[Cite as *State v. Sturm*, 2010-Ohio-336.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Petitioner-Appellee -vs- MARK D. STURM Respondent-Appellant	JUDGES: Hon. W. Scott Gwin, P. J. Hon. William B. Hoffman, J. Hon. John W. Wise, J. Case No. 2009 CA 00178 O P I N I O N
CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 2008 CV 00480
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	February 1, 2009

APPEARANCES:

For Petitioner-Appellee	For Respondent-Appellant
JOHN D. FERRERO PROSECUTING ATTORNEY ROSS RHODES ASSISTANT PROSECUTOR 110 Central Plaza South, Suite 510 Canton, Ohio 44702	WAYNE E. GRAHAM, JR. Renaissance Centre Suite 300 4580 Stephen Circle, NW

Wise, J.

{¶1} Petitioner-Appellant Mark D. Sturm appeals the June 2, 2009, decision of the Stark County Court of Common Pleas ruling finding that the retroactive application of Senate Bill [“S.B.”] 10, Ohio's sexual offender classification and registration scheme, to him did not constitute a breach of his plea agreement and dismissing his Petition.

{¶2} Respondent-Appellee is the State of Ohio, through the Stark County Prosecuting Attorney's Office.

STATEMENT OF THE FACTS AND CASE

{¶3} Petitioner-Appellant Mark D. Sturm contested his reclassification as a Tier III sex offender under R.C. 2950.01, et seq., as amended by S.B.10, also known as the "Adam Walsh Act". Appellant challenged the constitutionality of Ohio's S.B. 10, effective January 1, 2008, which eliminated the prior sex offender classifications and substituted a three-tier classification system based on the offense committed. Appellant argued that R.C. Chapter 2950, as amended by S.B. 10, violates the prohibition against ex post facto laws, that it interferes with his right to contract because it required the state to breach his plea agreement, that it violates the separation of powers doctrine and constitutes a double jeopardy violation, and that it violates both procedural and substantive due process. Briefly, the relevant facts of this case are as follows.

{¶4} Appellant entered a plea agreement and was convicted of one count of Attempt to Commit Rape, and five counts of Gross Sexual Imposition in April, 1997. That plea agreement included a stipulation that Petitioner-Appellant be classified as a sexually oriented offender under Ohio's Megan's Law (R.C. 2950.01, *et seq*.).

{¶5} On or about November 26, 2007, Appellant received a Notice of New Classification and Registration Duties from the Office of the Attorney General informing him that he was going to be reclassified under a newly enacted law, Ohio's Adam Walsh Act (AWA) (R.C. 2950.01, *et seq.)* as a "Tier III Sex Offender."

{¶6} Enacted on June 30, 2007, Ohio's Adam Walsh Act (SB 10) fundamentally transforms Ohio's sex offender classification process and offender registration requirements, notification requirements, and residency restrictions. Unlike sex offender classifications under Ohio's Megan's Law which were based on an offender's likelihood of committing future sex offenses, Ohio's AWA assigns sex offenders to one of three tiers based solely on the offense of conviction with no consideration of the offenders' risk to the community or likelihood of reoffending.

{¶7} Ohio's AWA imposes more onerous obligations and responsibilities on Petitioner-Appellant. This reclassification of appellant under Ohio's AWA, does, among other things, require him to register every 90 days for life as a Tier III Sex Offender rather than annually for 10 years as a sexually oriented offender; be subject to community notification requirements for the first time; and be subject to more stringent restrictions on where Appellant could lawfully reside.

{¶8} On January 25, 2008, Appellant timely filed a Petition therein challenging the Attorney General's Sex Offender Classification with the Stark County Court of Common Pleas pursuant to Ohio Rev. Code 2950.031(E) and 2950.032(E), challenging both the level of his classification and the application of the Act itself. Petitioner-Appellant argued, *inter alia*, that R.C. Chapter 2950, as amended by S.B. 10, is unconstitutional as applied to him on the basis that it violates the right to contract

pursuant to Article II, Section 28 of the Ohio Constitution. Petitioner-Appellant requested a hearing on his petition.

{¶9} The trial court scheduled a hearing in this matter for March 19, 2008, but stayed such hearing in light of the stay issued by the United States District Court for the Northern District of Ohio, Eastern Division, involving all cases regarding Ohio's version of the Adam Walsh Act.

{¶10} On June 9, 2009, the United States District Court for the Northern District of Ohio, Eastern Division, dissolved the aforementioned stay. See *Doe v. Dann* (June 9, 2008), Case No. 1:08 CV 220.

{¶11} The Stark County trial court left its stay in place pending this Court's decision in the many appeals pending before it on the Adam Walsh Act.

{¶12} By Judgment Entry filed June 2, 2009, relying upon this Court's decisions in *Sigler v. State,* 5th Dist. No. 08-CA-79, 2009-Ohio-2010, appeal accepted, 122 Ohio St.3d 1520, 2009-Ohio-4776, 913 N.E.2d 457 and *In re Adrian R.,* 5th Dist. No. 08-CA-17, 2008-Ohio-6581, appeal accepted 121 Ohio St.3d 1472, 2009-Ohio-2045, 905 N.E.2d 653, the trial court found that Senate Bill 10 was constitutional both facially and as applied to Appellant. The trial court found it was bound by this Court's decisions.

