

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2014-CA-13
	:	
v.	:	Trial Court Case No. 13-CR-63
	:	
ZACHARY D. MOORE	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 13th day of February, 2015.

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FAIN, J.

{¶ 1} Defendant-appellant Zachary D. Moore appeals from his Tier II sexual offender classification, resulting from his conviction for two counts of Unlawful Sexual Conduct with a Minor, in violation of R.C. 2907.04(A). He pled no contest to both counts.

{¶ 2} Moore contends that his Tier II classification violates the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. We conclude that it violates neither clause. Accordingly, the judgment of the trial court is Affirmed.

I. The Course of Proceedings

{¶ 3} Following a no-contest plea, Moore was convicted of two counts of Unlawful Sexual Conduct with a Minor. He was sentenced and classified as a Tier II sexual offender. He appealed, contending that his classification depended, at least in part, upon facts involving the ages of himself and his victim, which had not been found by a jury.

{¶ 4} We reversed, holding that under the particular circumstances surrounding Moore's plea, he had been led by the trial court to believe that his plea, which would otherwise arguably have conceded the factual issue, would preserve for appellate review his argument that he was entitled to have a jury determine those facts. *State v. Moore*, 2d Dist. Darke No. 2013-CA-9, 2014-Ohio-1123, ¶ 18-19.

{¶ 5} Upon remand, Moore again pled no contest to both counts, this time with an express agreement that by tendering his plea, he would be waiving a jury trial on the

factual issue, which had been made the subject of an amended bill of particulars setting forth the ages of Moore and his victim at the time of the offenses. At the sentencing hearing, Moore was once again classified as a Tier II sexual offender. From his classification, Moore appeals.

II. Moore's Sexual Offender Classification

Does Not Violate Due Process

{¶ 6} Moore's First Assignment of Error is as follows:

THAT THE TRIAL COURT COMMITTED ERROR TO THE PREJUDICE OF THE DEFENDANT IN IMPOSING SEX OFFENDER REGISTRATION REQUIREMENTS UPON THE DEFENDANT AS PART OF THE SENTENCE IN THIS CASE UNDER CHAPTER 2950 OF THE OHIO REVISED CODE (THE ADAM WALSH ACT) IN THAT THE SAME VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 [sic, of the Ohio Constitution].

{¶ 7} As amended in 2007 Am.Sub. S.B. No. 10, Ohio's sexual offender reporting, registration, and notification requirements are now punitive in nature; that is, they are part of the criminal penalty imposed for the sexual offense of which a defendant has been convicted. *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, ¶ 16. Moore argues that his automatic classification as a Tier II sex offender, as a result of his conviction of the charged offense, deprived him of "the right to be present at every critical stage of the trial, including sentencing, and the right to confront adverse witnesses

face-to-face and to cross-examine them,” conferred by the Due Process clauses of the Fourteenth Amendment and Article I, Section 10 of the Ohio Constitution. He also contends that he was deprived of notice and the right to be heard.

{¶ 8} In short, Moore contends that his automatic Tier II sex offender classification deprived him of procedural due process. We conclude otherwise.

{¶ 9} In *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, 773 N.E.2d 502, the Supreme Court of Ohio considered an argument that under the prior version of the law, a criminal defendant’s automatic classification as a sexually oriented offender resulting from his conviction for a crime specified in the statute deprived him of procedural due process. The Supreme Court held that it did not. *Id.* ¶ 18.

{¶ 10} We find the case before us to be indistinguishable from the holding in *Hayden*. Moore was entitled to all the due process protections of a jury trial on the pending charges. By pleading no contest, he waived those rights. His classification as a Tier II sex offender was a required part of his criminal sentence for those offenses.

{¶ 11} In a case involving the Connecticut sex offender classification statute, the United States Supreme Court has held that it is not a violation of procedural due process to impose a sex offender reporting, registration, or notification requirement based solely upon an offender’s conviction of a specified offense. *Connecticut Dep’t. of Public Safety v. Doe*, 538 U.S. 1, 7-8, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003).

{¶ 12} Although the case involved application of the Ex Post Facto clause, not the Due Process clause, Moore cites Justice Ginsburg’s dissenting opinion in *Smith v. Doe*, 538 U.S. 84, 116-117, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003), in which she opined concerning Alaska’s Sex Offender Registration Laws: “What ultimately tips the balance

for me is the Act's excessiveness in relation to its nonpunitive purpose." But in the case before us, the sex offender reporting, registration, and notification requirements to which Moore is subject have a punitive purpose, not a non-punitive purpose. *Williams, supra*. Justice Ginsburg's above-quoted remark was in the context of her conclusion, for Ex Post Facto analysis purposes, that Alaska's requirements were punitive, not remedial, in nature.

