

[Cite as *In re J.M.*, 2009-Ohio-2880.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 91800**

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**IN RE: J.M.**

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**JUDGMENT:  
AFFIRMED IN PART, REVERSED  
IN PART AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Juvenile Division  
Case No. DL 08121170

**BEFORE:** Stewart, P.J., Boyle, J., and Sweeney, J.

**RELEASED:** June 18, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, J.M., appeals the judgment of the Cuyahoga County Court of Common Pleas, Juvenile Division, that denied his petition contesting the application to him of the new classification and registration requirements of Ohio's sex offender statutes.

{¶ 2} The following are the facts as asserted by appellant in his petition. In 2002, the Huron County Court of Common Pleas, Juvenile Division, adjudicated appellant a delinquent child by virtue of committing the crime of rape, a violation of R.C. 2907.02. The juvenile court designated appellant a serious youthful offender pursuant to R.C. 2152.13 and imposed a blended sentence of juvenile and adult sanctions. Appellant was committed to the custody of the Ohio Department of Youth Services ("ODYS") for a maximum term up to his 21<sup>st</sup> birthday, and the adult part of appellant's sentence was stayed pending the successful completion of the ODYS commitment.

{¶ 3} Upon appellant's release from ODYS custody in March 2005, the Huron County juvenile court held a sex offender classification hearing and found appellant to be a habitual sex offender. The court informed him of his registration and verification requirements under the then-existing version of R.C. Chapter 2950 ("Megan's Law"). Community notification provisions were not imposed as part of appellant's classification.

{¶ 4} On November 29, 2007, the Bureau of Criminal Identification and Investigation of the Ohio Attorney General's Office sent appellant a Notice of New Classification and Registration Duties ("notice"). The notice stated that pursuant to the Ohio Legislature's passage of Senate Bill 10, implementing the federal Adam Walsh Child Protection and Safety Act of 2006 ("AWA"), appellant would be newly classified as a Tier III Juvenile Sex Offender beginning January 1, 2008. The Tier III classification was a consequence of appellant's juvenile rape adjudication, and required him to register with the local sheriff's office every 90 days for the rest of his life.

{¶ 5} The notice informed J.M. that as a Tier III juvenile offender he may be eligible for reclassification or declassification under R.C. 2152.84 and 2152.85. Additionally, appellant was informed that under R.C. 2950.031(E) he had 60 days to contest the application of the new classification and registration requirements to him by filing a petition in the Court of Common Pleas in the county of his residence.

{¶ 6} On January 25, 2008, appellant filed in the Cuyahoga County Court of Common Pleas, Juvenile Division, a petition to contest the application of Senate Bill 10 to him, pursuant to R.C. 2950.031(E). Appellant argued that: (1) the retroactive application of Senate Bill 10 violated the Ex Post Facto Clause of the United States Constitution; (2) the retroactive application of Senate Bill 10 violated the prohibition against retroactive laws in the Ohio Constitution; (3) his

reclassification under Senate Bill 10 violated the doctrine of separation of powers; (4) his reclassification constitutes impermissible multiple punishment under the double jeopardy clause; (5) the residency restrictions under Senate Bill 10 violated due process; (6) he cannot be subject to the community notification requirements of Senate Bill 10 because he was not subject to such requirements under the old law; (7) the rationale for classifying adults as sex offenders does not apply to juvenile offenders; (8) his reclassification constitutes a breach of contract and impinges on his right to contract; and (9) his reclassification without a jury trial violates the Sixth Amendment.

{¶ 7} On June 25, 2008, the juvenile court heard and denied appellant's petition. The judge stated that although he was aware of, and agreed with, a common pleas decision finding the retroactive application of the Adam Walsh Act unconstitutional, he was bound by this court's decision in *State v. Holloman-Cross*, Cuyahoga App. No. 90351, 2008-Ohio-2189, which upheld the retroactive application of the Act.

{¶ 8} Appellant timely appealed this decision raising eleven errors for review.

{¶ 9} "I. The trial court erred and abused its discretion by failing to consider any classification other than Tier III for appellant."

