4824, held that an offender's classification as a sexual predator is merely 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 [such] a collateral consequence ***." Id. at 14. Likewise, in the instant case, appellant has failed to establish he possessed a reasonable expectation of finality in his original classification.

{¶21} Consistent with the foregoing precedent, appellant's expectation of finality is limited to his conviction and does not include his former classification. His previous classification is nothing more than a collateral consequence arising from his criminal conduct. As a result, in amending Ohio's classification scheme and making it retroactive to apply to all sex offenders, including appellant, the General Assembly did not abrogate a final judgment in favor of appellant.

{¶22} We therefore hold that the application of S.B. 10 to appellant does not violate principles of res judicata and collateral estoppel.

{¶23} Appellant's first assignment of error is not well taken and is overruled.

{¶24} For his second assignment of error, appellant contends:

{¶25} "The Trial Court erred in the retroactive/reclassification of Mr. Rice and constitutes impermissible multiple punishment under the Double Jeopardy Clause. Fifth Amendment to the United States Constitution; Article I, Section 10 of the Ohio Constitution."

{¶26} Appellant argues that because S.B. 10 is punitive in intent and effect, it constitutes a second punishment in violation of the Double Jeopardy Clause of the United States and Ohio Constitutions.

{¶27} However, as we held in *Swank,* supra, S.B. 10 is not punitive in intent or effect. Rather, it enacted a civil, regulatory scheme. Therefore, S.B. 10 does not constitute punishment for purposes of the Double Jeopardy Clause. *State v. Hughes*, 5th Dist. No. 2008-CA-23, 2009-Ohio-2406, at ¶19-21; *State v. Sewell*, 4th Dist. No. 08CA3042, 2009-Ohio-594, at ¶11-13; *State v. Byers*, 7th Dist. No. 07 CA 39, 2008-Ohio-5051, at ¶100-103; *Brooks v. State*, 9th Dist. No., 2008CA009452, 2009-Ohio-1825, at ¶21-25 ; *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195, at ¶107-111.

{¶28} This Court agrees with the rationale offered by these other districts, and we hold that S.B. 10 does not violate the Double Jeopardy Clause of the United States Constitution or the Ohio Constitution.

{¶29} Appellant's second assignment of error is not well taken and is overruled.

{¶30} Appellant asserts the following for his sixth assigned error:

{¶31} "The Trial Court erred in the retroactive/reclassification of Mr. Rice and constitutes a Breach of Contract in violation of the right to contract under the Ohio and United States Constitutions."

{¶32} Appellant argues S.B. 10 altered his sentence by imposing additional obligations in breach of his plea bargain with the state. He therefore contends that S.B. 10 constitutes an impairment of a contractual obligation in violation of the state and federal constitutions.

{¶33} We note that once appellant pled guilty and was sentenced by the trial court, both the state and appellant performed their obligations under the plea bargain. Thus, no action by the state after sentencing could have breached the plea agreement. *State v. Pointer*, 8th Dist. No. 85195, 2005-Ohio-3587, at ¶9.

{¶34} Further, as noted supra, "[e]xcept with regard to constitutional protections against ex post facto laws, *** felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation." *Cook*, supra, at 412, quoting *Matz*, supra, at 281-282.

{¶35} Moreover, the court was not a party to the plea bargain, and is not bound by its terms. *State v. Brown*, 5th Dist. No. 2007 CA 00095, 2008-Ohio-880, at ¶76. Thus, amended registration requirements do not offend appellant's right to contract.

{¶36} Accordingly, appellant's sixth assignment of error is not well taken and is overruled.

{¶37} We are not insensitive to the serious nature of the restrictions imposed by S.B. 10. Moreover, we recognize the Ohio Supreme Court has become increasingly divided on the issue of whether SORNA is constitutional and that the issue is currently before the Supreme Court. However, as an appellate court, it is not our role to prognosticate how the various Justices will rule on the issue. In fact, to do so would be to abdicate our obligation to follow precedent set by the Ohio Supreme Court as well as the United States Supreme Court.

{¶38} For the reasons stated in the Opinion of this court, the assignments of error are without merit. It is the order and judgment of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J., concurs with Concurring Opinion,

DIANE V. GRENDELL, J., dissents with Dissenting Opinion.

