[Cite as *In re C.P.*, 2010-Ohio-1484.]

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

IN THE MATTER OF C.P.,	:	
Adjudicated Delinquent Child	:	Case No. 09CA41
And Serious Youthful Offender.	:	
	:	**DECISION AND**
	:	**JUDGMENT ENTRY**
	:	File-stamped date: 3-30-10

APPEARANCES:

Timothy Young, Ohio State Public Defender, and Brooke M. Burns, Ohio State Assistant Public Defender, Columbus, Ohio, for Appellant.

C. David Warren, Athens County Prosecuting Attorney, and George J. Reitmeier, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for Appellee.

Kline, J.:

{¶1} C.P. appeals the judgment of the trial court, which classified him as a tier III juvenile offender registrant and a public registry-qualified juvenile offender registrant. On appeal, C.P. contends that Ohio's recently enacted registration laws are unconstitutional as applied to juveniles. Specifically, C.P. contends that the mandatory imposition of registrant status on serious youthful offenders is unconstitutional because it violates C.P.'s substantive due process rights, C.P.'s right to equal protection of the laws, and C.P.'s right to be free from cruel and unusual punishment. We disagree. First, C.P. fails to establish that the proceedings below infringed on a fundamental liberty interest of his. Second, C.P. fails to rebut our presumption that the statute is rationally related to a legitimate legislative purpose. Third, we have previously

concluded that this legislation does not violate the Eighth Amendment's prohibition on cruel and unusual punishment, and we see no reason to revisit that conclusion now.

{¶2} C.P. also contends that his attorney's failure to raise these constitutional arguments shows that his attorney provided ineffective assistance. But we have found C.P.'s arguments to be without merit. As such, any objection raised by his attorney would have been appropriately denied. Accordingly, we affirm the judgment of the trial court.

I.

{¶3} On June 26, 2009, the Athens County Sheriff's Department filed a complaint that accused C.P. of two counts of rape and one count of kidnapping. That same day, the State filed a motion requesting the trial court bind C.P. over to Athens County Common Pleas Court. At a hearing, the trial court denied the State's motion to transfer jurisdiction on August 24, 2009.

{¶4} The grand jury indicted C.P. on September 14, 2009. See R.C. 2152.13. The indictment alleged that C.P. was delinquent because he engaged in conduct that if engaged in by an adult would be a crime against the laws of Ohio. Specifically, the indictment alleged two counts of rape in violation of R.C. 2907.02(A)(1)(b) and one count of kidnapping in violation of 2905.01(A)(4). The indictment also indicated that C.P. was eligible to be classified as a serious youthful offender. C.P. admitted to the allegations in the indictment.

{¶5} On September 30, 2009, the trial court held a dispositional hearing. According to a later entry, the trial court found C.P. to be delinquent based on his admissions. The trial court further found that "[p]ursuant to the parties' joint recommendation and R.C.

2152.11, the Court finds that a serious youthful offender dispositional sentence should be imposed[.]" The trial court then classified C.P. as a tier III juvenile offender registrant and also classified C.P. as a public registry-qualified juvenile offender registrant.

{¶6} C.P. now appeals and raises the following assignments of error: I. "The trial court erred when it classified C.P. as a public registry-qualified juvenile offender registrant, as R.C. 2152.86 violates his right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution." II. "The trial court erred when it classified C.P. as a public registry-qualified juvenile offender registrant as [R.C.] 2152.86 violates his right to equal protection under the law. Fourteenth Amendment to the United States Constitution; Article I, Section 2 of the Ohio Constitution." III. "The trial court erred when it classified C.P. as a public registry-qualified juvenile offender registrant, in violation of the prohibition against cruel and unusual punishments. (Sept 30, 2009 Hearing; T.pp. 1-22; A-4). Eighth and Fourteenth Amendments to the United States Constitution; Section 9, Article I of the Ohio Constitution." And IV. "[C.P.] was denied the effective assistance of counsel when trial counsel failed to object to the imposition of a classification that was unconstitutional. (Sept. 30, 2009 T.pp. 1-23; A-4)[.] Sixth and Fourteenth Amendments to the United States Constitution; Section 10, Article I of the Ohio Constitution."

