[Cite as *Acheson v. State*, 2010-Ohio-1946.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

SCOTT ACHESON,	:	
Petitioner-Appellant,	:	CASE NO. CA2009-06-066
	:	O P I N I O N
- vs -		5/3/2010
	:	
STATE OF OHIO,	:	
Respondent-Appellee.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08CV70913

Paris K. Ellis, 1501 S. Breiel Blvd., Middletown, Ohio 45044, for petitioner-appellant

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

HENDRICKSON, J.

{¶1} Petitioner-appellant, Scott Acheson, appeals a decision of the Warren County Court of Common Pleas dismissing a petition challenging his reclassification as a Tier III sex offender under the Adam Walsh Act. For the reasons that follow, we reverse and remand.

{¶2} In July 2005, appellant was convicted of two counts of rape in the Butler County Court of Common Pleas and adjudicated a sexually oriented offender. This classification required appellant to register with the county sheriff annually for ten years.

In January 2008, following the passage of Ohio's Adam Walsh Act, appellant received notice that he had been reclassified as a Tier III sex offender.[1] The reclassification imposed a lifetime registration requirement and subjected appellant to community notification.

{¶3} Appellant is currently incarcerated in the Lebanon Correctional Institution in Warren County, Ohio. In March 2008, appellant filed a petition in the Warren County Court of Common Pleas challenging his reclassification and questioning the constitutionality of the Adam Walsh Act. Following a hearing, a magistrate denied the petition. The magistrate determined that the court lacked jurisdiction to consider appellant's argument contesting community notification. The trial court adopted the magistrate's decision after appellant failed to file objections. Appellant timely appeals, raising six assignments of error.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PETITIONER-APPELLANT WHEN IT DETERMINED THAT APPLYING THE ADAM WALSH ACT TO PETITIONER-APPELLANT DID NOT VIOLATE THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION."

{¶6} Assignment of Error No. 2:

{¶7} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PETITIONER-APPELLANT WHEN IT DETERMINED THAT APPLYING THE ADAM WALSH ACT TO PETITIONER-APPELLANT DID NOT VIOLATE THE PROBATION ON RETROACTIVE LAWS IN ARTICLE II, SECTION 28 OF THE OHIO STATE

1. Ohio Senate Bill 10 was enacted in July 2007 to implement the federal Adam Walsh Child Safety and Protection Act. The law amended R.C. Chapter 2950, Ohio's Sex Offender Registration and Notification Act. Pursuant to these amendments, convicted sex offenders subject to registration are classified under a new three-tiered system, based solely on their offense. Senate Bill 10 also provides for reclassification of

CONSTITUTION."

{¶8} Assignment of Error No. 3:

{¶9} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PETITIONER-APPELLANT WHEN IT DETERMINED THAT APPLYING THE ADAM WALSH ACT TO PETITIONER-APPELLANT DID NOT VIOLATE THE SEPARATIONS [sic] OF POWERS DOCTRINE IN THE OHIO CONSTITUTION."

{¶10} Assignment of Error No. 4:

{¶11} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PETITIONER-APPELLANT WHEN IT HELD THAT APPLYING THE ADAM WALSH ACT TO THE PETITIONER-APPELLANT DID NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE OHIO OR THE UNITED STATES CONSTITUTION."

{¶12} Assignment of Error No. 5:

{¶13} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PETITIONER-APPELLANT WHEN IT HELD THAT THE APPLYING OF THE ADAM WALSH ACT TO PETITIONER-APPELLANT WHO HAD PREVIOUSLY BEEN SUBJECT TO THE 2003 VERSION OF MEGAN'S LAW DID NOT VIOLATES [sic] DUE PROCESS AND DID NOT CONSTITUTES [sic] CRUEL AND UNUSUAL PUNISHMENT AS PROHIBITED BY THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 9, ARTICLE I OF THE OHIO CONSTITUTION."

{¶14} Assignment of Error No. 6:

{¶15} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PETITIONER-APPELLANT WHEN IT HELD THAT THE ADAM WALSH ACT APPLIED TO PETITIONER-APPELLANT AS HE HAD ENTERED A PLEA OF GUILTY/NO CONTEST

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all offenders who were initially classified prior to its enactment. As with new classifications, reclassifications are based solely on the crime for which the offender was convicted.

WHICH HOLDING IMPAIRS THE OBLIGATION OF CONTRACTS AS PROTECTED BY THE OHIO AND UNITED STATES CONSTITUTION."