_____

MARY JANE TRAPP, P.J., concurs with Concurring Opinion.

{¶39} The appellant's ex post facto and retroactive claims are rejected based on the Supreme Court of Ohio's prior determination that the registration and notification statute is civil and remedial in nature, and not punitive. I write separately to note as we did in *State v. Charette*, 11th Dist. No. 2008-L-069, 2009-Ohio-2952, that the Supreme Court of Ohio has become more divided on the issue of whether the registration and notification statute has evolved from a remedial and civil statute into a punitive one. As Justice Lanzinger stated in her concurring in part and dissenting in part opinion in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶46: "I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions." See, also, *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824 (Lanzinger, J., dissenting). I believe Senate Bill 10 merits review by the Supreme Court of Ohio to address the issue of whether the current version of R.C. Chapter 2950 has been transformed from remedial to punitive law. Before that court revisits the issue, however, we, as an inferior court, are bound to apply its holdings in *State v. Cook* (1998), 83 Ohio St.3d 404, and *Wilson*, as we did in *Swank*.

DIANE V. GRENDELL, J., dissents with Dissenting Opinion.

{¶40} Appellant, Captain P. Rice's, reclassification as a Tier II Sex Offender pursuant to the Adam Walsh Act, unconstitutionally upsets his prior classification in a final order of a court of competent jurisdiction as a sexually oriented offender, in violation of the doctrine of separation of powers. Accordingly, I respectfully dissent. Rice's obligations to register a sexual offender should continue as set forth in the November 13, 2002 Judgment Entry of the Lake County Court of Common Pleas.[1]

{¶41} "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* (1922), 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"). This limit on the legislature's power is part of the separation of powers doctrine. "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.

{¶42} In effect, the separation of powers doctrine applies the principle of res judicata, typically used as a bar to further litigation by parties, to legislative action. Cf. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, at paragraph one of the

1. Contrary the majority's assertion, this court did not consider the separation of powers doctrine in *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, with respect to the legislature's authority to annul, reverse, or modify final judgments. Rather, the sex offender in *Swank* argued "that in enacting a system of registration and notification based solely on the offense committed by the sex offender, S.B. 10 divested Ohio courts of the power to sentence a defendant." 2008-Ohio-6059, at ¶99.

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").

{¶43} In the present case, the trial court's November 13, 2002 Judgment Entry, finding that Rice was not a sexual predator and notifying him of his duty to register as a "sexually oriented offender," constituted such a final judgment. Once the period for appeal had passed, Rice's classification became a settled judgment, which neither Rice nor the State could challenge. *Armstrong v. Marathon Oil Co.* (1990), 64 Ohio App.3d 753, 757 ("when a reviewable final determination has also become final in the sense that the time for review has expired, its effect cannot be challenged in a later appeal on another matter"). As such, Rice had every reasonable expectation that his duty to register was fixed by that judgment entry.

{¶44} The majority states that "[p]ut simply, S.B. 10 does not require the Attorney General *** to reopen final judicial judgments." I disagree. "When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than 'reverse a determination once made, in a particular case.'" *Plaut v. Spendthrift Farm, Inc.* (1995), 514 U.S. 211, 225, quoting The Federalist No. 81 (J. Cooke ed. 1961), 545.

{¶45} The majority relies on prior appellate decisions holding that "the classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts. *** Therefore, *** the power to classify is properly expanded or limited by the legislature." *In re Smith*, 3rd Dist. No. 1-07-58, 2008-Ohio-3234, at ¶39.

{¶46} This response does not address the problem raised by Rice's classification as a sexually oriented offender being the settled judgment of the trial court, a judgment in which Rice had a reasonable expectation of finality. It is not disputed that the General Assembly has full authority to enact new laws and alter the classification of sexual offenders. The application of any new law to persons already classified as sexual offenders, whose judgments have become final, however, necessarily results in those prior final judicial decisions being re-opened, contrary to the principles of res judicata. Rice's reclassification as a Tier II offender involves more than merely altering the denomination of his status, the obligations imposed by Tier II status are substantively greater than those entailed by his classification as a sexually oriented offender pursuant to the final sentencing judgment journalized by the trial court on November 13, 2002.

