

[Cite as *State v. Heys*, 2009-Ohio-5397.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MIAMI COUNTY**

|                     |   |                                |
|---------------------|---|--------------------------------|
| STATE OF OHIO       | : |                                |
|                     | : | Appellate Case No. 09-CA-04    |
| Plaintiff-Appellee  | : |                                |
|                     | : | Trial Court Case No. 98-CR-199 |
| v.                  | : |                                |
|                     | : | (Criminal Appeal from          |
| EDWARD HEYS         | : | Common Pleas Court)            |
|                     | : |                                |
| Defendant-Appellant | : |                                |
|                     | : |                                |

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OPINION

Rendered on the 9<sup>th</sup> day of October, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant Edward Heys appeals from an order overruling his “Motion for Relief from Application of the Adam Walsh Act.” The Ohio General Assembly enacted Senate Bill 10 (S.B. 10) in response to the federal “Adam Walsh Child Protection and Safety Act” (AWA). Heys offers eleven arguments against the

constitutionality of both the federal AWA and Ohio's S.B. 10, which modifies Ohio's system of classification, reporting, and community notification provisions for sex offenders as embodied in R.C. Chapter 2950. Because Heys was convicted under the Ohio statutes and not under the federal AWA, we need only consider his arguments as they relate to S.B. 10. For the following reasons, we conclude that the provisions of S.B. 10 are not unconstitutional. Accordingly, we affirm the order from which this appeal is taken.

I

{¶ 2} In September, 1998, Heys pled guilty to one count of Rape. He was sentenced to six years in prison. Additionally, he was designated as a sexually oriented offender, which carried annual registration requirements for ten years after his release from prison. The sexually oriented offender designation did not include a community notification requirement.

{¶ 3} In November, 2007, Heys received a letter from the Ohio Attorney General (AG) regarding the three-tier classification system enacted by S.B. 10, informing Heys that his conviction classified him as a Tier 3 offender, which meant that he was required to report to the local sheriff every ninety days for the rest of his life. The Tier 3 offender classification also includes provisions for community notification. Heys filed a "Motion for Relief from Application of the Adam Walsh Act."

Following a hearing on the motion, the trial court overruled it. Heys appeals from the order overruling his motion.

II

{¶ 4} Heys's sole assignment of error is as follows:

{¶ 5} “FOR A VARIETY OF REASONS, THE NEWLY ENACTED REPORTING PROVISIONS FOR SEX OFFENDERS VIOLATES SEVERAL FEDERAL CONSTITUTIONAL PROVISIONS.”

{¶ 6} In his sole assignment of error, Heys attacks the constitutionality of the provisions enacted by Ohio’s S.B. 10 and the federal AWA, offering eleven reasons why he believes that those statutory schemes violate the United States Constitution. Because Heys was convicted under the Ohio statutes, and not under the federal AWA, we need only address his arguments as they apply to the constitutionality of S.B. 10.

{¶ 7} All statutes enacted in Ohio are presumed to be constitutional. *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, ¶12, citing *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.2d 159, 161. The party challenging the constitutionality of a statute bears the burden of proving beyond a reasonable doubt, that the statute is unconstitutional. *Id.*, citing *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7, 13. The presumption of validity cannot be overcome unless there is a clear conflict between the challenged legislation and a particular constitutional provision. *Id.*, citations omitted. We conclude that Heys fails to meet his burden of proving S.B. 10 to be unconstitutional.

#### A. Non-delegation Doctrine.

{¶ 8} Heys first argues that the AWA and S.B. 10 violate the non-delegation doctrine – that “the General Assembly cannot delegate its essential legislative power to administrative bodies or officers.” *Redman v. Ohio Dept. Of Indus.*

*Relations* (1996), 75 Ohio St.3d 399, 404, citations omitted. However, “[i]t must be conceded that the legislative body cannot deal with each specific case and therefore legislative action in the main must be general in character, which is the basis for the rule that it is no violation of the constitutional inhibition against the delegation of legislative power for the General Assembly to establish a policy and fix the standards for guidance of administrative agencies, while leaving them to the making of subordinate rules within those fixed standards, and the determination of facts to which the legislative policy applies.” *Id.*, citing *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, 343. In other words, although only the legislative branch has the power to make laws, administrative agencies have the power to execute them. *Id.*, citing *Cincinnati, Wilmington & Zanesville RR. Co. v. Comms. Of Clinton Cty.* (1852), 1 Ohio St. 77, 88. Heys insists that there is no policy to guide the Ohio Attorney General (AG) concerning the retroactive application of S.B. 10, and that the AG is given sole authority to determine who is subject to the requirements. To the contrary, the determination of which tier a sex offender falls into, and the attendant registration and notification obligations, have been determined by the Ohio legislature. The AG simply notifies the offender of the new designation and its relevant requirements. The AG has no discretion in applying the laws.

