[Cite as *State v. Kelch*, 2010-Ohio-3772.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23532
v.	:	T.C. NO. 2008CV896
JOHN R. KELCH	:	(Civil appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 13th day of August, 2010.

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DONOVAN, P.J.

{¶ 1} Defendant-appellant John R. Kelch appeals a decision of the Montgomery County Court of Common Pleas, General Division, in which the trial court denied Kelch's petition contesting his reclassification as a Tier II sex offender pursuant to the mandates of the Senate Bill 10. The trial court issued its decision denying Kelch's petition on July 2,

2009. Kelch filed a timely notice of appeal with this Court on July 13, 2009.

I

{¶ 2} On June 18, 2004, Kelch was convicted in Case No. 2003-CR-777 of three counts of illegal use of a minor in nudity oriented material or performance, and three counts of pandering sexually oriented matter involving a minor. The Greene County Court of Common Pleas sentenced Kelch to five years of community control. In addition to his sentence, the court designated Kelch as a sexually oriented offender, thus requiring Kelch to register annually with the sheriff's office in the county in which he resided for a period of ten years.

{¶ 3} In November of 2007, the Ohio Attorney General notified Kelch that pursuant to S.B. 10, Ohio's new sexual offender registration law, that he would be reclassified as a Tier II sex offender as of January 1, 2008. The revised Tier II classification required Kelch to register every 180 days for a period of fifteen years.

{¶ 4} On January 25, 2008, Kelch filed a petition with the trial court in which he attacked the constitutionality of S.B. 10 and contested his reclassification as a Tier II sex offender. As previously noted, the trial court denied Kelch's petition and affirmed the constitutionality of S.B. 10 in a decision issued on July 2, 2009.

{¶ 5} It is from this judgment that Kelch now appeals.

II

{¶ 6} Kelch's sole assignment of error is as follows:

{¶ 7} "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."

{¶ 8} We recently discussed the same argument in *State v. Hill*, Montgomery App. No. 23171, 2010-Ohio-2834, in which we stated the following:

{¶ 9} "By way of background, in 2006, Congress passed the Adam Walsh Child Protection and Safety Act ("A.W.A.") which created national standards for sex-offender registration, community notification, and classification. In 2007, the Ohio General Assembly enacted Senate Bill 10 ("S.B.10") in response to the A.W.A. S.B. 10 repealed former legislation, replacing it with a retroactive scheme that includes a three-tiered system dividing sex offenders into three categories. S.B. 10 abolished the previous classifications of sexually oriented offender, habitual sex offender, and sexual predator, and it required the attorney general to reclassify offenders instead as Tier I, Tier II, or Tier III sex offenders, based upon the offender's offense. S.B.10 required the attorney general to send official notification to existing offenders regarding their new tier classification and attendant duties.

{¶ 10} "The Ohio Supreme Court recently determined that R.C. 2950.031 and 2950.032 violate the separation of powers doctrine, and the Court severed those sections from the statutory scheme. *State v. Bodyke*, Slip Opinion No. 2010-Ohio-2424, ¶ 66. Those sections governed the reclassification by the attorney general of sex offenders already

classified by judges under a prior version of R.C. Chapter 2950.

{¶ 11} "According to *Bodyke*, "Our Constitution and case law make undeniably clear that the judicial power resides exclusively in the judicial branch. (Citation omitted). The judicial power of the state is vested exclusively in the courts. (Citation omitted). The power to review and affirm, modify, or reverse other court's judgments is strictly limited to appellate courts. (Citation omitted). The AWA intrudes on that exclusive role and thus violates the separation-of-powers doctrine.

{¶ 12} "Moreover, once the final judgment has been opened, the AWA requires that the attorney general 'shall determine' the new classifications of offenders * * * who were classified by judges under the former statutes. R.C. 2950.031(A)(1); 2950.032(A)(1)(a) and (b). In doing so, it violates a second prohibition by assigning to the executive branch the authority to revisit a judicial determination.

{¶ 13} "Thus, we conclude that R.C. 2950.031 and 2950.032, which require the attorney general to reclassify sex offenders who have already been classified by court order under former law, impermissibly instruct the executive branch to review past decisions of the judicial branch and thereby violate the separation-of-powers doctrine.

{¶ 14} "We further conclude that R.C. 2950.031 and 2950.032, which require the attorney general to reclassify sex offenders whose classifications have already been adjudicated by a court and made the subject of a final order, violate the separation-of-powers doctrine by requiring the opening of final judgments." Id., at ¶ 58- 61.

{¶ 15} "The Supreme Court concluded that 'severance of R.C. 2950.031 and 2950.032, the reclassification provisions in the AWA, is the proper remedy. By excising the

unconstitutional component, we do not 'detract from the overriding objectives of the General Assembly,' i.e., to better protect the public from the recidivism of sex offenders, and the remainder of the AWA, 'which is capable of being read and of standing alone, is left in place.' (Citation omitted). We therefore hold that R.C. 2950.031 and 2950.032 are severed and, that after severance, they may not be enforced. R.C. 2950.031 and 2950.032 may not be applied to offenders previously adjudicated by judges * * * , and the classifications and community-notification and registration orders imposed previously by judges are reinstated.' Id., at ¶ 66."

{¶ 16} *Bodyke* is dispositive of Kelch's arguments addressed to his reclassification; R.C. 2950.031 and 2950.032 have been excised from the statutory scheme. Accordingly, Kelch's reclassification by the Attorney General is unconstitutional. The judgment which overruled Kelch's constitutional challenge to the Attorney General's reclassification, finding no violation of the separation of powers doctrine, is reversed, and the classification and registration order imposed previously by the trial judge is reinstated.

{¶ 17} Kelch's sole assignment of error is sustained.

III

{¶ 18} Kelch's sole assignment of error having been sustained, the judgment of the trial court is reversed. This matter is remanded to the trial court for proceedings in accordance with this opinion.

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FAIN, J. and VUKOVICH, J., concur.

(Hon. Joseph J. Vukovich, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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