{¶47} The majority also emphasizes that the new registration scheme is merely a "collateral consequence of the offender's criminal acts rather than a form of punishment per se." *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, at ¶34; also *State v. Cook*, 83 Ohio St.3d 404, 423, 1998-Ohio-291 ("[w]e do not deny that the notification requirements may be a detriment to registrants, but the sting of public censure does not convert a remedial statute into a punitive one") (citation omitted).

{¶48} Reliance upon the remedial nature of the legislation is misplaced. "The doctrine of *res judicata* *** applies equally to criminal and to civil litigation." *Akron v. Smith*, 9th Dist. Nos. 16436 and 16438, 1994 Ohio App. LEXIS 1859, at *4 (citation omitted).

{¶49} Moreover, the majority's citation to *Ferguson* is misleading. The Supreme Court did not hold, as the majority opinion implies, that offenders have no reasonable expectation of finality in collateral consequences. Rather, it held that "Ferguson has not established that he had any reasonable expectation of finality in a collateral consequence .." *Ferguson*, 2008-Ohio-4824, at ¶34 (italics in original; bold-face added). Ferguson, as a sexual predator, was required to register for the rest of his life, although he could petition the court to remove his sexual predator classification. Subsequent amendments to the Sex Offender Act rendered the sexual predator designation permanent, without the possibility of subsequent judicial review. Since there was never any guarantee that Ferguson could alter his status as a sexual predator, the Supreme Court properly acknowledged that he had no reasonable expectation in its eventual removal.

{¶50} This is a far different situation than the present one. According to the November 13, 2002 Judgment Entry, Rice's duty to register was to end after ten years as a matter of law. It was not a future contingency, such as the possibility of Ferguson petitioning the court to remove his sexual predator designation. Whereas Ferguson was unable to present any "argument" or "evidence that would support a reasonable conclusion that [he] was likely to have his classification removed," Rice had every right to expect the removal of his classification after ten years based upon the November 13, 2002 Judgment Entry and former R.C. 2950.07(B)(3).

{¶51} It is important to note that in *Ferguson*, the Supreme Court did not consider any argument based on the finality of the original judgment or principles of res judicata. *Ferguson* stands in a line of cases beginning with *State v. Cook*, 83 Ohio

St.3d 404. The *Cook*/*Ferguson* line of cases is distinguishable from the present situation in that, when Rice was classified as a sexually oriented offender, there was no classification system operative in Ohio for sex offenders. Rice's classification was an initial classification that did not upset some prior determination. Thus, the Supreme Court could properly declare that sex offenders had "no reasonable right to expect that their conduct will never thereafter be made the subject of legislation." *Cook*, 83 Ohio St.3d at 412 (citation omitted). Such a declaration does not carry the same import where the offender's conduct is already the subject of legislation and the court's final judgment.

{¶52} Finally, the majority asserts that a "final judgment for purposes of appeal" is not the same as a final judgment for purposes of the separation of powers doctrine/res judicata. I fail to see any meaningful distinction between a final judgment for purposes of appeal and a final judgment on the merits for the purposes of applying the separation of powers and/or res judicata doctrine. Cf. *Federated Dept. Stores v. Moitie* (1981), 452 U.S. 394, 398 ("[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action").

{¶53} The General Assembly's stated purpose in enacting the Adam Walsh Act, "to provide increased protection and security for the state's residents from persons who have been convicted of, or found to be delinquent children for committing, a sexually oriented offense or a child-victim oriented offense," is properly realized in its application to cases pending when enacted and those subsequently filed. Section 5, S.B. No. 10. Rice's sentence, however, had become final prior to the Adam Walsh Act. As such, it is

beyond the power of the Legislature to vacate or modify.[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 attempts to modify existing final sentencing judgments, such as Rice's sentence, it violates the doctrines of separation of powers and finality of judicial judgments, despite the good intentions of the Legislature. As such, that portion of the Act is invalid, unconstitutional, and unenforceable.

{¶54} For the foregoing reasons, I would reverse the decision of the court below and reinstate the trial court's November 13, 2002 Judgment Entry, requiring Rice to register as a sexually oriented offender.

2. Moreover, as a final judgment, Rice's sentence also is 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).