II.

{¶7} In his first three assignments of error, C.P. challenges the constitutionality of Ohio's recent changes to the treatment of juveniles who have committed a sexually oriented offense. The Ohio legislature enacted these changes via Senate Bill 10 ("S.B. 10"). Statutes enacted in Ohio, including S.B. 10, are "presumed to be constitutional."

State v. Ferguson, 120 Ohio St.3d 7, 2008-Ohio-4824, at ¶12, citing *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.2d 159, 161. This presumption remains unless C.P. can establish, "beyond reasonable doubt, that the statute is unconstitutional." *Ferguson* at ¶12, citing *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7, 13.

A. Due Process

{¶8} In his first assignment of error, C.P. contends that R.C. 2152.86 violates his right to due process. C.P.'s brief is unclear on precisely why he contends this statute violates his right to due process under the Fourteenth Amendment to the United States Constitution. Nonetheless, his brief contends that community notification and registration, as imposed by R.C. 2152.86, constitute punishment, and that the imposition of criminal punishment in a juvenile proceeding violates the juvenile's right to substantive due process. C.P. does not appear to contend that the procedures used to impose his classification were inadequate. "Though [C.P.] was afforded due process considerations as it relates to his designation as a serious youthful offender, he was denied due process when he was given an offense-based classification as a Tier III juvenile offender registrant with community notification, because the juvenile court did not have discretion in making that determination." C.P.'s brief at 11. C.P. contends that S.B. 10 impermissibly restrains the discretion of the trial court, but C.P. raises no argument claiming he was denied notice or an opportunity to be heard.

{¶9} Since C.P. relies on substantive due process, he must establish that the challenged provision violates a fundamental liberty interest. See *Reno v. Flores* (1993), 507 U.S. 292, 301-02 (substantive due process "forbids the government to infringe

certain 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.") (Emphasis sic.).

{¶10} C.P. contends that public registration for sex offenders constitutes a shaming punishment. However, we find that Ohio's present scheme of public notification of sex offenders is indistinguishable from *Smith v. Doe* (2003), 538 U.S. 84. In that case, the State of Alaska required certain offenders to register with the Alaska Department of Public Safety, and that department then disseminated the offender's "name, aliases, address, photograph, physical description, description[,] license [and] identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with [the update] requirements . . . or cannot be located." *Smith* at 90-91 (alterations in original, citations omitted).

{¶11} The United States Supreme Court rejected the argument that this notification constituted punishment because of its resemblance to colonial shaming punishments. "Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Smith* at 98. This conclusion is one that other Ohio Courts of Appeals have reached. *State v. Maggy*, Trumbull App. No. 2008-T-0078, 2009-Ohio-3180, at ¶68-71; *State v. Williams*, Warren App. No. CA2008-02-029, 2008-Ohio-6195, at ¶61-66; *State v. Swank*, Lake App. No. 2008-L-019, 2008-Ohio-6059, at ¶85; *State v. King*, Miami App. No. 08-CA-02, 2008-Ohio-2594, at ¶17-20.

{¶12} We see no material difference in the nature of the dissemination of information between Ohio's notification scheme and Alaska's notification scheme. And C.P. provides us with no argument that distinguishes *Smith* or the other cited cases above. We, therefore, find that the imposition of community notification requirements does not serve to render Ohio's community notification provisions punitive in nature.

