

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22969
v.	:	T.C. NO. 2008 CV 360
MARK A. HALL	:	(Civil appeal from
Defendant-Appellant	:	Common Pleas Court)

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OPINION

Rendered on the 19th day of June, 2009.

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FROELICH, J.

{¶ 1} Mark A. Hall appeals from a judgment of the Montgomery County Court of Common Pleas, which overruled his constitutional challenges to R.C. Chapter 2950, as amended by Senate Bill 10.

{¶ 2} In 1987, Hall was convicted of two counts of rape, in violation of R.C. 2907.02,

in the Sandusky County Court of Common Pleas. Hall's conviction was vacated in 2001, and on February 16, 2001, Hall pled no contest to two counts of attempted rape, in violation of R.C. 2907.02(A)(1)(b) and R.C. 2923.02.¹ Hall was designated a sexually oriented offender, which required him to register annually with the local sheriff's office for ten years, in accordance with the registration requirements set forth in Ohio's Sex Offender Registration and Notification Act, R.C. Chapter 2950 ("SORN"). Hall currently resides in Montgomery County, and he has registered as a sexually oriented offender in this county.

{¶ 3} In 2007, the General Assembly enacted Senate Bill 10 ("S.B. 10") to implement the federal Adam Walsh Child Protection and Safety Act of 2006. Among other changes, S.B. 10 modified the classification scheme for offenders who are subject to the Act's registration and notification requirements. S.B. 10 created a three-tiered system, in which a sex offender's classification is determined based on the offense of which the offender was convicted.

{¶ 4} On November 26, 2007, Hall received a notice from the Ohio Attorney General, informing him of recent changes to SORN and that he had been reclassified as a Tier III sex offender. As a Tier III sex offender, Hall would be required to register with the local sheriff's office every 90 days for life, and he would be subject to community notification.

{¶ 5} On January 10, 2008, Hall filed a petition to contest the application of S.B. 10 to him. He raised several constitutional challenges to S.B. 10, including that retroactive application of S.B. 10 violates the prohibition on ex post facto laws and retroactive laws and that the residency restrictions violate due process. Hall also asserted that reclassification

¹ The trial court sentenced Hall to consecutive sentences of seven to fifteen years in prison. Hall was credited with the fourteen years that he had previously served in this case, and he was placed on five years of community control.

constitutes a violation of the separation of powers doctrine, a breach of contract, a violation of his constitutional right to contract, and multiple punishments under the double jeopardy clause. He argued that S.B. 10 “requires [the] Court to modify and enhance the sentences *** in violation of the doctrines of res judicata and collateral estoppel,” and he claimed, citing R.C. 2950.11(F), that he could not be subject to community notification requirements under S.B. 10 because he was not subject to community notification under a prior version of SORN. Alternatively, Hall contended that the State improperly reclassified him as a Tier III sex offender instead of a Tier II sex offender. Hall requested a hearing in accordance with R.C. 2950.031(E), R.C. 2950.032(E), and R.C. 2950.11(H) (to contest community notification provisions), as well as an order enjoining the application of S.B. 10 to him until further order of the court.

{¶ 6} On September 5, 2008, the trial court overruled Hall’s constitutional challenges to S.B. 10. Relying upon *State v. Barker* (Aug. 29, 2008), Montgomery C.P. No. 91-CR-504, and *State v. Hoke* (Aug. 29, 2008), Montgomery C.P. No. 91-CR-2354, the trial court summarily concluded that (1) S.B. 10 is not an ex post facto law; (2) the statute’s classification, registration, and notice requirements are not impermissibly retroactive; (3) S.B. 10’s residency restrictions are unconstitutionally retroactive when applied to require an owner of residential property or a resident of such property, who owned or resided in the property before the enactment of the statute, to vacate the residence; (4) S.B. 10 does not implicate double jeopardy; (5) S.B. 10 does not violate the separation of powers doctrine; (6) S.B. 10 does not entail cruel and unusual punishment; (7) S.B. 10’s residency restrictions, applied prospectively, do not violate substantive due process; (8) S.B. 10’s scheme does not violate procedural due process; and (9) the retroactive application of S.B. 10 does not constitute a breach of the petitioner’s plea

agreements. The court noted that if Hall still desired a hearing, he “must file a separate motion regarding this issue.” Hall did not renew his request for a hearing.