{¶16} In the instant appeal, appellant raises a multitude of constitutional challenges often lodged against the Adam Walsh Act. Because appellant failed to object to the magistrate's decision, we are limited to a plain error standard of review. *Fender v. Miles*, Brown App. No. CA2009-01-003, 2009-Ohio-6043, ¶27. This court, like other Ohio jurisdictions, has found that sexual offender classifications and their corresponding requirements are civil penalties. *State v. Williams*, Warren App. No. CA2008-02-029, 2008-Ohio-6195, ¶39-49. Accordingly, we must apply the civil plain error standard in reviewing the instant appeal.

{¶17} Civil plain error "is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, syllabus. We are mindful of this standard in addressing appellant's arguments.

{¶18} One of the claims advanced by appellant in his reclassification petition was that the community notification requirements of the Adam Walsh Act could not be applied to him. Appellant insisted that the exception contained in R.C. 2950.11(F) exempted him from community notification because he was not subject to this sanction when adjudicated a sexually oriented offender under the former R.C. Chapter 2950.

{¶19} R.C. 2950.11 codifies the revised requirements for community notification of sex offender registration which were incorporated into Ohio's Sex Offender Registration and Notification Act with the passage of Ohio's Adam Walsh Act. R.C. 2950.11(A) outlines the community notification requirements themselves, while

subsection (F)(1) establishes which sex offenders are bound by those requirements. R.C. 2950.11(F)(2) sets forth an exception to subsection (F)(1), and provides in pertinent part:

{¶20} "The notification provisions of this section do not apply to a person described in division (F)(1)(a), (b), or (c) of this section if a court finds at a hearing after considering the factors described in this division that the person would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment."

{¶21} R.C. 2950.11(F)(2) goes on to delineate 11 factors that a court must consider when determining whether a person would have been subject to community notification under the former R.C. Chapter 2950. See R.C. 2950.11(F)(2)(a)-(k). If a court conducts a hearing and makes the required findings, the court may remove an offender's duty to comply with community notification requirements. *State v. McConville*, 182 Ohio App.3d 99, 2009-Ohio-1713, ¶11-12.

{¶22} R.C. 2950.11(H) is also tangentially relevant to our discussion of the present matter. R.C. 2950.11(H)(1) provides that a trial court may suspend an offender's community notification requirements on a motion submitted by certain persons named in the statute, including the offender. A motion made under this section may not be filed until 20 years after community notification was initially imposed upon the offender. R.C. 2950.11(H)(2). In order to warrant relief, the court must find that the offender has proven the following two elements by clear and convincing evidence: (1) that the offender is unlikely to commit a sexually-oriented offense in the future, and (2) that suspension of the community notification requirements serves the interests of justice. R.C. 2950.11(H)(1). The statute directs the court to consider the ten factors listed in subsection (K) in making its determination.

{¶23} In the case at bar, the magistrate briefly reviewed R.C. 2950.11(F)(2) and R.C. 2950.11(H)(1) and thereafter declined to rule on appellant's argument regarding the community notification requirements of the Adam Walsh Act. The magistrate opined that the 11 factors enumerated in R.C. 2950.11(F)(2) appeared to be outside the scope of a reclassification hearing. In addition, the magistrate interpreted R.C. 2950.11(H)(1) to require that a hearing on a motion for suspension of community notification requirements must be held before the sentencing judge. Because appellant did not file his petition in the sentencing court, the magistrate concluded that the court lacked jurisdiction to rule on appellant's community notification claim.

{¶24} On appeal, appellant does not contest the jurisdictional dismissal of his community notification claim by the trial court. However, we must raise jurisdictional issues sua sponte. *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 87. See, also, *Foster v. Wickliffe*, 175 Ohio App.3d 526, 2007-Ohio-7132, ¶106 (Rice, P.J., dissenting) (stating, "Where * * * parties fail to raise a jurisdictional issue on appeal, an appellate court must raise it sua sponte"). In view of a recent decision issued by the Ohio Supreme Court, we find that the trial court's dismissal of appellant's community notification argument was improper.

{¶25} In *State v. McConville*, __ Ohio St.3d __ , 2010-Ohio-958, the Ohio Supreme Court scrutinized the community notification provisions of R.C. 2950.11(F)(2). The high court addressed two potential options for operation of the statute: (1) the statute applied only to sex offenders whose status was determined under the law in effect prior to the Adam Walsh Act, or (2) the statute applied to the class of defendants mentioned under the first option *as well as* defendants who were notified of their sex

offender status after the effective date of the Adam Walsh Act.[2]

{¶26} The defendant in *McConville* pleaded guilty to rape and gross sexual imposition and was classified as a Tier III sex offender on a date after the Adam Walsh Act had already gone into effect. Following a hearing, the trial court removed the defendant's duty to comply with community notification requirements. The appellate court affirmed, and the OhioSupreme Court accepted a discretionary appeal.

