[Cite as *In re Rodney C.*, 2010-Ohio-646.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	JUDGES: Hon. W. Scott Gwin, P. J. Hon. Sheila G. Farmer, J. Hon. John W. Wise, J.
RODNEY C.	Case No. 09 CA 71
ALLEGED DELINQUENT CHILD	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. A2004-06439
JUDGMENT:	Affirmed in Part; Reversed in Part
DATE OF JUDGMENT ENTRY:	February 19, 2010

APPEARANCES:

For Appellee State of Ohio	For Petitioner-Appellant Adrian R.
KENNETH W. OSWALT LICKING COUNTY PROSECUTOR ALICE ROBINSON-BOND ASSISTANT PROSECUTOR 20 South Second Street, Fourth Floor Newark, Ohio 43055	BROOKE M. BURNS ASSISTANT PUBLIC DEFENDER 8 East Long Street 11th Floor Columbus, Ohio 43215

Wise, J.

{¶1} Petitioner-Appellant R.C. appeals the Licking County Court of Common Pleas, Juvenile Division, which found that the Attorney General's classification as a Tier III juvenile sex offender was proper.

STATEMENT OF THE FACTS AND CASE

{¶2} On October 29, 2007, R.C. was committed to the Ohio Department of Youth Services ("DYS") and classified as a juvenile offender registrant, with a duty to comply with registration requirements annually for ten years. The classification followed R.C.'s adjudication for rape and gross sexual imposition, which occurred in November 2004, when he was fourteen years old. While R.C. was serving his commitment in DYS, the Ohio General Assembly passed Senate Bill 10 ("S.B. 10"), which drastically changed the law affecting adult and juvenile sex offender registrants.

{¶3} On December 12, 2007, while incarcerated at the Cuyahoga Hills Juvenile Correctional Facility, R.C. received a Notice of New Classification and Registration Duties under S.B. 10 from the Ohio Attorney General. The notice informed Rodney that beginning January 1, 2008, he would be reclassified as a Tier III Juvenile Sex Offender Registrant under Ohio's newly enacted version of the Adam Walsh Act. The new law required that persons wishing to challenge their reclassification had sixty (60) days to file a challenge petition in their county of residence. R.C. 2950.031(E) and 2950.032(E).

{¶4} Since R.C. received his notice of reclassification on December 12, 2007, his deadline for filing a challenge petition would have been February 11, 2008. However, on February 6, 2008, the U.S. District Court for the Northern District of Ohio issued an Order staying the 60-day filing requirement for all persons who were

reclassified by letter from the Ohio Attorney General. The stay was in effect until June 9, 2008.

{¶5} On February 13, 2008, R.C. filed his challenge petition in Cuyahoga County Juvenile Court. His petition was subsequently transferred to the Licking County Juvenile Court upon his release from DYS and his return to his home county. Prior to R.C.'s hearing on his challenge petition, the State of Ohio filed a motion to dismiss R.C.'s petition, alleging that it was filed outside of the 60-day requirement. R.C. filed a memorandum in response, citing to the federal stay on the 60-day challenge deadline, and requesting that his challenge petition be heard on the merits.

{¶6} R.C.'s hearing was held on April 15, 2009.

{¶7} On April 21, 2009, the Licking County Juvenile Court filed an Entry, which granted the State's Motion to Dismiss, finding that R.C.'s petition was untimely filed. (April 21, 2009 Entry). The trial court also noted, that even if it had overruled the State's Motion to Dismiss, R.C.'s requested relief would still be denied, as this Court has already addressed and overruled all the constitutional claims raised in R.C.'s petition. (April 21, 2009 Entry, citing to *In re Adrian R.,* Licking App. No. 08-CA-17, 2008-Ohio-6581).

{¶8} Appellant R.C. now prosecutes this appeal, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶9} "I. THE JUVENILE COURT ERRED WHEN IT GRANTED THE STATE'S MOTION TO DISMISS RODNEY C.'S PETITION TO CONTEST RECLASSIFICATION, AS RODNEY'S PETITION WAS TIMELY FILED

{¶10} "II. THE TRIAL COURT ERRED WHEN IT FOUND SENATE BILL 10 CONSTITUTIONAL AS APPLIED TO RODNEY C., AS THE RETROACTIVE APPLICATION OF SENATE BILL 10 TO RODNEY VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION AND THE RETROACTIVITY CLAUSE OF OHIO CONSTITUTION.

