[Cite as *State v. Gillingham*, 2010-Ohio-379.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23244
v.	:	T.C. NO. 02 CR 3025
BRIAN GILLINGHAM	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 5th day of February, 2010.

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FROELICH, J.

{¶ 1} Brain Gillingham 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, and denied his petition to contest his reclassification under that statute. For the following reasons, the trial court's

judgment will be affirmed.

I.

{¶ 2} In June 2004, Gillingham was found guilty of three counts of pandering obscenity involving a minor, in violation of R.C. 2907.321(A)(5); four counts of pandering obscenity involving a minor, in violation of R.C. 2907.321(A)(2); one count of possession of criminal tools; and one count of gross sexual imposition. He was acquitted of seven other counts of pandering obscenity involving a minor. The court sentenced Gillingham to eleven months on three counts of pandering obscenity, seven years for four counts of pandering obscenity, eleven months for possession of criminal tools, and four years for gross sexual imposition. The pandering obscenity sentences and possession of criminal tool sentence were to be served concurrently to each other, but consecutively to the four-year sentence for gross sexual imposition, for a total of eleven years in prison. In August 2004, the court found Gillingham to be a sexual predator under Ohio's Sex Offender Registration and Notification Act, R.C. Chapter 2950 ("SORN").

{¶ 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} In accordance with S.B. 10, Gillingham 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, Gillingham is required to register with the local sheriff's office every 90 days for life and is subject to community notification.

{¶ 5} On March 28, 2008, Gillingham filed a petition to contest his reclassification under S.B. 10. He argued that his reclassification was barred by res judicata and constituted a violation of the separation of powers doctrine. He also raised several constitutional challenges to S.B. 10, including that retroactive application of S.B. 10 violates the prohibitions on ex post facto laws and retroactive laws. Gillingham further argued that retroactive application of S.B. 10 violates his right to procedural due process.

{¶ 6} On February 22, 2008, the trial court stayed Gillingham's case pending a decision on similar cases in which constitutional challenges to S.B. 10 were raised. On October 7, 2008, the trial court overruled Gillingham'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 permitted the parties to provide supplemental memoranda on Gillingham's res judicata argument. Gillingham and the State both filed supplemental memoranda.

{¶ 7} On January 28, 2009, the trial court rejected Gillingham's contention that reclassification was barred by res judicata. The court reasoned, in part: "At their essence, res judicata and collateral estoppel prohibit relitigation. The Petitioner's reclassification from a 'sexually oriented offender' to a 'Tier III offender' is not the result of relitigation; rather, it is the result of change of statutory law enacted by the Ohio Legislature. Therefore, the Court finds that reclassification under S.B. 10 does not violate the doctrines of res judicata and collateral estoppel." Upon concluding that res judicata did not bar Gillingham's reclassification, the trial court denied his petition.

{¶ 8} Gillingham appeals from the trial court's denial of his petition to contest his reclassification, raising four assignments of error.

II.

{¶ 9} We will address Gillingham's first and second assignments of error together. They state:

{¶ 10} "1. DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COMMON PLEAS COURT FAILED TO APPLY THE DOCTRINE OF ***RES JUDICATA*** CONCERNING THE ADMINISTRATIVE RE-DETERMINATION OF

DEFENDANT'S SEX OFFENDER STATUS.

{¶ 11} "2. DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT RULED THAT THE OHIO ADAM WALSH ACT, CHAPTER 2950 OF THE OHIO REVISED CODE[,] WAS CONSTITUTIONAL AND VALID."

{¶ 12} In his first and second assignments of error, Gillingham claims that the trial court erred in finding that his reclassification was not barred by res judicata and that S.B.10 is constitutional. On appeal, Gillingham claims that S.B. 10 violates the prohibitions against ex post facto and retroactive laws and suggests that reclassification constitutes multiple punishments in violation of the Double Jeopardy Clause. He further claims that reclassification without a prior hearing is contrary to procedural due process.

{¶ 13} We have previously addressed and rejected each of Gillingham's arguments. In *State v. Desbiens,* Montgomery App. No. 22489, 2008-Ohio-3375, we held that S.B. 10 does not offend the Ex Post Facto Clause of the United States Constitution, because S.B. 10 is civil and non-punitive and the Ex Post Facto Clause applies only to criminal statutes. Id. at ¶30. We reiterated that holding in *State v. Moore,* Greene App. No. 07CA093, 2008-Ohio-6238, and further held that S.B. 10 does not violate the Retroactivity Clause of the Ohio Constitution. Id. at ¶28. Because S.B. 10 is civil and non-punitive, it likewise does not violate the Double Jeopardy Clause. *State v. Heys*, Miami App. No. 09-CA-04, 2009-Ohio-5397, ¶17.

{¶ 14} In *State v. Barker*, Montgomery App. No. 22963, 2009-Ohio-2774, the defendant claimed that the legislature had violated the separation of powers

doctrine when it enacted S.B. 10 by unilaterally changing the sexual classification she received in 1997 under previous legislation. Barker argued 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. We rejected Barker's argument, reasoning, in part:

{¶ 15} "*** [T]he 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, 893 N.E.2d 909, 2008-Ohio-2980.

{¶ 16} "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."

{¶ 17} Barker, like Gillingham, also argued that the doctrines of res judicata and collateral estoppel barred her reclassification. We held that res judicata, collateral estoppel, and issue preclusion were "inapplicable to her reclassification," reasoning:

{¶ 18} "*** '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.'

