

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 08CA3056
	:	
vs.	:	Released: August 13, 2009
	:	
JONATHAN L. IRVIN,	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
Defendant-Appellant.	:	

APPEARANCES:

Claire M. Ball, Jr., Athens, Ohio, for Defendant-Appellant.

Michael M. Ater, Ross County Prosecuting Attorney, and Matthew S. Schmidt, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for Plaintiff-Appellee.

McFarland, J.:

{¶1} Defendant-Appellant, Jonathan Irvin, appeals from the decision of the Ross County Court of Common Pleas contending the trial court erred both in convicting him on three counts of rape, when there was insufficient evidence of penetration, and in designating him as a Tier III sex offender. Because evidence of penetration is not required in instances of rape involving fellatio, Appellant’s first assignment of error is without merit. Because his designation as a Tier III sex offender does not violate the doctrine of separation of powers and does not constitute double jeopardy, his

second and third assignments of error also are unpersuasive. Accordingly, we overrule each of Appellant's assignments of error and affirm the decision of the trial court.

I. Facts

{¶2} Appellant was indicted, in November, 2007, on three counts of rape and one count of gross sexual imposition. All four counts concerned the same victim, a boy who, at the time of the first incident, was eight years old. Appellant, a family friend of the victim, was charged with performing fellatio on the victim on three separate occasions: once in the summer of 2001 and twice in the summer of 2002. The gross sexual imposition charge resulted from an incident in 2004 in which Appellant fondled the victim's genitals.

{¶3} The case proceeded to trial and the jury found Appellant guilty on all counts. The trial court sentenced him to five years imprisonment for each rape count and one year for the gross sexual imposition, the sentences to run consecutively. After sentencing, the court held a hearing pursuant to R.C. 2950 and, due to the rape convictions, designated Appellant as a Tier III sex offender. Appellant subsequently filed the current appeal.

II. Assignments of Error

- I. THE STATE PRESENTED INSUFFICIENT EVIDENCE OF PENETRATION TO SUSTAIN THE CONVICTIONS FOR RAPE.
- II. CLASSIFICATION OF THE APPELLANT AS A TIER III SEXUAL OFFENDER CONSTITUTES A VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS.
- III. CLASSIFICATION OF THE APPELLANT AS A TIER III SEXUAL OFFENDER CONSTITUTES IMPERMISSIBLE MULTIPLE PUNISHMENT UNDER THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND OHIO CONSTITUTIONS.

III. First Assignment of Error

{¶4} As his first assignment of error, Appellant argues there was insufficient evidence of penetration to sustain his three rape convictions. While Appellant states his argument is based on sufficiency of the evidence and sets forth the corresponding standard of review, in actuality, his argument more directly concerns the interpretation of R.C. 2907.01 and R.C. 2907.02. As such, the issue is a matter of law and our standard of review is *de novo*. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, at ¶8.

{¶5} Our analysis requires an examination of R.C. 2907.02 and R.C. 2907.01(A). R.C. 2907.02 states, in pertinent part:

“(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is

living separate and apart from the offender, when any of the following applies:

* * *

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

* * *

(B) Whoever violates this section is guilty of rape, a felony of the first degree * * *.” R.C. 2907.02

{¶6} “‘Sexual conduct’ means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.” R.C. 2907.01(A).

{¶7} Appellant’s argument is predicated upon the theory that, for all rape convictions, evidence of penetration is required. He states R.C. 2907.01(A) is unclear as to whether penetration applies only to vaginal and anal intercourse and, accordingly, the ambiguity requires that the statute be read as requiring penetration in all instances, including instances involving fellatio. This court has previously and expressly rejected the argument. In

State v. Turvey, 84 Ohio App.3d 724, 618 N.E.2d 214, we found there was “no merit to appellant's contention that a rape conviction requires proof of penetration.” *Id.* at 747. Other courts have found similarly. See, e.g., *State v. Molen*, 2nd Dist. No. 21941, 2008-Ohio-6237, at ¶38; *State v. Boyer*, 10th Dist. No. 06AP-05, 2006-Ohio-6992, at ¶25.

{¶8} Appellant’s first assignment of error is dependant upon the premise that R.C. 2907.01(A) is unclear as to whether penetration is required in cases of rape involving fellatio. Because Ohio courts have clearly found otherwise, the assignment of error is overruled.

IV. Second and Third Assignments of Error

{¶9} In his second and third assignments of error, Appellant argues that Ohio’s version of the Adam Walsh Act, as contained in amended R.C. Chapter 2950, both violates the doctrine of separation of powers and constitutes double jeopardy. As shown in the following, Ohio courts have consistently rejected both arguments.

{¶10} Ohio’s version of the Adam Walsh Act, as enacted by Senate Bill 10, significantly altered Chapter 2950 of the Revised Code. Prior to Senate Bill 10, sexual offenders were placed into one of three categories: 1) sexually oriented offender; 2) habitual sex offender, or; 3) sexual predator.