{¶11} "III. THE TRIAL COURT ERRED WHEN IT FOUND SENATE BILL 10 CONSTITUTIONAL AS APPLIED TO RODNEY C. AS THE APPLICATION OF SENATE BILL TO RODNEY 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.

{¶12} "IV. THE TRIAL COURT ERRED WHEN IT APPLIED SENATE BILL 10 TO RODNEY, AS THE LAW VIOLATES HIS RIGHT TO EQUAL PROTECTION UNDER THE LAW. FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION 2 OF THE OHIO CONSTITUTION.

{¶13} "V. THE TRIAL COURT ERRED WHEN IT FOUND SENATE BILL 10 CONSTITUTIONAL AS APPLIED TO RODNEY C., AS THE APPLICATION OF SENATE BILL 10 TO RODNEY VIOLATES THE SEPARATION OF POWERS DOCTRINE THAT IS INHERENT IN OHIO'S CONSTITUTION."

{¶14} "VI. THE RETROACTIVE APPLICATION OF SENATE BILL 10 VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION AND THE RETROACTIVITY CLAUSE OF SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION. FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION; SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."

I.

{¶15} In his first assignment of error, Appellant argues that the trial court erred in granting the State's Motion to Dismiss on the basis of timeliness. We agree.

{¶16} R.C. §2950.031(E), and R.C. §2950.032(E) require that a petition contesting the application of Senate Bill 10 to be filed "… with the appropriate court no later than the date that is sixty days after the offender or delinquent child* * * is provided the notice[.]"

{¶17} Appellant herein received notice from the Attorney General on or about December 12, 2007. Appellant filed his petition challenging his reclassification on February 14, 2008, sixty-three days after receiving notice.

{¶18} Appellant argues that the federal district court extended the time to file such petitions and that therefore his petition is timely filed.

{¶19} In January 2008, a putative class action suit was filed in the United States District Court for the Northern District of Ohio, against the Ohio Attorney General, concerning the reclassification of persons under S.B. 10. The plaintiffs included: "all individuals whose sex offender classification status was previously governed by Ohio's Megan's Law (H.B. 180) but whose classification status, as of January 1, 2008, has been changed by Ohio's Adam Walsh Act (S.B. 10) ("AWA")." On January 25, 2008, the plaintiffs requested, inter alia, that the District Court would suspend the requirement that all challenges to reclassification be filed within sixty (60) days of their notice of reclassification. On February 6, 2008, the District Court issued an Agreed Order, which applied to all concerned plaintiffs. The Order stated, in pertinent part:

{¶20} "The Court, having been advised that Defendants Marc Dann and Plaintiffs John Doe I, John Doe II, John Doe III, and John Doe IV, through counsel, are in agreement to the following, it is hereby ordered that:

{¶21} "1. The parties shall be bound by the terms of this Order until further Order from this Court.

{¶22} " ***

{¶23} "3. The 60-day filing deadlines of R.C. 2950.031(E) and R.C. 2950.032(E) as amended by S.B. 10 shall be considered unexpired for Plaintiffs and all members of Plaintiff's putative class until further Order from this Court. All petitions which have already been filed pursuant to R.C. 2950.031(E) and R.C. 2950.032(E) or which are filed during the pendency of this Order are timely filed under R.C. 2950.031(E) and 2950.032(E)."

{¶24} The District Court's Order was in effect from February 6, 2008 until June 9, 2008, when the Court issued its Memorandum of Opinion and Order, dissolving the previously issued stay of the 60-day filing requirement.

{¶25} Based on the foregoing, we find that as Appellant's petition was filed between February 6, 2008 and June 9, 2008, such was timely filed.

{¶26} For the reasons set forth above, we find Appellant's first assignment of error well-taken and hereby sustain same.

II., III., V. and VI.

{¶27} Appellant's second, third, fifth and sixth assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶28} In his assigned errors, Appellant argues that Senate Bill 10 is unconstitutional as applied to Appellant on the basis that it violates the Ex Post Facto clause, the right to due process, and the double jeopardy clause of the United States Constitution and the right to due process, the retroactivity clause and the Separation of Powers doctrine of the Ohio Constitution.