{¶ 13} Moore's First Assignment of Error is overruled.

III. Moore's Sexual Offender Classification

Does Not Violate Equal Protection

{¶ 14} Moore's Second Assignment of Error is as follows:

THAT THE TRIAL COURT COMMITTED ERROR PREJUDICIAL TO THE DEFENDANT IN IMPOSING SEX OFFENDER REGISTRATION REQUIREMENTS UPON THE DEFENDANT AS PART OF THE SENTENCE IN THIS CASE UNDER CHAPTER 2950 OF THE OHIO REVISED CODE (THE ADAM WALSH ACT) IN THAT THE SAME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 2 [of the Ohio Constitution].

{¶ 15} Moore first argues that the strict-scrutiny Equal Protection analysis applies because: "In this case, Moore's fundamental right to privacy is implicated. Simply stated, citizens have a fundamental right to be left alone." He bases this argument upon the fact that the sex offender registration, reporting, and notification requirements

imposed by his Tier II classification work “a fundamental abrogation of a right to privacy.”

{¶ 16} Moore argues too much. Every criminal sentence involving incarceration includes the deprivation of the fundamental right of liberty. But Moore has cited no authority, and we are aware of none, applying a strict-scrutiny Equal Protection analysis merely because a criminal defendant is deprived of liberty as a result of his conviction.¹ “Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees. [Citation omitted.] But a person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, [citations omitted], and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment.” *Chapman v. U.S.*, 500 U.S. 453, 465, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991), (emphasis in original). We have held that Ohio’s sex offender classification law does not violate the Cruel and Unusual Punishment Clause. *State v. Blankenship*, 2d Dist. Clark No. 2012-CA-74, 2014-Ohio-232, ¶ 10-11.

{¶ 17} Absent the application of strict-scrutiny analysis, “a statute is ‘presumed to be valid and will be sustained if the classification * * * is rationally related to a legitimate state interest.’” *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Under the rational-basis Equal Protection analysis,

¹ Of course, strict scrutiny may be required if the act made criminal implicates a fundamental right. See *Citizens United v. Federal Election Com’n.*, 538 U.S. 310, 312, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). We do not understand Moore to be arguing that he had a fundamental right to engage in sexual conduct with an underage victim more than four years his junior, the criminal acts to which he pled no contest.

“a classification does not violate equal protection and a statute creating the classification must be upheld if there exists any conceivable set of facts under which the classification rationally furthers a legitimate legislative purpose.” *State v. Lewis*, 2d Dist. Greene No. 97 CA 134, 1998 WL 771399, *3 (Oct. 2, 1998), citing *Schwan v. Riverside Methodist Hospital*, 6 Ohio St.3d 300, 452 N.E.2d 1337 (1983), and *Menefee v. Queen City Metro*, 49 Ohio St.3d 27, 550 N.E.2d 181 (1990).

{¶ 18} We have held that:

The legislature’s stated purpose in imposing registration and notification requirements was to protect the safety and general welfare of the people of Ohio. R.C. 2950.02 As we noted above, this is a legitimate governmental objective. Given the existing data demonstrating a high rate of recidivism among sex offenders, it is clearly conceivable that the registration and notification provisions in R.C. 2950.01 et seq., rationally further the legislature’s stated goal of protecting the public. * * * We find no equal protection violation stemming from the registration and notification requirements in R.C. 2950.01 et seq.

State v. Lewis, supra.

{¶ 19} Since *State v. Lewis*, the sex offender classification statute has been amended to make the classification result solely from the offense or offenses of which the defendant has been convicted, and to make some of those requirements somewhat more onerous. But we see no change in the statutory scheme that would cause us to conclude that the present sex offender classification statute cannot conceivably further the legislature’s stated goal of protecting the public. We conclude, therefore, that Moore’s

Tier II sex offender classification does not violate the Equal Protection clauses of either the United States or the Ohio Constitution.

{¶ 20} Moore's Second Assignment of Error is overruled.

IV. Conclusion

{¶ 21} Both of Moore's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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FROELICH, P.J., and HALL, J., concur.

Copies mailed to:

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