

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

|                       |   |                                  |
|-----------------------|---|----------------------------------|
| STATE OF OHIO,        | : |                                  |
|                       | : |                                  |
| Plaintiff-Appellee,   | : | Case No. 08CA3086                |
|                       | : |                                  |
| vs.                   | : | <b>Released: August 28, 2009</b> |
|                       | : |                                  |
| NEBRASKA HOWARD, JR., | : | <u>DECISION AND JUDGMENT</u>     |
|                       | : | <u>ENTRY</u>                     |
| Defendant-Appellant.  | : |                                  |

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APPEARANCES:

Nebraska Howard, Jr., Chillicothe, Ohio, Defendant-Appellant, pro-se.

Michael M. Ater, Ross County Prosecuting Attorney, and Jeffrey C. Marks,  
Ross County Assistant Prosecuting Attorney, for Plaintiff-Appellee.

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McFarland, J.:

{¶1} Defendant-Appellant, Nebraska Howard, Jr., appeals the decision of the Ross County Court of Common Pleas. Appellant asserts there was error below in that he was reclassified as a Tier III sex offender, pursuant to Revised Code Chapter 2950, when provisions of that chapter: violate the separation of powers doctrine; violate prohibitions against ex post facto and retroactive laws, and violate his right to due process. Because he fails to show the challenged provisions are unconstitutional beyond a

reasonable doubt, we reject each of Appellant's assignments of error and affirm the decision of the trial court.

### I. Facts

{¶2} In 1978, Appellant was convicted of two counts of kidnapping and three counts of rape and sentenced to prison. At the time of the filing of this appeal, Appellant remained incarcerated. In November 2007, he received a notice from the Office of the Ohio Attorney General informing him that he had been reclassified as a Tier III sex offender pursuant to Ohio's version of the Adam Walsh Act, as codified in amended R.C. Chapter 2950.

{¶3} Appellant subsequently filed a petition to contest his reclassification and also filed a motion for relief from community notification. At the hearing, the trial court gave him an opportunity to argue in support of his petition, but Appellant presented no evidence. Following the hearing, the trial court denied Appellant's petition. Appellant then timely filed the current appeal.

### II. Assignments of Error

- I. CLASSIFICATION OF APPELLANT CONSTITUTES A VIOLATION OF SEPARATION OF POWERS DOCTRINE.
- II. CLASSIFICATION OF APPELLANT UNDER THE RETROACTIVE APPLICATION OF OHIO'S AWA VIOLATES THE PROHIBITION ON EX POST FACTO LAWS IN ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION.

- III. CLASSIFICATION OF APPELLANT UNDER THE RETROACTIVE APPLICATION OF OHIO'S AWA VIOLATES THE PROHIBITION ON RETROACTIVE LAWS IN ARTICLE II, SECTION 28 OF THE OHIO CONSTITUTION.
- IV. CLASSIFICATION OF APPELLANT UNDER THE RESIDENCY RESTRICTION OF OHIO'S AWA VIOLATES DUE PROCESS.
- V. CLASSIFICATION OF APPELLANT UNDER SENATE BILL 10 OR ANY SEXUAL CLASSIFICATION SHALL BE IN ACCORDANCE WITH THE PROVISIONS OF THE REVISED CODE IN EXISTENCE PRIOR TO JULY 1, 1996.

### III. Legal Analysis

{¶4} As each of Appellant's five assignments of error challenge the constitutionality of R.C. Chapter 2950, we consider them together.

{¶5} 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.

{¶6} We have recently reviewed numerous appeals by inmates raising the same issues as Appellant in the case sub judice. Those appeals claimed that changes to the sexual offender classification system, as reflected in amended R.C. Chapter 2950, amount to an improper intrusion into judicial function and, thus, violate the doctrine of separation of powers. This court has expressly rejected this argument. See, e.g., *State v. Netherland*, 4th Dist. No. 08CA3043, 2008-Ohio-7007, at ¶26; *State v. Randlett*, 4th Dist. No. 08CA3046, 2009-Ohio-112, at ¶22; *State v. Bower*, 4th Dist. No. 08CA3047, 2009-Ohio-201, at ¶4; *State v. Linville*, 4th Dist. No. 08CA3051, 2009-Ohio-313, at ¶24-25.

{¶7} Prior appeals have also challenged amended R.C. Chapter 2950 on the basis of the United States Constitution's prohibition against ex post facto laws and the Ohio Constitution's prohibition against retroactive laws. Again, we rejected these attacks because amended R.C. Chapter 2950 remains civil and remedial in nature, rather than criminal and punitive. See, e.g., *Netherland* at ¶34; *Randlett* at ¶14; *Bower* at ¶19; *Linville* at ¶11.

{¶8} Finally, on the basis of lack of standing, we have rejected the argument that the residency requirements, mandated by amended R.C. Chapter 2950, deny inmates due process of law. See, e.g., *State v. Coburn*,

4th Dist. No. 08CA3062, 2009-Ohio-632, at ¶26; *Messer* at ¶38; *Randlett* at ¶33; *Linville* at ¶37.

{¶9} Appellant's arguments are identical to those that we have consistently and repeatedly rejected. Because he raises no new issues for our consideration in the case sub judice, we see no reason to revisit the issues or deviate from our recent decisions. Accordingly, based upon the rationales expressed in the cases cited above, we reject each of Appellant's assignments of error. As such, we find Appellant has failed to establish beyond a reasonable doubt that the contested provisions of amended R.C. Chapter 2950 are unconstitutional. 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.: Concur in Judgment Only.

Harsha, 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.**