{¶13} C.P. also argues that the imposition of notification requirements furthers the traditional penological goals of retribution and deterrence. Again, the United States Supreme Court rejected the argument that the presence of a deterrent purpose renders sanctions criminal in nature. *Smith* at 102, citing *Hudson v. United States* (1997), 522 U.S. 93, 105. The *Smith* Court also rejected the argument that the Alaska scheme's obligations were retributive by noting that "[t]he broad categories * * * and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Smith* at 102. Again, Ohio Courts have previously rejected C.P.'s argument. *Williams* at ¶67-72; *Sigler v. State*, Richland App. No. 08-CA-79, 2009-Ohio-2010, at ¶73; *State v. Byers*, Columbiana App. No. 07 CO 39, 2008-Ohio-5051, at ¶41; *King* at ¶21-22; *State v. Candela*, Ashtabula App. No. 2008-A-0068, 2009-Ohio-4096, at ¶26. But, See, *State v. Garner*, Lake App. No. 2008-L-087, 2009-Ohio-4448, at ¶31-34.

{¶14} In addition, C.P. never explains what the foregoing arguments are intended to prove in regard to his argument that S.B. 10 violates substantive due process. Generally, courts have considered whether the restrictions of laws like S.B. 10 are punitive or regulatory in the context of an ex post facto argument or an argument that the restrictions violated the Eighth Amendment's prohibition on cruel and unusual

punishment. The United States Constitution prohibits state governments from enacting ex post facto laws. Clause 1, Section 10, Article I, United States Constitution. This prohibition applies only to criminal laws. See *Lynce v. Mathis* (1997), 519 U.S. 433, 441. The Eighth Amendment to the United States Constitution prohibits a state from imposing a cruel and unusual punishment. *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, at ¶12. Again, this provision applies only if the sanctions imposed are punitive, which is to say criminal in nature. *State ex rel. Brown v. Dayton Malleable, Inc.* (1982), 1 Ohio St.3d 151, 158, fn. 5, citing *Ingraham v. Wright* (1977), 430 U.S. 651. Therefore, most of the cases which have considered whether S.B. 10's notification requirements are punitive in nature do so by addressing whether S.B. 10 violates either the ex post facto clause or the Eighth Amendment's prohibition on cruel and unusual punishment.

{¶15} Here, C.P. presumes that the imposition of criminal sanctions in a juvenile proceeding must be a violation of his substantive due process rights. C.P. reasons that "[t]he very purpose of the juvenile code was to avoid treating children as criminals and insulating them from the reputation and answerability of criminals." C.P.'s brief at 12. This is C.P.'s only argument that might distinguish the facts of this case from those in *Smith*. The mere fact that community notification provisions might conflict with the principles of juvenile law does not establish a violation of due process. To establish such a violation, C.P. would need to demonstrate that he had a fundamental right to not be treated like an adult in this proceeding. At best, C.P. has demonstrated that the juvenile code has some provisions that are in tension with the juvenile code's stated purposes. But this is to be expected. Legislatures need to reconcile competing

concerns and interests. In so doing, the resulting legislation often includes provisions motivated by those competing interests, and this is not a sufficient basis for finding a statute unconstitutional.

{¶16} C.P. also cites an opinion of the United States Court of Appeals for the Ninth Circuit. *United States v. Juvenile Male* (C.A.9, 2009), 581 F.3d 977. In that case, the Ninth Circuit Court of Appeals found that provisions of the federal juvenile code imposed an unconstitutional ex post facto punishment on juveniles. *Juvenile Male* at 993. However, C.P. raises no argument under the ex post facto clause in the present case. Presuming arguendo, we accept the Ninth Circuit's analysis and concluded that the registration requirements imposed against C.P. under S.B. 10 constitute criminal punishment. Nonetheless, this alone fails to demonstrate an unconstitutional denial of either substantive or procedural due process.

{¶17} Accordingly, we overrule C.P.'s first assignment of error.

B. Equal Protection Clause

{¶18} The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that: "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." Section 1, Fourteenth Amendment to the United States Constitution. The Ohio Constitution provides that "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit[.]" Section 2, Article I of the Ohio Constitution. "The limit placed upon governmental action by the Equal Protection Clauses of the Ohio and United States Constitutions are nearly identical." *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 424, 1994-Ohio-38.