{¶27} After reviewing the applicable law, the high court noted that the plain language of R.C. 2950.11(F) did not limit its application solely to those sex offenders whose status was determined under the former version of R.C. Chapter 2950.11. *McConville* at ¶10. The court opined that the language employed by the revised statute exhibited the legislature's intent to grant the trial court discretion to determine whether an individual should be made subject to community notification. Id. at ¶11. The high court held that the relief afforded under R.C. 2950.11(F)(2) was available to defendants who were notified of their sex offender status after the effective date of the Adam Walsh Act. *McConville* at ¶14.

{¶28} Also of note, the *McConville* court declared that R.C. 2950.11(H) was not relevant to community notification determinations under R.C. 2950.11(F). *McConville* at ¶13. Rather, R.C. 2950.11(H) was a separate provision which permitted the suspension of community notification requirements for an offender who had already been enduring that sanction. *McConville* at ¶13. By contrast, R.C. 2950.11(F)(2) contained language which referred to the initial imposition of the community notification requirement. *McConville* at ¶13. In addition, the high court observed, the two provisions did not refer to one another or otherwise indicate that the legislature intended them to be read together. Id.

2. The Adam Walsh Act went in to effect on January 1, 2008.

{¶29} We highlight the following observation made by the *McConville* court, which is particularly relevant to the present appeal:

{¶30} "The R.C. 2950.11(F)(2) community-notification issue may also arise in a reclassification context: if a sexual offender was not subject to community notification when his status was determined under pre-Senate Bill 10 legislation but is automatically reclassified under Senate Bill 10 into a status that does require community notification, R.C. 2950.11(F)(2) may be implicated. However, a reclassification situation of this type is not presented in this case and, accordingly, we express no opinion as to the operation of R.C. 2950.11(F)(2) in this regard." *McConville* at ¶4, fn. 1.

{¶31} This is precisely the scenario we are confronted with in the case at bar. Appellant was not subject to community notification when initially adjudicated a sexually oriented offender under the former R.C. Chapter 2950. When appellant was reclassified as a Tier III sex offender under the Adam Walsh Act, the duty to comply with community notification requirements attached automatically. We recognize that the *McConville* court declined to issue a definitive ruling on the application of the law to this scenario. *McConville* at ¶4, fn. 1. However, as quoted above, the high court acknowledged that "R.C. 2950.11(F)(2) *may be implicated*" when community notification is imposed upon a sex offender by virtue of his reclassification under the Adam Walsh Act. *McConville* at ¶4, fn. 1. (Emphasis added.) We find this dictum to be indicative of the more prudent approach in such cases.

{¶32} As in appellant's case, an offender who is reclassified under the Adam Walsh Act may find himself subject to community notification requirements where he previously was not. Such circumstances mimic the imposition of community notification upon a newly-adjudicated sex offender. In line with the high court's reasoning in *McConville* and the language employed by R.C. 2950.11(F)(2), we believe that the

legislature intended to permit courts discretion to remove the community notification requirement when this sanction is imposed upon an offender reclassified under the Adam Walsh Act. Such a scenario is distinct from cases in which a sex offender who has been subject to community notification from the time he was initially adjudicated or classified later moves for suspension of that sanction. Under those circumstances, R.C. 2950.11(H) would apply.

{¶33} In sum, we hold that a sex offender who is reclassified under the Adam Walsh Act and automatically becomes subject to community notification requirements as a result of his reclassification may seek removal of that sanction in accordance with the procedures outlined in R.C. 2950.11(F)(2). We have previously ruled that the Adam Walsh Act requires an offender to file a petition contesting reclassification in the common pleas court situated in the county of the offender's residence or temporary domicile. *Roy v. State*, Butler CA2009-02-067, 2009-Ohio-5808, ¶6. We thus find it sensible to hold that the court conducting the reclassification hearing, i.e., the court in the offender's county of residence or temporary domicile, is the proper forum for a R.C. 2950.11(F)(2) motion seeking removal of community notification requirements.

{¶34} In view of our analysis, we find that the trial court in the case at bar possessed jurisdiction to entertain appellant's claim that he was entitled to removal of community notification requirements under R.C. 2950.11(F)(2). As stated, the magistrate opined that the 11 factors in R.C. 2950.11(F)(2) were outside the scope of a reclassification hearing and that R.C. 2950.11(H)(1) appeared to be the appropriate avenue for relief from community notification in appellant's case. The language of R.C. 2950.11(H)(1) implies that the proper forum for a motion under that section is the sentencing court. *Thomas v. State*, Lake App. No. 2008-L-026, 2009-Ohio-5209, ¶81. Appellant's petition was filed in the common pleas court in the county in which he was

currently incarcerated, not in the county in which he was sentenced. The magistrate thus concluded that the court lacked jurisdiction to consider appellant's claim for removal of community notification requirements.

