[Cite as *State v. Barker*, 2009-Ohio-2774.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 22963
Plaintiff-Appellee	:	
	:	Trial Court Case No. 91-CR-504
v.	:	
	:	(Criminal Appeal from
SHERRI LYNN BARKER	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 12th day of June, 2009.

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BROGAN, J.

{¶ 1} Sherri Lynn Barker appeals from the decision of the Montgomery County Common Pleas Court's declaration that R.C. 2950.01, et seq. (hereinafter S.B. 10) is

constitutional.[1] Barker was convicted pursuant to her guilty plea of attempted rape of a person under 13 without force in violation of R.C. 2923.02 and R.C. 2907.02(A)(1)(h). Barker was sentenced to an indeterminate sentence of five to fifteen years. The trial court found that she was a sexually oriented offender on November 25, 1997. In 2007, Barker received a notice from the Ohio Attorney General that she was being reclassified as a Tier III offender under the newly enacted S.B. 10. Barker's reclassification was based on the level of her offense without regard to an individual assessment of her dangerousness. She is now required to register with the county sheriff every ninety days for life, as opposed to her prior requirement to register annually for ten years. Tier III offenders are also subject to stricter community notification provisions and to residency restrictions which forbid them from residing within 1,000 feet of a school, pre-school, or day-care facility.

{¶ 2} In a single assignment of error, Barker argues that the trial court erred in declaring S.B. 10 constitutional because she argues the legislation violates the ex post facto clause of the United States Constitution Section 28, Article II of the Ohio Constitution which prohibits retroactive legislation, the double jeopardy provisions of the Ohio and United States Constitutions, the separation of powers doctrine, res judicata and collateral estoppel principles, and lastly the cruel and unusual punishment provisions of the Ohio and United States Constitutions.

{¶ 3} In July 2008, this court held that S.B. 10 did not offend the ex post facto clause of the United States Constitution because S.B. 10 is civil and non-punitive. *State*

[1] The trial court found in dictum that the residency restriction was constitutional only if it was applied prospectively. The State has not filed a cross-appeal challenging that ruling.

v. Desbiens, Montgomery App. No. 22489, 2008-Ohio-3375. In November, 2008, we held S.B. 10 did not violate the ex facto clause or retroactive clause of the Ohio Constitution. *State v. Moore*, Greene App. No. 07CA093, 2008-Ohio-6238. Having determined in *Desbiens* that S.B. 10 is civil and non-punitive, Barker's claim that the legislation violates the cruel and unusual punishment clauses and the double jeopardy clauses of the United States and Ohio Constitutions must fail as well.

{¶ 4} Barker argues that the legislature in enacting S.B. 10 has violated the separation of powers doctrine by unilaterally changing the sexual classification she received in 1997 under previous legislation. The State argues that the legislature did not change a prior judicial determination of her classification as a sexually oriented offender because that classification attached by operation of law, like the new classifications.

{¶ 5} A statute violating "the doctrine of separation of powers is unconstitutional." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward,* 86 Ohio St.3d 451, 475, 1999-Ohio-123. "The separation-of-powers doctrine implicitly arises from our tripartite democratic form of government and recognizes that the executive, legislative, and judicial branches of our government have their own unique powers and duties that are separate and apart from the others." *State v. Thompson*, 92 Ohio St.3d 584, 586, 2001-Ohio-1288, citing *Zanesville v. Zanesville Tel. & Telegraph Co.* (1900), 63 Ohio St. 442. The doctrine's purpose "is to create a system of checks and balances so that each branch maintains its integrity and independence." Id., citing *State v. Hochhausler* (1996), 76 Ohio St.3d 455; *S. Euclid v. Jemison* (1986), 28 Ohio St.3d 157.

{¶ 6} Pursuant to the Ohio Constitution, "the General Assembly is vested with the power to make laws." Id., citing Section 1, Article II, Ohio Constitution. The Ohio

General Assembly is prohibited "from exercising 'any judicial power, not herein expressly conferred.'" Id., citing Section 32, Article II, Ohio Constitution. Courts, on the other hand, "possess all powers necessary to secure and safeguard the free and untrammeled exercise of their judicial functions and cannot be directed, controlled or impeded therein by other branches of the government." Id. (Citations omitted.)

{¶ 7} Barker argues that the trial court made a judicial determination when she was classified a sexually oriented offender in 1997, and that the State, by applying the provisions of S.B. 10, unilaterally changed that result to a Tier III sex offender, with harsher registration and notification requirements. However, the trial court did not need to make the determination that Barker was a sexually oriented offender because her classification as a sexually oriented offender attached by operation of law – like the new Tier classifications under S.B. 10. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, paragraph 2 of the syllabus.

{¶ 8} The Ohio Supreme Court explained that, "[o]ther than 'the ministerial act of rubber-stamping the registration requirement on the offender,' the trial court plays no role in the imposition of the sexually oriented offender designation." Id.; see, also, *State v. Moyers*, 137 Ohio App.3d 130, 2000-Ohio-1669 (the defendant was classified as a sexually oriented offender by operation of statute, not by court judgment; therefore, the court did not consider any of the assigned errors alleging various constitutional violations).