{¶ 10} “II. The trial court failed to conduct an adequate classification hearing as required by R.C. 2152.83 and 2152.84 and in violation of appellant’s state and federal due process rights.”

{¶ 11} Appellant’s first two assignments of error challenge the adequacy of the juvenile court’s June 25, 2008 hearing and are premised on the fact that, under the new sex offender classification statutes, the juvenile court is granted discretion in classifying juvenile sex offenders. Appellant argues that the juvenile court was required to hold a reclassification hearing and exercise its discretion before he could be classified a Tier III offender.

{¶ 12} Senate Bill 10 abolished the prior classifications contained in R.C. 2950.01 and substituted new classifications. Under Senate Bill 10, the Ohio Attorney General was instructed to notify all adult and juvenile offenders who were currently imprisoned or were complying with then-existing notification requirements of their new classification and obligations under the new law. Appellant received notice of his classification as a Tier III juvenile offender subject to community notification. The notice informed appellant of the appeals process provided under R.C. 2950.031(E) and additionally informed him that he may have a right to reclassification or declassification by the juvenile court under R.C. 2152.84 and 2152.85.

{¶ 13} Ohio’s version of the Adam Walsh Act makes provision for a juvenile offender to be re-evaluated, prove their rehabilitation to the court, and have

their sexual offender status lowered or removed. *In re Gant*, Allen Cty. App. No. 1-08-11, 2008-Ohio-5198. These provisions are not self-activating. R.C. 2152.85 provides that juveniles such as appellant, who were classified juvenile offender registrants relative to an offense committed on or after January 1, 2002, may file a petition with the juvenile court requesting reclassification or declassification.

{¶ 14} The record indicates that appellant filed his petition pursuant to R.C. 2950.031(E) only. Appellant's petition makes no reference to R.C. 2152.85 and does not ask the juvenile court to reclassify him. Instead, the petition contests the application of the new statutory requirements to appellant on constitutional grounds, and alternatively states that even if the statutes are upheld, under the provisions of the new law the community notification provisions do not apply to him. At the hearing on the petition, appellant confined his arguments to the constitutional challenges raised in the petition. Therefore, we find that appellant did not petition the juvenile court to reclassify him, and the record reflects that the juvenile court conducted the hearing as petitioned. Accordingly, appellant's first two assignments of error are not well taken and are overruled.

{¶ 15} "III. The trial court erred and abused its discretion by failing to relieve appellant of community notification."

{¶ 16} Appellant argues: 1) that the attorney general lacked the authority to impose community notification upon him, and 2) pursuant to R.C.

2950.11(F)(2), the trial court should have relieved him of the notification requirements because he was not subject to community notification prior to January 1, 2008.

{¶ 17} Appellant's first argument, premised on alleged constitutional violations, is without merit as explained below. However, appellant's second argument has merit. The notification from the attorney general informing appellant of his new Tier III classification, stated: "You are subject to community notification requirements under Ohio Revised Code \_2950.11, if you were previously subject to community notification prior to January 1, 2008." In his petition, appellant asserted that he was not subject to community notification prior to January 1, 2008, and therefore, even if the court found the Adam Walsh Act applied to him, he would not be subjected to community notification.

{¶ 18} Recently, in *Gildersleeve v. State*, Cuyahoga App. No. 91515, 2009-Ohio-2031, this court had the opportunity to review the community notification provisions of S.B. 10 and found them "wrought with confusion." We stated it "would be nonsensical for a court to hold a hearing to determine whether [previously classified offenders] would have been subject to community notification under the former statute, when it was already determined that they were not subject to community notification under the former statute." As a result, we held: "For those Tier III offenders who were not subject to



community notification under the former statute, we find that they are exempt from community notification under the AWA. In such situations, the court need not hold an evidentiary hearing or consider the R.C. 2950.11(F)(2) factors.” *Id.* at \_77 (internal citation omitted).

{¶ 19} Accordingly, we sustain appellant’s third assignment of error and find that, although appellant is now classified as a Tier III offender, because he was not subject to community notification under the former statute, he is exempt from community notification under the AWA.