{¶19} Unless the government restriction at issue targets a suspect class or infringes on a fundamental right, we review the restriction merely to ensure that it is rationally related to some governmental interest. *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, at ¶82; *Vacco v. Quill* (1997), 521 U.S. 793, 799. "The vast weight of authority requires that, when utilizing the 'rational basis' test, the courts defer to the legislature on the issue of constitutionality. 'We do not inquire whether this statute is wise or desirable * * *. * * * Misguided laws may nonetheless be constitutional.'" *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 692, quoting *James v. Strange* (1972), 407 U.S. 128, 133. C.P. concedes that rational basis is the appropriate standard of review. C.P.'s brief at 17.

{¶20} C.P. argues that "[t]he provisions of S.B. 10 violate the Equal Protection Clauses of both the Ohio and United States Constitutions by treating similarly situated persons in vastly different ways. It subjects some juvenile offenders to mandatory classification and registration while others are subject to discretionary sex offender classification and registration." C.P.'s brief at 15. C.P. raises three different distinctions that he argues are not rationally related to any legitimate goal.

{¶21} First, juveniles who were fourteen or fifteen years old at the time of their offense are subject to discretionary classification. See *In re J.M.*, Pike App. No. 08CA782, 2009-Ohio-4574, at ¶68-72; R.C. 2152.83(B)(1). However, if the juvenile has a prior adjudication for a sexually oriented offense or was sixteen or seventeen years old at the time of the offense then that juvenile is subject to mandatory sex offender classification and registration. R.C. 2152.82(A); R.C. 2152.83(A)(1).

{¶22} Second, a juvenile who is fourteen years old or older at the time of the offense may be subject to classification and registration, but a juvenile younger than fourteen at the time of the offense is not subject to classification or registration at all. See R.C. 2152.82(A); R.C. 2152.83(A)(1) & (B)(1).

{¶23} Third, a juvenile who is fourteen years old or older at the time of the offense and is designated a serious youthful offender is automatically subject to the public registry so long as the offense is within an enumerated list. R.C. 2152.86(A)(1). However, a juvenile offender the same age who is not designated a serious youthful offender is not subject to the public registry. See R.C. 2152.82; R.C. 2152.83; R.C. 2152.86. Finally, juvenile offenders who are thirteen years old or younger at the time of their offense and have been designated serious youthful offenders are not subject to any classification or registration, or the public registry. See R.C. 2152.86.

{¶24} However, in examining these provisions, we find that the general assembly has enacted provisions that are more likely to impose registration and public registry requirements on offenders who are older or who have previously been adjudicated delinquent for committing sexually oriented offenses. The purpose of the notification and public registry provisions is to protect the public. See *State v. Cook*, 83 Ohio St.3d 404, 413, 1998-Ohio-291.

{¶25} C.P. contends that "these classifications are based on age and, in only some cases, prior offense. Under the rational basis review, these classifications cannot survive. * * * There is simply no evidence at all that a sixteen-year-old offender (mandatory) is more likely to re-offend than a fifteen-year-old offender (discretionary)." C.P.'s brief at 17-18. However, as we noted above, validly enacted statutes are

presumed to be constitutional. The State need not introduce evidence justifying a statute. We do not review a statute under the rational basis test to determine whether the legislature's decisions are wise or supported by evidence, but only to determine if the enacted statute is rationally related to a legitimate governmental aim. Here, the legitimate governmental aim is the protection of the public. The General Assembly concluded that juveniles who were older when they committed their offenses or who had previously been adjudicated delinquent for committing a sexually oriented offense are more likely to reoffend. And we find that these conclusions are rationally related to the legislative goal of protecting the public.

{¶26} C.P. also cites *Roper v. Simmons* (2005), 543 U.S. 551. We do not find this case persuasive as it deals with the question of whether applying the death penalty to juveniles violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Roper* at 578-79.