{¶29} Recently, this Court addressed the issues raised herein in *In re. Adrian R.* (December 11, 2008), Licking App. No. 08CA17, 2008 Ohio 6581. In that opinion, this Court overruled the Constitutional challenges raised based upon the holding and rationale set forth in *State v. Cook* (1998), 83 Ohio St.3d 404, and the decisions of numerous Ohio Appellate courts. Similar to the case sub judice, the appellant in *In re Adrian R*., a delinquent child, was adjudicated by the Licking County Court of Common Pleas, and classified a Tier III sexual offender subject to statutory registration requirements.

{¶30} Generally, an enactment of the General Assembly is presumed to be constitutional absent proof beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible. *State v. Cook* (1998), 83 Ohio St.3d 404, 409, 700 N.E.2d 570, 1998-Ohio-291 quoting *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St.2d 142, paragraph one of the syllabus. “A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality.” Id. at 147.

{¶31} In *In re Adrian R*., supra, this Court recognized the Supreme Court of the United States' holding, “[t]he State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their

dangerousness, does not make the statute a punishment [.]" *Smith v. Doe* (2003), 538 U.S. 84, 104, 123 S.Ct. 1140, 1153. In *Smith v. Doe*, Alaska's system of lifetime, quarterly registration and its internet registry were upheld as valid non-punitive measures to protect the public. Community notification also constitutes a valid non-punitive measure, as found by the Ohio Supreme Court. *Cook*, supra; *State v. Williams* (2000), 88 Ohio St.3d 513, 728 N.E.2d 342, 2000-Ohio-428. In *State v. Williams*, the Court further held that R.C. 2950 did not violate double jeopardy or equal protection provisions of the United States Constitution."

{¶32} In *In re Adrian R.*, this Court also looked to the Ohio Supreme Court's decision in *State v. Cook* (1998), 83 Ohio St.3d 404, wherein the Supreme Court found the former version of R.C. 2950 constitutional. Senate Bill 10 amended R.C. 2950 so that classification is no longer based on an individualized analysis. Instead, classification is now based on the type of crime committed. In addition, Senate Bill 10 increased the reporting requirements.

{¶33} In *Cook*, supra, the Ohio Supreme Court determined the old system effective in 1997, was "retroactive" because it looked to the prior conviction as a starting point for regulation. *Cook*, Id. at 410. Even so, the Court upheld the old system because it had a valid remedial and non-punitive purpose. The Cook court determined Ohio's sex offender statutes did not violate the Ex Post Facto clause of the United States Constitution, finding:

{¶34} "R.C. Chapter 2950 serves the solely remedial purpose of protecting the public. Thus, there is no clear proof that R.C. Chapter 2950 is punitive in its effect. We do not deny that the notification requirements may be a detriment to registrants, but the

sting of public censure does not convert a remedial statute into a punitive one. *Kurth Ranch*, 511 U.S. at 777, 114 S.Ct. at 1945, 128 L.Ed.2d at 777, fn. 14. Accordingly, we find that the registration and notification provisions of R.C. Chapter 2950 do not violate the Ex Post Facto Clause because its provisions serve the remedial purpose of protecting the public."

{¶35} In *State v. Williams* (2000), 88 Ohio St.3d 513, the Ohio Supreme Court determined Ohio's sex offender statutes did not violate the Double Jeopardy Clause, stating:

{¶36} "The Double Jeopardy Clause states that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.' Fifth Amendment to the United States Constitution; see, also, Section 10, Article I, Ohio Constitution. 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. See *Kansas v. Hendricks*, 521 U.S. at 369, 117 S.Ct. at 2085, 138 L.Ed.2d at 519; *Witte v. United States* (1995), 515 U.S. 389, 396, 115 S.Ct. 2199, 2204, 132 L.Ed.2d 351, 361. The threshold question in a double jeopardy analysis, therefore, is whether the government's conduct involves criminal punishment. *Hudson v. United States* (1997), 522 U.S. 93, 101, 118 S.Ct. 488, 494, 139 L.Ed.2d 450, 460.