{¶35} Due to our ruling that R.C. 2950.11(F)(2) is the statute applicable to an offender in appellant's position, we find that the magistrate erred in dismissing appellant's community notification argument on the basis that the court lacked jurisdiction to consider it. We find that the trial court's refusal to consider that issue was an error sufficiently egregious to amount to civil plain error. *Goldfuss*, 1997-Ohio-401 at syllabus.

{¶36} Before addressing appellant's assignments of error, we pause to clarify a recent decision promulgated by this court and cited above. In *Roy v. State*, Butler CA2009-02-067, 2009-Ohio-5808, this court addressed a trial court's decision dismissing a defendant's petition challenging his reclassification to a Tier III sex offender. The defendant had been convicted and initially adjudicated a sex offender in the Butler County Common Pleas Court in 1997. In March 2008, while incarcerated in Madison County, the defendant filed a petition challenging his reclassification with the sentencing court in Butler County. After surveying the law, this court concluded that the proper forum for a petition challenging reclassification was the common pleas court in the county of the petitioner's residence or temporary domicile, not the county in which the petitioner was sentenced or adjudicated a sex offender. Id. at ¶6.

{¶37} We recognize that *Roy* made no differentiation between challenges to reclassification and challenges to community notification requirements. This omission does not critically impact motions for removal of newly-imposed community notification requirements under R.C. 2950.11(F)(2). As declared above, a petition challenging sex offender reclassification and a motion seeking removal of community notification

requirements under R.C. 2950.11(F)(2) must both be filed in the common pleas court in the offender's county of residence or temporary domicile. See *Roy* at ¶6. However, petitions for the suspension of community notification requirements under R.C. 2950.11(H) are a different creature.

{¶38} As stated, R.C. 2950.11(H)(1) contains language which implies that a petitioner seeking suspension of community notification requirements under that section must file his motion with the original sentencing court. *Thomas*, 2009-Ohio-5209 at ¶81. We take this opportunity to clarify that the proper forum for a petition seeking suspension of community notification under R.C. 2950.11(H) is distinct from the proper forum for a petition contesting reclassification or a petition seeking removal of community notification requirements under R.C. 2950.11(F)(2). Due to this distinction, the holdings in *Roy* and in the case at bar do not apply to cases in which a petitioner files for relief under R.C. 2950.11(H).

{¶39} We now turn to appellant's six assignments of error. Appellant challenges the Adam Walsh Act on a number of constitutional grounds. Specifically, appellant argues that the law violates the ex post fact clause, the prohibition against retroactive laws, the separation of powers doctrine, the double jeopardy clause, the due process clause, the prohibition against cruel and unusual punishment, and the right to contract.

{¶40} Each of appellant's constitutional objections has already been disposed of by this court. In *State v. Williams*, Warren App. No. CA2008-02-029, 2008-Ohio-6195, we ruled that Ohio's Adam Walsh Act does not violate, inter alia, the Double Jeopardy and Retroactivity Clauses of the Ohio Constitution or the separation of powers doctrine. Id. at ¶107-111, ¶22-36, and ¶95-102. In addition, we found that the act does not violate the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution. Id. at ¶37-75 and ¶107-111. We also ruled that the act does not infringe

upon a defendant's due process rights or defy the prohibition against cruel and unusual punishment found in the Ohio and United States Constitutions. Id. at ¶49, 60, 66, 72, 74 and ¶103-106. Finally, this court has also determined that the Adam Wash Act does not impair the right to contract as protected by the Ohio and United States Constitutions. *Ritchie v. State*, Clermont CA2008-07-073, 2009-Ohio-1841, ¶7-13.

{¶41} Having disposed of appellant's constitutional arguments, the first, second, third, fourth, fifth, and sixth assignments of error are overruled.

{¶42} Because the trial court erred in finding that it lacked jurisdiction to entertain appellant's community notification argument, we reverse the decision of the trial court and remand the matter for consideration of that issue.

{¶43} Reversed and remanded.

BRESSLER, P.J., concurs.

RINGLAND, J., concurs in part and dissents in part.

RINGLAND, J., concurring in part and dissenting in part.

{¶44} I respectfully dissent based upon my analysis in *Sears v. State*, Clermont App. No. CA2008-07-068, 2009-Ohio-3541, finding that the retroactive modification of judicially-determined sex offender classifications by the Adam Walsh Act violates the separation of powers doctrine. I concur with the majority's resolution of the remaining issues.