{¶27} Finally, C.P. cites statistical studies to demonstrate that the recidivist rates of juvenile sex offenders are relatively low. Even if we accept this as true, nonetheless this does not demonstrate that S.B. 10's provisions related to the classification and notification of juvenile offenders violates the Equal Protection Clauses of the Ohio or United States Constitutions. C.P. contends that if the legislature were really concerned with recidivism and protecting the public then the legislature would have enacted a notification regime for juveniles who are adjudicated delinquent for theft offenses. However, the legislature may have concluded that the harm of a juvenile reoffending by means of a theft offense is not as great as the harm of a juvenile reoffending by means of a sexually oriented offense. In any event, as we noted above, when reviewing a

statute using the rational basis test, we do not review the wisdom of the enacted legislation. Even if we accepted C.P.'s arguments that S.B. 10's structure in regard to juveniles is unwise and counterproductive, nonetheless, we would conclude that the act is constitutional.

{¶28} Accordingly, we overrule C.P.'s second assignment of error.

C. Eighth Amendment

{¶29} C.P. next contends that the imposition of S.B. 10's classification and notification scheme violates his Eighth Amendment rights. The Eighth Amendment of the United State Constitution provides that "cruel and unusual punishments [shall not be] inflicted." However, we have previously rejected Eighth Amendment challenges to S.B. 10 by juveniles. See, e.g., *In re T.M.*, Adams App. No. 08CA863, 2009-Ohio-4224, at ¶32. We see no reason to revisit this conclusion at this time. C.P. concentrates this section of his brief on the issue of why the Eighth Amendment provides higher protections for juveniles than adults. However, unless the sanction constitutes a punishment, this jurisprudence is not relevant. C.P. does cite to the Ninth Circuit case, *United States v. Juvenile Male*, above in the section of his brief concerning substantive due process. However, we have reviewed this case and find that we rejected these arguments in the *T.M.* case. We see no reason to revisit that conclusion in the present case. And C.P. provides no argument in this section that explains why registration and notification constitutes punishment here.

{¶30} Accordingly, we overrule C.P.'s third assignment of error.

III.

{¶31} Finally, C.P. contends in his fourth assignment of error that his trial counsel provided ineffective assistance for failing to raise these constitutional objections to S.B. 10.

{¶32} "'In Ohio, a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel's ineffectiveness.'" *State v. Countryman*, Washington App. No. 08CA12, 2008-Ohio-6700, at ¶20, quoting *State v. Wright*, Washington App. No. 00CA39, 2001-Ohio-2473; *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56, cert. den. *Hamblin v. Ohio* (1988) 488 U.S. 975. To secure reversal for the ineffective assistance of counsel, one must show two things: (1) "that counsel's performance was deficient * * * " which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[;]" and (2) "that the deficient performance prejudiced the defense * * *[,]" which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. See, also, *Countryman* at ¶20. "Failure to satisfy either prong is fatal as the accused's burden requires proof of both elements." *State v. Hall*, Adams App. No. 07CA837, 2007-Ohio-6091, at ¶11, citing *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, at ¶205.

{¶33} In reviewing the performance of trial counsel, an appellate court must bear in mind that it should "'ordinarily refrain from second-guessing strategic decisions counsel make[s] at trial, even where counsel's trial strategy was questionable.'" *State v. Rinehart*, Ross App. No. 07CA2983, 2008-Ohio-5770, at ¶50, quoting *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, at ¶152.

{¶34} Here, we have rejected all of C.P.'s arguments that purport to demonstrate that S.B. 10 is unconstitutional. We find that had C.P.'s trial counsel raised those arguments, the trial court should have rejected them anyway. As such, C.P. cannot demonstrate that his counsel's performance was deficient under the first prong of the *Strickland* test.

{¶35} Accordingly, we overrule C.P.'s fourth assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, and Appellant pay the 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 Athens County Court of Common Pleas to carry this judgment into execution.

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

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

For the Court

BY: _____
Roger L. Kline, Judge

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.