{¶ 7} Hall appeals from the trial court’s denial of his constitutional challenges to S.B. 10.

{¶ 8} On December 5, 2009, we notified counsel that a sizable number of cases is currently pending before the Court in which the Montgomery County trial courts addressed the constitutionality of S.B. 10 and did so in reliance on the decision in *Barker*. We indicated that we would treat *Barker* as the lead case, and we asked counsel to notify the court if he intended to rely on the *Barker* brief in whole, in part, or not at all. Hall has filed a brief to “supplement” the *Barker* appellant’s brief. The State relies entirely on its brief in *Barker*.

{¶ 9} Hall’s sole assignment of error states:

{¶ 10} “THE RETROACTIVE APPLICATION OF SENATE BILL 10 VIOLATES THE EX POST FACTO, DUE PROCESS, AND DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES CONSTITUTION AND THE RETROACTIVITY CLAUSE OF SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION[;] FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; SECTION 10, ARTICLE I OF THE UNITED STATES CONSTITUTION; AND SECTIONS 10 AND 28, ARTICLES I AND II, RESPECTIVELY, OF THE OHIO CONSTITUTION.”

{¶ 11} Although raising only one assignment of error, Hall claims that S.B. 10 violates the United States and Ohio Constitutions in several respects. Many of Hall’s claims mirror issues raised in the *Barker* appeal, including that S.B. 10 is an impermissible ex post facto law, violates the prohibition against retroactive laws, constitutes cruel and unusual punishment,

violates the separation of powers doctrine, and constitutes multiple punishments under the Double Jeopardy Clause. Hall raises an additional argument that S.B. 10's residency restrictions are unconstitutional.

{¶ 12} Based on this Court's respect for stare decisis and our opinion in *State v. Barker*, Montgomery App. No. 22963, 2009-Ohio-2774, Hall's constitutional arguments that mirror those raised in *Barker* are not well taken.

{¶ 13} Turning to S.B. 10's residency restrictions, now codified at R.C. 2950.034, Hall claims that these restrictions constitute a restraint on his liberty, infringe upon his fundamental right to live where he chooses, and do not rationally advance a legitimate State purpose. R.C. 2950.034 provides, in part:

{¶ 14} "(A) No person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises or preschool or child day-care center premises."

{¶ 15} R.C. 2950.034 is worded similarly to former R.C. 2950.031, the residency restriction statute under 2003 Am.Sub.H.B. 5 ("S.B. 5"), which prohibited a person who had been convicted of or pled guilty to a non-registration-exempt sexually oriented offense or child-victim oriented offense from establishing a residence or occupying residential premises within 1,000 feet of any school premises. The current version of the residency provision adds further restrictions that prohibit establishing a residence or occupying residential premises near a pre-school or child-care center.

{¶ 16} Although S.B. 10 may impose more stringent residency restrictions than the

former version, we find no indication in the record that Hall has standing to challenge the constitutionality of R.C. 2950.034 at this time. “The constitutionality of a state statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied and who has not been injured by its alleged unconstitutional provision.” *Palazzi v. Estate of Gardner* (1987), 32 Ohio St.3d 169, syllabus. “ ‘[A] hypothetical or potential injury’ will not give a person standing to challenge the constitutionality of a statute.” *Brooks v. State*, Lorain App. No. 08CA9452, 2009-Ohio-1825, at ¶11, quoting *State v. Spikes* (1998), 129 Ohio App.3d 142, 145.

{¶ 17} Hall’s petition to contest the application of S.B. 10 states that he resides in Montgomery County and that he has registered in Montgomery County as a sexually oriented offender. Hall received his notice from the Ohio Attorney General at his Huber Heights address. There is no evidence in the record, however, that he either occupies a residence within 1,000 feet of a school, preschool, or daycare center or that he has been forced to move from such an area. Hall has not suggested that he has any present intent to move to a residence within the proscribed area. Hall, therefore, has not demonstrated that R.C. 2950.034 has caused any actual or imminent deprivation of a constitutional right. Consequently, Hall lacks standing to challenge the constitutionality of that statute.