{¶ 19} "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. 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.

{¶ 20} "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. 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. Where a claim could have been litigated in the previous suit, claim preclusion also

bars subsequent actions on that matter.

{¶ 21} "'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.' 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." (Internal citations omitted.) *Barker* at ¶12-15.

{¶ 22} Finally, we addressed Gillingham's procedural due process argument in *Heys*. There, Heys argued that the new requirements of S.B. 10 denied him procedural due process because he has a vested right, or liberty interest, in his original classification and registration requirements and, therefore, he was entitled to notice and the opportunity to be heard prior to the reclassification and attendant requirements taking effect. We rejected his argument, stating: "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." Id. at ¶11. We further noted that no liberty

interest was implicated, because S.B. 10 was non-punitive in nature. Id. at ¶12.

{¶ 23} Based on our prior holdings, each of Gillingham's claims lack merit.

{¶ 24} The first and second assignments of error are overruled.

III.

{¶ 25} Gillingham's third assignment of error states:

{¶ 26} "DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT UPHELD A COMMUNITY NOTIFICATION DETERMINATION WITHOUT A HEARING."

{¶ 27} In his third assignment of error, Gillingham asserts that the trial court should have held a hearing before determining that he was subject to community notification.

{¶ 28} Under R.C. 2950.11(F)(1), a Tier III offender is subject to community notification. R.C. 2950.11(F)(2), however, sets forth an exception to R.C. 2950.11(F)(1), stating:

{¶ 29} "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. ***" R.C. 2950.11(F)(2).

{¶ 30} Nothing in R.C. 2950.11(F)(2) states that the trial court must hold a hearing in order to determine whether a Tier III offender is subject to community notification. Rather, the plain language of the statute indicates that Tier III

offenders are subject to community notification as a default, and the trial court may remove the community notification requirement for certain offenders who the court finds, after a hearing, would not have been subject to community notification under the prior statute. In other words, the statute permits the trial court, upon request, to hold a hearing on whether a Tier III offender would have been subject to community notification under the prior statute and to exempt that offender from community notification under S.B. 10. Gillingham's due process rights were not violated when he was informed, without a hearing, that he would be subject to community notification. If Gillingham wished to challenge the community notification requirement under R.C. 2950.11(F)(2), he was required to request a hearing with the trial court.

{¶ 31} Nevertheless, we note that Gillingham was classified as a sexual predator under the prior statute. As a sexual predator, Gillingham was subject to community notification. Former R.C. 2950.11(F)(1). Accordingly, Gillingham does not satisfy the exception set forth in R.C. 2950.11(F)(2), as modified by S.B. 10.

{¶ 32} The third assignment of error is overruled.

IV.

{¶ 33} Gillingham's fourth assignment of error, which was raised in a supplemental brief, states:

{¶ 34} "DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN HE WAS CLASSIFIED AS A TIER III OFFENDER WHEN HE SHOULD HAVE BEEN CLASSIFIED AS A TIER II OFFENDER."

{¶ 35} In his fourth assignment of error, Gillingham contends that he was

erroneously classified as a Tier III offender, because he was convicted of gross sexual imposition, in violation of R.C. 2907.05(A)(4), which R.C. 2950.01(F)(1)(c) classifies as a Tier II offense.

{¶ 36} As noted by Gillingham, R.C. 2950.01(F)(1)(c) defines a violation of R.C. 2907.05(A)(4) as a Tier II offense. A violation of R.C. 2907.321 is also a Tier II offense. R.C. 2950.01(F)(1)(a). However, under R.C. 2950.01(G), which defines Tier III offenders, a person who was adjudicated a sexual predator prior to 2008 is classified as a Tier III sex offender, regardless of the offense, unless certain exceptions apply. R.C. 2950.01(G)(5). Specifically, R.C. 2950.01(G)(5) states that a "Tier III sex offender/child-victim offender" includes:

{¶ 37} "A sex offender or child-victim offender who is not in any category of tier III sex offender/child-victim offender set forth in division (G)(1), (2), (3), or (4) of this section, who prior to January 1, 2008, was convicted of or pleaded guilty to a sexually oriented offense or child-victim oriented offense ***, and who prior to that date was adjudicated a sexual predator or adjudicated a child-victim predator, unless either of the following applies:

{¶ 38} "(a) The sex offender or child-victim offender is reclassified pursuant to section 2950.031 or 2950.032 of the Revised Code as a tier I sex offender/child-victim offender or a tier II sex offender/child-victim offender relative to the offense.

{¶ 39} "(b) The sex offender or child-victim offender is a delinquent child, and a juvenile court, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies the child a tier I sex offender/child-victim offender or a tier

II sex offender/child-victim offender relative to the offense." R.C. 2950.01(G)(5).

{¶ 40} Prior to January 1, 2008, Gillingham was convicted of gross sexual imposition and pandering obscenity involving a minor and was adjudicated a sexual predator. Neither of the exceptions set forth in R.C. 2950.01(G)(5)(a) and (b) applies. Accordingly, under R.C. 2950.01(G)(5), Gillingham is a Tier III sex offender, despite the fact that his offenses are categorized as Tier II offenses. Gillingham's reclassification as a Tier III sex offender was proper.

{¶ 41} The fourth assignment of error is overruled.

V.

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

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

Copies mailed to:

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