{¶13} Appellant now appeals, assigning the following sole error for review:

ASSIGNMENTS OF ERROR

{¶14} "I. APPELLANT WAS DEPRIVED OF A FULL AND FAIR HEARING ON WHETHER HE WAS PROVIDED AN OPPORTUNITY TO SHOW THAT HIS RECLASSIFICATION VIOLATED THE TERMS AND CONDITIONS OF HIS PLEA AGREEMENT."

I.

{¶15} In his sole assignment of error, Appellant argues that the trial court erred by not conducting a hearing on his petition in which he alleged that retroactive application of the new sex offender classification laws to him constitutes a breach of his plea agreement. He further argues that such breach constitutes an impairment of an obligation of contract prohibited by both the Ohio and United States Constitutions. We disagree.

{¶16} In *State v. Winfield*, Richland App. No. 2005-CA-32, 2006-Ohio-721, this Court reviewed the nature of a plea agreement between a defendant and the state. We noted that a plea agreement is generally "contractual in nature and subject to contract-law standards." *Winfield,* supra at ¶ 22, citing *State v. Butts* (1996), 112 Ohio App.3d 683, 686, 679 N.E.2d 1170; *State v. Namack*, Seventh Dist. No. 01BA46, 2002-Ohio-5187 at ¶25. Plea agreements should be construed strictly against the government. *State v. Ford* (Feb. 18, 1998), 4th Dist. No. 97 CA 32, at 3; *United States v. Fitch* (C.A.6, 2002), 282 F.3d 364, 367. "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York* (1971), 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427. "When an allegation is made that a plea agreement has been broken, the defendant must merely show that the agreement was not fulfilled." *State v. Legree* (1988), 61 Ohio App.3d 568, 571, 573 N.E.2d 687. A prosecutor's failure to comply with the terms of a plea agreement may, in some circumstances, render a defendant's plea involuntary and undermine the

constitutional validity of a conviction based upon that plea. Id.*; Blackledge v. Allison* (1977), 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136; *State v. Namack*, supra.

{¶17} In order to determine whether a plea agreement has been breached, courts must examine what the parties reasonably understood at the time the defendant entered his guilty plea. See *United States v. Partida-Parra* (C.A.9, 1988), 859 F.2d 629; *United States v. Arnett* (C.A.9, 1979), 628 F.2d 1162*. Smith v. Stegall* (6th 2004), 385 F.3d 993, 999. Therefore, we must identify the terms of the plea agreement before we can determine if the state breached the agreement. *State v. Thompson*, Fourth Dist. 03CA766, 2004-Ohio-2413; *Winfield*, supra, 2006-Ohio-721 at ¶ 25; *State v. Nice*, Morgan App. No. 07-CA-2, 2008-Ohio-5799 at ¶ 11.

{¶18} We do not have either appellant's plea agreement or the transcript of appellant's change of plea hearing in the record before us. However, even if we assume for the sake of argument that Appellant's original classification was the result of a plea agreement, we do not find an impairment of contract.

{¶19} Once Appellant entered his plea and the court sentenced him, both Appellant and the State had performed their respective parts of the plea agreement. Consequently, no action by the State after this date could have breached the plea agreement. *State v. Pointer,* Cuyahoga App. No. 85195, 2005-Ohio-3587.

{¶20} Additionally, because "[t]he registration and notification requirements of R.C. Chapter 2950 are merely remedial conditions imposed upon offenders after their release from prison and not punishment, they do not affect any plea agreement previously entered into between the offender and the State." *State v. Paris,* Auglaize App. No. 2-2000-04, 2000-Ohio-1886.

{¶21} "Therefore, we join the numerous other Ohio courts that have rejected arguments similar to Appellant's and find that Senate Bill 10 does not impair the obligation of contracts. See *State v. Randlett,* Ross App. No. 08CA3046, 2009-Ohio-112; *In re Gant,* Allen App. No. 1-08-11, 2008-Ohio-5198; *State v. Desbiens,* Montgomery App. No. 22489, 2008-Ohio-3375. See, also, *State v. Taylor,* Geauga App. No. 2002-G-2442, 2003-Ohio-6963; *State v. Paris,* supra; *State v. Harley* (May 16, 2000), Franklin App. No. 99AP-374." *In re J.M.*, Cuyahoga App. No. 91800, 2009-Ohio-2880 at ¶ 36.[1] See, also *State v. Howell,* Richland App. No. 2008-CA-0155, 2009-Ohio-3985 at ¶ 24-25.