{¶ 9} In regard to the dissemination of his personal information, Heys claims that the AG has too much discretion because there is no statutory guidance as to “how to gather create, or disseminate the information.” But these details are what is being referred to when it is said that the administrative agency may create the rules necessary to execute the laws enacted by the general assembly. The AG is in a

better position than the General Assembly to determine the details of how the agency can best comply with S.B. 10.

B. Substantive and Procedural Due Process.

{¶ 10} Heys next maintains that the AWA and S.B. 10 deny him both substantive and procedural due process. As a threshold matter, a person alleging a due process violation must first demonstrate a deprivation of a protected liberty or property interest. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, ¶6, cert. denied *Hayden v. Ohio* (2003), 537 U.S. 1197, 123 S.Ct. 1265, 154 L.Ed.2d 1035, citation omitted. Because Heys fails to point to a deprivation of either protected interest, his due process challenge fails.

{¶ 11} Heys argues that the new requirements of S.B. 10 deny him procedural due process because he has a vested right, or liberty interest, in his original classification and registration duty and was therefore entitled to notice and the opportunity to be heard prior to the reclassification and attendant requirements taking effect. We disagree. Heys has no vested interest or settled expectation in his previous classification and requirements because “a convicted felon has no reasonable expectation that his or her criminal conduct will not be subject to further legislation,” including the registration requirements of R.C. Chapter 2950. *State v. Desbiens*, Montgomery App. No. 22489, 2008-Ohio-3375, at ¶28, citing *State v. King*, Miami App. No. 08-CA-02, 2008-Ohio-2594, at ¶33, in turn quoting *State v. Cook*, 83 Ohio St.3d 404, 412, 1198-Ohio-291, cert. denied (1999), 525 U.S. 1182, 119 S.Ct.1122, 143 L.Ed.2d 116.

{¶ 12} Furthermore, no liberty interest is implicated. *King*, *supra*, at ¶34,

citing *Hayden*, supra. “A constitutionally protected liberty interest has been defined as freedom from bodily restraint and punishment.” *Hayden*, supra, at ¶14, citing *Ingraham v. Wright* (1977), 430 U.S. 651, 673-74, 97 S.Ct. 1401, 51 L.Ed.2d 711, in turn citing *Rochin v. California* (1952), 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183. The Ohio Supreme Court held that the previous registration requirements involved no bodily restraint or punishment; they are neither criminal nor punitive in nature. *Id.*, citations omitted. See, also, *Cook*, supra. Similarly, the S.B. 10 requirements have also been found to be non-punitive. *State v. Barker*, Montgomery App. No. 22963, 2009-Ohio-2774, ¶3, citing *Desbiens*, supra.

{¶ 13} Heys contends that he should have been afforded a hearing prior to his reclassification. Under a previous version of the sexual predator laws, the Ohio Supreme Court held that the laws required a hearing only for certain classifications, not applicable the defendant in that case, that required factual findings beyond the bare fact that the offender committed a sexually oriented offense. *Hayden*, supra. The court explained that where the particular sexual offender classification in that case depended upon nothing more than that the offender was convicted of a sexually oriented offense, affording a hearing “would be nothing more than an empty exercise.” *Id.*, at ¶15. The same is true under the mandatory provisions of S.B. 10, because the classification is dependent entirely upon the identity of the crime of which Heys was convicted. Therefore, the lack of a hearing before classification does not deprive the defendant of any protected liberty interest. *King*, supra, at ¶34, citing *Hayden*, supra. See, also, *Desbiens*, supra, at ¶29.

{¶ 14} Heys insists that he was denied substantive due process, because his

property interest is hindered by the residency requirements. Specifically, he claims that he could be forced from his home if a school, preschool, or daycare center opens within 1,000 feet of his home. However, he can demonstrate no interference with his property interest because he has shown no actual injury. *State v. Swank*, Lake App. No. 08–L-019, 2008-Ohio-6059, ¶110. Without an actual deprivation of property rights, Heys lacks standing to challenge the constitutionality of the residency restriction. *Id.*, ¶111, citation omitted. See, also, *State v. Hall*, Montgomery App. No. 22969, 2009-Ohio-3020, ¶¶16-17.