### Constitutional Challenges

{¶ 20} For ease of review, we will address appellant’s final eight assignments of error together. In these assignments of error, appellant argues that Senate Bill 10 is not civil and remedial, but is punitive in nature and, as a result, violates his constitutional rights. Appellant asserts that the application of Senate Bill 10 violates various constitutional provisions

{¶ 21} In *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, the Ohio Supreme Court stated:

{¶ 22} “[S]tatutes enjoy a strong presumption of constitutionality. ‘An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.’

*State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St.142, 57 Ohio Op. 134,

128 N.E.2d 59, 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, 57 Ohio Op. at 137, 128 N.E.2d at 63. ‘That presumption of validity of such legislative enactment cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution.’ *Xenia v. Schmidt* (1920), 101 Ohio St. 437, 130 N.E. 24, paragraph two of the syllabus; *State ex rel. Durbin v. Smith* (1921), 102 Ohio St. 591, 600, 133 N.E. 457, 460; *Dickman*, 164 Ohio St. at 147, 57 Ohio Op. at 137, 128 N.E.2d at 63.” Id. at 409.

{¶ 23} In the 1998 *Cook* decision, the court found that Ohio’s sex offender statutes did not violate the retroactivity clause of the Ohio Constitution or the ex post facto clause of the United States Constitution as applied to previously convicted defendants. In *State v. Williams*, 88 Ohio St.3d 513, 2000-Ohio-428, the Ohio Supreme Court further held that Ohio’s sex offender statutes did not violate double jeopardy or equal protection provisions of the United States Constitution.

{¶ 24} Most recently, in *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, the Ohio Supreme Court addressed the constitutionality of the 2003 version of R.C. Chapter 2950, the Sexual Offender Registration and Notification Law as amended by Am.Sub.S.B. No. 5 (“S.B. 5”), effective July 31, 2003. The

court found the provisions were not unconstitutionally retroactive and did not violate protections against ex post facto laws. The court reaffirmed its prior finding that the registration statutes are remedial in nature and are neither criminal, nor statutes that inflict punishment. *Id.* at \_29, citing *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202.

{¶ 25} The Ohio Supreme Court has yet to rule on the constitutional challenges to Senate Bill 10 currently pending before it. However, in the months since appellant filed his appellate brief, decisions out of this court and other appellate districts have reviewed and rejected the constitutional challenges raised in this appeal.

#### Retroactivity, Ex Post Facto, and Double Jeopardy

{¶ 26} In *State v. Ellis*, Cuyahoga App. No. 90844, 2008-Ohio-6283, this court found that The Sex Offender Registration and Notification Act contained in the Adam Walsh Act and incorporated into Ohio law at R.C. 2950, et seq., does not violate ex post facto protections; does not violate the retroactivity clause of the Ohio Constitution; and does not violate the double jeopardy clause of the Ohio Constitution. *Id.* at \_39-42, citing *In re Gant*, *supra*; *State v. Byers*, Columbiana App. No. 07 CO 39, 2008-Ohio-5051; *State v. Honey*, Medina App. No. 08CA0018-M, 2008-Ohio-4943; *State v. Longpre*, Ross App. No. 08CA3017, 2008-Ohio-3832. Accordingly, we reject J.M.'s challenges based upon these constitutional issues.

## Separation of Powers Doctrine

{¶ 27} Appellant argues that by authorizing the Attorney General's Office to reclassify him under the new tier classification, the Ohio legislature impermissibly interfered with the prior judicial adjudication of his sex offender status in violation of the separation of powers doctrine. We disagree.

{¶ 28} Senate Bill 10 does not require the attorney general to reopen appellant's final court judgment. In 2005, the juvenile court adjudicated appellant a habitual sex offender subject to registration and verification requirements. Senate Bill 10 simply changes the frequency and duration of the registration and verification requirements to which appellant is subject. Additionally, as noted above, under the provisions of Senate Bill 10, appellant can seek a reduction in the registration and verification requirements applicable to him by petitioning the juvenile court to reclassify him.