{¶ 9} Likewise, the new Tier classifications under S.B. 10 operate as a matter of law, not by judicial determination. S.B. 10 abolished the former classifications of sexually oriented offenders, habitual sex offenders, or sexual predators. A legal

designation of a "sexual predator," which previously required a hearing, no longer exists. See, e.g, *State v. Williams*, Warren App. No. 2008-02-029, 2008-Ohio-6195, ¶15. Rather, sex offenders are now classified within Tiers based solely on the offense of their conviction. Id., ¶16, quoting *State v. Clay*, 177 Ohio App.3d 78, 2008-Ohio-2980.

{¶ 10} S.B. 10 also provides for the reclassification of all offenders who were classified and still had duties under the former law when S.B. 10 came into effect. The act of reclassifying sex offenders does not encompass a judicial determination, but it is determined solely upon the offense for which the offender was convicted. Nor does it disturb a prior judicial determination. For example, a sex offender who received a sexual predator hearing where the judge judicially determined that there was a likelihood of recidivism and that the offender would have to register every 90 days for life was automatically reclassified to a Tier III offender, which contains the same registration requirements as before.

{¶ 11} A number of Ohio appellate courts have rejected challenges to S.B. 10 based on a separation of powers argument. The Third, Fourth, Fifth, Sixth, Tenth, and Twelfth appellate districts have all held that S.B. 10 does not violate separation of powers. "[S]ex offender classification[s] 'ha[ve] always been a legislative mandate, not an inherent power of the courts.'" *Holcome v. Ohio*, Logan App. No. 8-08-23, 2009-Ohio-782, citing *Slagle v. State*, 145 Ohio Misc.2d 98, 2008-Ohio-593. Furthermore, "[a] sex offender classification is nothing more 'than a creation of the legislature, and therefore, the power to classify is properly expanded or limited by the legislature.'" *State v. Randlett*, Ross App. No. 08CA3046, 2009-Ohio-112, citing *Slagle v. State*, supra. See, also, *In Re Adrian*, Licking App. No. 08-CA-17, 2008-Ohio-6581; *Montgomery v. Leffler*,

Huron App. No. H-08-011, 2008-Ohio-6397; *State v. Bodyke*, Huron App. No. H-07-040, 2008-Ohio-6387; *State v. Christian*, Franklin App. No. 08AP-170, 2008-Ohio-6304; and *In the Matter of S.R.P.*, Butler App. No. CA 2007-11-027, 2009-Ohio-11.

{¶ 12} Barker also argues that her reclassification under S.B. 10 should be barred by the doctrines of res judicata and collateral estoppel. "Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at trial*, which resulted in that judgment of conviction, *or on appeal* from that judgment." *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. (Emphasis in original.)

{¶ 13} Barker's reclassification is not a "final judgment of conviction." Rather, the Ohio Supreme Court has found that proceedings under R.C. Chapter 2950 are civil rather than punitive or criminal. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, certiorari denied *Hayden v. Ohio* (2003), 537 U.S. 1197, 123 S.Ct. 1265, 154 L.Ed.2d 1035; *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291. Therefore, because a sex offender classification is not a part of the criminal sanctions imposed upon a convicted defendant, as provided under the sentencing statutes, the doctrine of res judicata is inapplicable to her cause.

{¶ 14} Barker also argues that her reclassification is barred by the doctrine of collateral estoppel. "The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as * * * estoppel by judgment, and issue preclusion, also known as collateral estoppel. *Grava v. Parkman Twp.,* 73 Ohio St.3d 379, 381, 1995-

Ohio-331. Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.,* 81 Ohio St.3d 392, 395, 1998-Ohio-435. Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter. *Grava*, supra, at 382.

{¶ 15} "Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. * * * Issue preclusion applies even if the causes of action differ." *O'Nesti v. DeBartolo Realty Corp.,* 113 Ohio St.3d 59, 61, 2007-Ohio-1102 (Citation omitted). See, also, *State ex rel. Davis v. Public Employees Ret. Bd.,* 174 Ohio App.3d 135, 2007-Ohio-6594 (holding that "issue preclusion precludes relitigation of an issue that has been actually and necessarily litigated and determined in a prior action"). Barker was classified a sexually oriented offender as a matter of law. Although Barker argues that the trial court necessarily found she was not likely to re-offend in finding that she was not a habitual offender or a sexual predator, the State notes the legislature is not attempting to set aside that factual determination because likelihood of re-offending is not a necessary finding required for classification as a Tier III offender. No judicial determination was made then or now. Therefore, the doctrines of res judicata, collateral estoppel and issue preclusion are inapplicable to her reclassification.

{¶ 16} Lastly, although we have found the notification provisions of S.B. 10 constitutional, Barker may yet request a hearing pursuant to R.C. 2950.11(F)(2) to

demonstrate that the notification provisions of S.B. 10 do not in fact apply to her.

{¶ 17} The Appellant's assignment of error is Overruled. The judgment of the trial court is Affirmed.

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FAIN and FROELICH, JJ., concur.

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