{¶22} The record in the case at bar reflects that by Judgment Entry filed January 28, 2008, the trial court ordered "a hearing on all issues relative to the constitutionality of the statute and/or its enforceability in these specific cases, shall be held on March 19, 2008 at 1:00 p.m. in Courtroom Number 2. Briefs by both Petitioners and the State of Ohio are due on or before January 31, 2008 and reply briefs by all parties are due on or before February 14, 2008…" The trial court then stayed the matter in light of the stay issued by the United States District Court for the Northern District of Ohio, Eastern Division in *Doe v. Dann* (June 9, 2008), Case No. 1:08 CV 220, 2208 WL 2390778[2].

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[1] We recognize that other appellate courts have reached contrary conclusions. Thus, in *State v. Garner,* Lake App. No. 2008-L-087, 2009-Ohio-4448, the Eleventh District sustained a breach of contract argument on the basis that a valid plea agreement entered by the state with a defendant is a contract incorporating the terms of the classification made, and therefore, the legislature cannot change substantially the terms of a civil contract previously entered by the state without consideration. ¶ 48-51. See also, *Burbrink v. State*, Hamilton App. No. C-081075, 2009-Ohio-5346 at ¶ 18. (Hendon, P.J., dissenting). The Ohio Supreme Court has accepted the *Garner* decision for review. *State v. Gardner*, 123 Ohio St.3d 1507, 2009-Ohio-6210, 917 N.E.2d 810.

[2] The federal case is a putative class action brought pursuant to 42 U.S.C. § 1983 on behalf of sex offenders whose classification status was previously governed by Ohio's

{¶23} In the trial court's June 2, 2009 Judgment Entry which dismissed appellant's petition, the trial court noted, "Further, as all the parties to this action have agreed that this matter is a declaratory judgment action, the Court finds that no further hearing on the matter is necessary and that this entry resolves all issues presented by the petition. See Judgment Entry filed Jan. 18, 2008, in Stark County Case No. 2008MI00015."

{¶24} In pertinent part, R.C. §2950.031(E) provides the following:

{¶25} "An offender * * * may request as a matter of right a court hearing to contest the application to the offender * * * of the new registration requirements under Chapter 2950. of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008. The offender * * * may contest the manner in which the letter sent to the offender * * * specifies that the new registration requirements apply to the offender * * * or may contest whether those new registration requirements apply at all to the offender * * *."

{¶26} The statute goes on to state that, in order to request a hearing, the offender shall file a petition with the appropriate court within 60 days of the offender's receipt of notice of reclassification from the Attorney General. Id. Once the petition is

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Megan's Law (H.B. 180) and whose classification status was changed on January 1, 2008 by Ohio's Adam Walsh Act (S.B. 10). On January 25, 2008, a Complaint for Declaratory and Injunctive Relief with Class Allegations was filed against the Ohio Attorney General and the 88 county sheriffs. Also on that date, the Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction was filed. In essence, Plaintiffs in the federal case contend that procedural due process requires that they receive a hearing to challenge their reclassification before they are to be subject to the heightened obligations and duties imposed by the AWA. On June 9, 2008, the United States District Court for the Northern District of Ohio denied the plaintiffs' motion for a preliminary injunction. On August 11, 2008, that Court dismissed the complaint as to the county sheriffs, finding that the plaintiffs failed to state a claim for violation of their procedural due process rights against the sheriffs.

timely filed with the appropriate court, the offender must serve a copy of the petition on the county prosecutor. Thereafter, according to the statute, “[t]he court shall schedule a hearing, and shall provide notice to the offender * * * and prosecutor of the date, time, and place of the hearing.” Id. *Brewer v. State*, Butler App. No. 2009-02-041, 2009-Ohio-3157 at ¶ 9.

{¶27} We think it is clear from a reading of R.C. §2950.031(E) that the plain language of the statute mandates a hearing upon a timely and properly filed petition under that section. *Brewer* at ¶ 10.

{¶28} In the case at bar, Petitioner-Appellant was represented by counsel. It appears from the record that the parties met with the trial court on multiple occasions. Further, Petitioner-Appellant’s arguments were conveyed to the court in the petition itself.

{¶29} "In order to comport with due process, the type of hearing contemplated by the statute must be one at which both parties are given the opportunity to present evidence, in accordance with R.C. 2950.031(E), relevant to the propriety of the manner in which the new registration requirements have been applied to the offender or whether the new registration requirements should be applied to the offender at all." *Brewer* at ¶ 16

{¶30} In the case at bar, the trial court’s decision not to hold additional hearings on the petition was based upon this Court’s finding the new registration requirements to be constitutional in all respects. This Court has previously rejected Appellant’s arguments. See, *State v. Howell,* Richland App. No. 2008-CA-0155, 2009-Ohio-3985 at

¶ 24-25. Accordingly, we cannot find any prejudice to Appellant by the trial court's actions in failing to conduct a further hearing on Appellant's petition.

{¶31} Appellant's sole assignment of error is overruled.

{¶32} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ WILLIAM B. HOFFMAN_____

JUDGES

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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Petitioner-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MARK D. STURM	:	
Respondent-Appellant	:	Case No. 2009 CA 00178

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ WILLIAM B. HOFFMAN_____

JUDGES