C. Commerce Clause, Administrative Procedure Act, Tenth Amendment.

{¶ 15} Heys contends that the federal AWA violates the Interstate Commerce Clause contained in Article I, Section 8, of the United States Constitution, the federal Administrative Procedure Act, and the Tenth Amendment to the United States Constitution. The Ohio General Assembly enacted legislation that was clearly within their power to enact. It is the Ohio legislation that directly apply to Heys, not the federal act. Accordingly, even assuming, arguendo, that the AWA is in violation of the United States Constitution, the State of Ohio and its officers would be the aggrieved parties, with standing to contest the constitutionality of the AWA, not Heys. See, for example, *Printz v. United States* (1997), 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914, in which two chief local law enforcement officers successfully challenged a federal act that imposed duties directly upon them, upon the ground that the federal act violated the Tenth Amendment to the United States Constitution.

D. Separation of Powers.

{¶ 16} Next, Heys posits that the federal AWA and his reclassification under

the authority of Ohio's S.B. 10 violate the separation of powers doctrine by interfering with a prior judicial adjudication regarding his sex offender status. He argues that in carrying out the mandates of S.B. 10, the Attorney General of Ohio is engaged in sentencing and that by reclassifying him, the Attorney General has effectively set aside his previous sentence and imposed a new one. We have previously rejected this precise argument. *Barker*, supra. The Third, Fourth, Fifth, Sixth, Tenth, Eleventh, and Twelfth appellate districts have also rejected challenges to S.B. 10 based on a separation of powers challenge. *Id.*, at ¶11, citations omitted; *Swank*, supra, at ¶100.

#### E. Overbroad and Vague.

{¶ 17} Heys argues that the AWA and S.B. 10 are unconstitutionally overbroad and vague. Heys does not identify any specific provision or provisions in either statute with which he takes exception, nor to any specific sections within R.C. Chapter 2950. We note that the S.B. 10 reclassification provisions provide more guidance, and far less discretion, than previous versions of R.C. Chapter 2950, which were held to be neither overbroad nor vague. See, *State v. Williams*, 88 Ohio St.3d 513, 534, 2000-Ohio-248; *State v. Reichelderfer* (April 30, 1999), Montgomery App. No. 17445, citing *State v. Fortman* (March 27, 1998), Montgomery App. No. 16565. Furthermore, we have held that S.B. 10 is not unconstitutionally overbroad. *Desbiens*, supra, at ¶30, citing *King*, supra.

#### F. Double Jeopardy, Cruel and Unusual Punishment, and Purposes of Felony Sentencing.

{¶ 18} Heys claims that his reclassification under the AWA and S.B. 10

violates double jeopardy because, in effect, he has been re-sentenced for the same crime. Heys argues that the reclassification, registration, and notification requirements established by the AWA and S.B. 10 constitute cruel and unusual punishment. And he contends that the application of the new classification system is contrary to the purposes of felony sentencing as enunciated in R.C. 2929.11 because it is based solely upon the offense committed without consideration of any of the statutory factors to be considered. The fault with all three arguments lies in his incorrect premise that the S.B. 10 reclassification and attendant requirements constitute punishment. As discussed above, we have found the S.B. 10 requirements to be civil and non-punitive in nature. *Barker*, supra, at ¶3, citing *Desbiens*, supra. For that reason, we have previously rejected these arguments in *Barker*, supra, at ¶3.

#### G. Sixth Amendment.

{¶ 19} Finally, Heys maintains that the AWA and S.B. 10 reclassification violates his Sixth Amendment right to a jury trial, again pointing to his incorrect belief that his sentence has been enhanced. However, the S.B. 10 provisions rely entirely upon the specific crime of which a defendant was convicted. The reclassification is not an adjudication of fact, but merely a consequence that attaches as a result of conviction.

{¶ 20} Moreover, as previously mentioned, S.B. 10 is not punitive. Accordingly, when considering the previous version of Ohio's sexual predator laws, the Ohio Supreme Court held that "[t]he Confrontation Clauses of the Sixth Amendment to the United States Constitution and of Section 10, Article I of the Ohio

Constitution do not apply to R.C. Chapter 2950.” *Hayden*, supra, at paragraph one of the syllabus. Heys has not offered, nor do we see, any reason for a different outcome under R.C. Chapter 2950 as revised by S.B. 10.

{¶ 21} For the foregoing reasons, we conclude that the provisions of S.B. 10 are not unconstitutional for any of the reasons offered by Heys. Accordingly, his sole assignment of error is overruled.

III

{¶ 22} Heys’s sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and BROGAN, J., concur.

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