{¶37} "This court, in *Cook*, addressed whether R.C. Chapter 2950 is a 'criminal' statute, and whether the registration and notification provisions involved 'punishment.' Because *Cook* held that R.C. Chapter 2950 is neither 'criminal,' nor a statute that inflicts

punishment, R.C. Chapter 2950 does not violate the Double Jeopardy Clauses of the United States and Ohio Constitutions. We dispose of the defendants' argument here with the holding and rationale stated in *Cook*."

{¶38} Furthermore, the Court in *Williams* stated "stigma" or "favorable reputation" are not liberty or property interests protected by due process. *Williams*, 88 Ohio St.3d at 527, citing *Paul v. Davis* (1976), 424 U.S. 693, 96 S.Ct. 1155. An allegation defamation has caused or will cause anguish or stigma "does not in itself state a cause of action for violating a constitutional right. Id. at 527, quoting Cook, 83 Ohio St.3d at 413. Moreover, "public disclosure of a state's sex offender registry without a hearing as to whether an offender is 'currently dangerous' does not offend due process where the law required an offender to be registered based on the fact of his conviction alone." *Connecticut Dept. of Public Safety v. Doe* (2003), 538 U.S. 1, 123 S.Ct. 1160. Therefore, we conclude that due process is not implicated by Senate Bill 10.

{¶39} Appellant further contends Senate Bill 10 violates the Separation of Powers doctrine. Again, this Court addressed the argument raised herein in *In re Adrian R*., supra, citing the Third District Court of Appeals' decision in *In Re Smith*, Allen App. No. 1-07-58, 2008-Ohio-3234:

{¶40} "[W]e note that the classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts. *Slagle v. State*, 145 Ohio Misc.2d 98, 884 N.E.2d 109, 2008-Ohio-593. Without the legislature's creation of sex offender classifications, no such classification would be warranted. Therefore, with respect to this argument, we cannot find that sex offender classification is anything

other than a creation of the legislature, and therefore, the power to classify is properly expanded or limited by the legislature."

{¶41} This writer would note that he does question the trend of statutorily diluting case-by-case sexual offender analyses by juvenile courts. The Ohio Supreme Court in *In re Agler* (1969), 19 Ohio St.2d 70, recognized that civil disabilities ordinarily following convictions do not attach to children. This writer would therefore encourage the General Assembly to re-evaluate whether the approach set forth in Senate Bill 10 to these difficult types of cases is warranted for juveniles.

{¶42} However, based on this Court's analysis and disposition in *In re Adrian R.*, supra, and the Ohio Supreme Court decision in *Cook*, supra, we overrule Appellant's second, third, fifth and sixth assigned errors.

IV.

{¶43} In his fourth assignment of error, Appellant argues that Senate Bill 10 is unconstitutional as applied to him because it violates his right to equal protection under the law. We disagree.

{¶44} Specifically, Appellant herein argues that Senate Bill 10 denies equal protection of the laws because the statute, based on the juvenile offender's age, requires some juvenile sex offenders be subject to mandatory classification and registration, others to discretionary classification and registration and others are not subject to any classification or registration. Appellant argues that there is no rational basis for creating different classifications based on age.

{¶45} In addressing an equal protection challenge to Senate Bill 10, the Ohio Supreme Court in *State v. Williams*, 88 Ohio St.3d 513, 2000-Ohio-428, stated:

{¶46} "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." The Equal Protection Clause prevents states from treating people differently under its laws on an arbitrary basis. *Harper v. Virginia State Bd. of Elections* (1966), 383 U.S. 663, 681, 86 S.Ct. 1079, 1089, 16 L.Ed.2d 169, 181 (Harlan, J., dissenting). "Whether any such differing treatment is to be deemed arbitrary depends on whether or not it reflects an appropriate differentiating classification among those affected; the clause has never been thought to require equal treatment of all persons despite differing circumstances." *Id.*

{¶47} "Under the Equal Protection Clause, a legislative distinction need only be created in such a manner as to bear a rational relationship to a legitimate state interest. *Clements v. Fishing* (1982), 457 U.S. 957, 963, 102 S.Ct. 2836, 2843, 73 L.Ed.2d 508, 515. These distinctions are invalidated only where "they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." *Id.*; see, also, *Heller v. Doe* (1993), 509 U.S. 312, 320, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257, 271; *Am. Assn. of Univ. Professors, Cent. State Univ. v. Cent. State Univ.* (1999), 87 Ohio St.3d 55, 58, 717 N.E.2d 286, 290. This rational basis analysis is discarded for a higher level of scrutiny only where the challenged statute involves a suspect class or a fundamental constitutional right. *Clements,* 457 U.S. at 963, 102 S.Ct. at 2843, 73 L.Ed.2d at 515-516; see, also, *Cleburne v. Cleburne Living Ctr.* (1985), 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 320. We must first determine whether the provisions of R.C. Chapter 2950 deserve a higher level of scrutiny than that provided by a rational basis review.