{¶ 29} Other Ohio courts have also rejected appellant's contention and have concluded that Senate Bill 10 does not violate the doctrine of separation of powers by abrogating final court judgments. In *In re Smith*, Allen App. No. 1-07-58, 2008-Ohio-3234, the court reasoned 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 the 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.” Id. at \_39. See, also, *State v. Randlett*, Ross App. No. 08CA3046, 2009-Ohio-112; *State v. Byers*, Columbiana App. No. 07CA39, 2008-Ohio-5051.

{¶ 30} We agree with this reasoning and find no violation of the separation of powers doctrine.

#### Due Process, Equal Protection, and Trial By Jury

{¶ 31} Appellant argues generally that Senate Bill 10 is unconstitutional because it imposes adult consequences on a juvenile without affording him the same constitutional rights and procedural safeguards as an adult. However, appellant identifies for this court certain instances when a juvenile is afforded the same constitutional rights and protections as an adult. One such instance is during serious youthful offender proceedings. Although appellant does not include the record from the Huron County juvenile proceedings as part of the record on appeal, his petition states that he was given both a commitment to ODYS as a juvenile and an adult criminal sentence as a serious youthful offender. Accordingly, on the basis of appellant’s own assertion that he was subject to serious youthful offender proceedings, we find his due process challenge lacks merit.

#### Obligation of Contracts

{¶ 32} Appellant argues that the 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 are not persuaded.

{¶ 33} This court has stated: “It has been recognized that plea agreements are essential to the prompt disposition of criminal proceedings. A plea bargain is subject to contract law standards. Because a plea bargain is contractual in nature, we must first examine the nature of the plea agreement to determine what the parties understood at the time of the plea, and determine whether a breach occurred.” *State v. Pointer*, Cuyahoga App. No. 85195, 2005-Ohio-3587.

{¶ 34} It is impossible to determine from the record whether appellant’s adjudication for delinquency on the charge of rape was the result of a finding by the juvenile court after trial, or an admission by appellant pursuant to a plea agreement. Although appellant asserts in his petition that his delinquency adjudication was the result of a plea agreement, he has not established the existence of any agreement between him and the state, or cited to any details of any such agreement.

{¶ 35} Even if we were to assume for the sake of argument that appellant’s delinquency adjudication was the result of a plea agreement, we do not find an impairment of contract. 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*, supra. 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.

{¶ 36} 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.

### Cruel and Unusual Punishment

{¶ 37} The Eighth Amendment to the United States Constitution and Section 9, Article I of the Ohio Constitution prohibit the imposition of cruel and unusual punishment. The Ohio Supreme Court has determined that the registration and notification provisions of Chapter 2950 are neither criminal nor inflict punishment. *Cook and Williams*, supra.

{¶ 38} In *Ferguson*, even after acknowledging that “R.C. Chapter 2950 may pose significant and often harsh consequences for offenders, including harassment and ostracism from the community,” the court again determined that “the legislative history supports a finding that it is a remedial, regulatory scheme designed to protect the public rather to punish the offender.” *Id.*, 2008-Ohio-4824, at \_32 and 36. The Court found compelling, “the fact that the United States Supreme Court and state appellate courts have upheld provisions similar to the permanent, lifetime classification imposed by S.B. 5’s amendments. See *Smith v. Doe* (2003), 538 U.S. 84, 90, 103-104, 123 S.Ct. 1140, 155 L.Ed.2d 164; *Commonwealth v. Lee* (2007), 594 Pa. 266, 935 A.2d 865, 885.” *Id.* at \_35.

{¶ 39} Therefore, on the basis of the supreme court’s findings in *Cook*, *Williams*, and *Ferguson*, we are not persuaded that the registration, verification, and notification provisions of Senate Bill 10 constitute cruel and unusual punishment.

{¶ 40} In summary, appellant’s challenge to the imposition of community notification is sustained, his constitutional challenges are overruled, and the judgment of the juvenile court finding the Adam Walsh Act applicable to appellant is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Costs to be divided equally between appellee and appellant.

The court finds there were reasonable grounds for this appeal.



It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas – Juvenile Division 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.

MELODY J. STEWART, PRESIDING JUDGE

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MARY J. BOYLE, J., and  
JAMES J. SWEENEY, J., CONCUR