How an offender was categorized depended both upon the crime committed and the trial court's findings in each particular case.

{¶11} Current Chapter 2950 severely limits the discretion of the trial court. Now, trial courts must categorize offenders based solely upon the type of offense committed. The old sexual classification system was replaced by new designations: Tier I; Tier II; and Tier III sex offenders; each requiring specific registration and community notification requirements. When a defendant is convicted of rape, as was Appellant, the trial court must designate the offender as a Tier III sex offender, the highest tier, with registration every 90 days for life.

{¶12} There is a presumption that laws enacted in Ohio are constitutional. *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, at ¶12. That presumption remains until the challenger shows beyond a reasonable doubt that the statute in question is unconstitutional. *Id.*; *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7,13, 465 N.E.2d 421. Further, the presumption applies to R.C. Chapter 2950. *State v. Cook* (1998), 83 Ohio St.3d 404, 409, 700 N.E.2d 570. As Appellant's arguments challenge the constitutionality of Chapter 2950, they are matters of law and our standard of review is de novo. *State v. Messer*, 4th Dist. No. 08CA3050, 2009-Ohio-312, at ¶5.

A. Separation of Powers

{¶13} Appellant argues revised R.C. 2950 violates the separation of powers doctrine by requiring courts to impose sexual offender classifications strictly on the basis of the crime committed, instead of allowing courts to consider the individual circumstances of each particular case. The argument is without merit.

{¶14} “The separation of powers doctrine implicitly arises from our tripartite democratic form of government and recognizes that the executive, legislative, and judicial branches of our government have their own unique powers and duties that are separate and apart from the others.” *State v. Thompson*, 92 Ohio St.3d 584, 586, 752 N.E.2d 276, 2001-Ohio-1288, citing *Zanesville v. Zanesville Tel. & Telegraph Co.* (1900), 63 Ohio St. 442, 59 N.E. 109. The purpose of the doctrine is to create a checks and balances so that each branch maintains its own integrity and independence. *Id.*, citing *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 668 N.E.2d 457; *S. Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 503 N.E.2d 136.

{¶15} R.C. 2950, as amended by Senate Bill 10, does not interfere with the judiciary's power to sentence a sex offender, and Appellant's separation of powers argument fails, because the provisions are civil and remedial in nature, not criminal and punitive. *Ferguson* at ¶32; *State v.*

Coburn, 4th Dist. No. 08CA3062, 2009-Ohio-632, at ¶19; *State v. Sewell*, 4th Dist. No. 08CA3042, at ¶23; *Messer* at ¶26. Further, Appellant’s classification as a Tier III sex offender is only a collateral consequence of his criminal conduct. As such, he has no reasonable expectation that such conduct would not be subject to future versions of R.C. Chapter 2950. *State v. Randlett*, 4th Dist. No. 08CA3046, 2009-Ohio-112 at ¶21; *Coburn* at ¶18; *Sewell* at ¶22; *Messer* at ¶17.

{¶16} Accordingly, R.C. 2950, as amended by Senate Bill 10, does not abrogate final judicial determinations and Appellant’s separation of powers argument is unwarranted. We next turn to his double jeopardy argument.

B. Double Jeopardy

{¶17} “Although the Double Jeopardy Clause was commonly understood to prevent a second prosecution for the same offense, the United States Supreme Court has applied the clause to prevent a state from punishing twice, or from attempting a second time to criminally punish for the same offense. (Internal citations omitted.) The threshold question in a double jeopardy analysis, therefore, is whether the government’s conduct involves criminal punishment.” *State v. Williams*, 88 Ohio St.3d 513, 528, 2000-Ohio-428, 728 N.E.2d 342.

{¶18} As previously stated, the provisions of Chapter 2950, as amended in Senate Bill 10, are remedial in nature, not punitive. Accordingly, since the classification of sexual offenders under R.C. 2950 does not constitute additional criminal punishment, this court and other Ohio courts have determined that the statute does not violate the prohibition against double jeopardy. See, e.g., *Messer* at ¶29-31; *Randlett* at ¶24-25; *In re S.R.P.*, 12th Dist. No. CA2007-11-027, 2009-Ohio-11, at ¶30; *State v. Ware*, 6th Dist. No. L-08-1050, 2008-Ohio-6944, at ¶24-25; *In re Adrian R.*, 5th Dist. No. 08-CA-17, 2008-Ohio-6581, at ¶32.

{¶19} As Appellant's separation of powers and double jeopardy arguments are unwarranted, we overrule his second and third assignments of error.

V. Conclusion

{¶20} For the foregoing reasons, we overrule each of Appellant's assignments of error. His first assignment of error fails because evidence of penetration is not required in instances of rape involving fellatio. Because his designation as a Tier III sex offender is neither a violation of the separation of powers doctrine nor a violation of double jeopardy, his second and third assignments of error are overruled. Accordingly, Appellants

assignments of error are overruled and the decision of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the **JUDGMENT BE AFFIRMED** and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Kline, P.J. and Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