{¶48} " '[A] suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' " *Massachusetts Bd. of Retirement v. Murgia* (1976), 427 U.S. 307, 313, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520, 525, quoting *San Antonio Indep. School Dist. v. Rodriguez* (1973), 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16, 40. Moreover, the only classifications recognized as "suspect" are those involving race, alienage, and ancestry. *Id.* at 312, 96 S.Ct. at 2566, 49 L.Ed.2d at 524, fn. 4. Sex offenders, therefore, are not a suspect class. See *Cutshall v. Sundquist* (C.A.6, 1999), 193 F.3d 466, 482; *Artway v. Atty. Gen. of New Jersey* (C.A.3, 1996), 81 F.3d 1235, 1267.

{¶49} "Nor does R.C. Chapter 2950 implicate a fundamental constitutional right. Recognized fundamental rights include the right to vote, the right of interstate travel, rights guaranteed by the First Amendment to the United States Constitution, the right to procreate, and other rights of a uniquely personal nature. *Murgia,* 427 U.S. at 312, 96 S.Ct. at 2566, 49 L.Ed.2d at 524, fn. 3; see, also, *Albright v. Oliver* (1994), 510 U.S. 266, 272, 114 S.Ct. 807, 812, 127 L.Ed.2d 114, 122. As discussed in Part II(A), *supra,* there is nothing in R.C. Chapter 2950 that infringes upon any fundamental right of privacy or any other fundamental constitutional right that has been recognized by the United States Supreme Court. Because neither a suspect class nor a fundamental constitutional right is implicated by the provisions of R.C. Chapter 2950, a rational basis analysis is appropriate. See *Clements,* 457 U.S. at 963, 102 S.Ct. at 2843, 73 L.Ed.2d at 515.

{¶50} As set forth above, a statutory classification that does not involve a suspect class or a fundamental right does not violate the Equal Protection Clause if it bears a rational relationship to a legitimate governmental interest. Because sexual predators are not a suspect class, we apply a rational-basis test to the statute at issue. Under the rational-basis test, a statutory classification does not offend the Constitution simply because it results in some inequality. *Dandridge v. Williams* (1970), 397 U.S. 471, 501-502, 90 S.Ct. 1153. A statutory classification subject to rational-basis review must be upheld against an equal-protection challenge if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *Fed. Communications Comm. v. Beach Communications, Inc.* (1993), 508 U.S. 307, 313, 113 S.Ct. 2096. Under the rational basis standard, the state does not bear the burden of proving that some rational basis justifies the challenged legislation; rather, the challenger must negate every conceivable basis before an equal protection challenge will be upheld. See *Heller v. Doe by Doe* (1993), 509 U.S. 312, 320, 113 S.Ct. 2637.

{¶51} Upon review, we find that that there are conceivable legitimate reasons for treating younger juvenile sex offenders differently than older juvenile sex offenders. It is possible that younger juvenile sex offenders are more likely to be rehabilitated than older juvenile sex offenders.

{¶52} Appellant has failed to meet his burden of negating every conceivable basis for the age distinctions.

{¶53} Appellant's fourth assignment of error is overruled.

{¶54} For the foregoing reasons, the judgment of the Court of Common Pleas, Juvenile Division, Licking County, Ohio, is hereby affirmed in part and reversed in part.

By: Wise, J.

Gwin, P. J., and

Farmer, J., concur.

/S/ JOHN W. WISE

/S/ W. SCOTT GWIN

/S/ SHEILA G. FARMER

JUDGES

JWW/d 0208

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

IN THE MATTER OF:	:	
RODNEY C.	:	JUDGMENT ENTRY
DELINQUENT CHILD	:	Case No. 09 CA 71

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Juvenile Division, Licking County, Ohio, is affirmed in part and reversed in part.

Costs to be assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ SHEILA G. FARMER_____

JUDGES