{¶ 18} Nevertheless, the Supreme Court has held in reviewing S.B. 5’s residency restrictions that former R.C. 2950.031 was not intended to apply retroactively to a person who committed the offense and bought his home before its enactment. *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542. The *Hyle* Court found that neither the description of the convicted sex offenders nor the description of the prohibited acts included a clear declaration of

retroactivity. To the contrary, the Court noted that the description of the prohibited acts – “shall establish” and “occupy” – were written in the present tense, which suggested prospective application. The court rejected the assertion that R.C. Chapter 2950 as a whole was intended to apply retroactively.

{¶ 19} As stated above, the current residency restrictions are worded similarly to former R.C. 2950.31. As in the former version, the prohibited acts are written in the present tense, and there is no clear declaration that S.B. 10’s residency restrictions are intended to apply retroactively. Accordingly, as with former R.C. 2950.031, R.C. 2950.034 is prospective only and does not apply to Hall, who committed his offense before July 1, 2007, the effective date of S.B. 10’s residency provision. See *Nasal v. Burge*, Miami App. No. 08-CA-07, 2009-Ohio-1643 (concluding that, in accordance with *Hyle*, former R.C. 2950.031 did not apply to a sex offender who had committed a sexually oriented offense prior to the effective date of the statute, even though he began residing near a school after the statute took effect).

{¶ 20} In addition, we have previously rejected Hall’s assertion that the residency restrictions impose an unconstitutional restraint and infringe on a fundamental right. *State v. King*, Miami App. No. 08-CA-02, 2008-Ohio-2594, at ¶16. We noted that, “while S.B. 10 precludes sex offenders from living within 1,000 feet of certain facilities, a similar restriction existed” when the Supreme Court majority declared in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, that R.C. Chapter 2950 was non-punitive. *King* at ¶16. Moreover, several courts addressing residency restrictions have concluded that the right to “live where you want” does not rise to the level of a fundamental right. *State ex rel. O’Brien v. Heimlich*, Franklin App. No. 08AP-521, 2009-Ohio-1550, at ¶32-35 (discussing other cases). Finally, we are not

persuaded that R.C. 2950.034 fails to rationally advance a legitimate State purpose. As stated by the United States District Court for the Southern District of Ohio in regard to a prior version of R.C. Chapter 2950:

{¶ 21} “[T]he public has a compelling interest in protecting children from sex offenders and ... § 2950.031 furthers that goal by prohibiting sex offenders from establishing permanent residences in areas where children are sure to be concentrated.’ Doc. No. 45, at 10. Plaintiffs reiterate their argument that § 2905.031 does not actually limit sex offenders’ access to children and they point out that sex offenders can still live in apartment buildings full of children or near parks or other places where children congregate. These are perhaps valid criticisms of § 2950.031 from a policy standpoint, but they do not detract from a rational conclusion that the safety of children is promoted when sex offenders are prohibited from living near schools. For instance, the legislature might reasonably have concluded that safety is furthered by denying sex offenders of convenient safe havens near schools. It is immaterial for purposes of the rational connection assessment that § 2905.031 fails to protect children in apartments and parks. The Court does not sit to judge whether the legislature has made the best possible choice in attempting to protect children from sex offenders. *Smith [v. Doe]*, 538 U.S. [84,] 105, 123 S.Ct. 1140[, 155 L.Ed.2d 164]. Moreover, the legislature is entitled to address problems it identifies in incremental fashion. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955). Perhaps the issue of sex offenders frequenting public parks is next on its agenda, but the legislature’s failure to address every conceivable situation where sex offenders may prey on children does not mean that § 2950.031 lacks a rational connection to the legislature’s objective.” *Coston v. Petro* (S.D. Ohio 2005), 398 F.Supp.2d 878, 886.

{¶ 22} In short, even if Hall had standing to assert his constitutional challenges to R.C.
2950.034, we would find them to be not well taken.

{¶ 23} Hall's assignment of error is overruled in its entirety.

{¶ 24} The judgment of the trial court will be affirmed.

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BROGAN, J. and FAIN, J., concur.

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