

[Cite as *Boswell v. State*, 2010-Ohio-3134.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

CHARLES BOSWELL,	:	
Petitioner-Appellant,	:	CASE NO. CA2010-01-006
- vs -	:	<u>OPINION</u> 7/6/2010
STATE OF OHIO,	:	
Respondent-Appellee.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08CV70527

Charles Boswell, #A170943, Lebanon Correctional Institute, P.O. Box 56, Lebanon, Ohio 45036, petitioner-appellant, pro se

Rachel A. Hutzel, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for respondent-appellee

YOUNG, J.

{¶1} Petitioner-appellant, Charles Boswell, appeals a decision of the Warren County Court of Common Pleas dismissing a petition challenging his reclassification as a sex offender under Ohio's Adam Walsh Act.¹

{¶2} The record indicates appellant was convicted of criminal sexual conduct

1. Pursuant to Loc.R. 6(A), we sua sponte remove this appeal from the accelerated calendar.

in the state of Michigan in 1994, sentenced in February 1995, and released from a Michigan prison in November 2006. Thereafter, appellant moved to Ohio. On January 3, 2008, appellant received a letter from the Ohio Attorney General informing him he had been reclassified as a sex offender as a result of Ohio's Adam Walsh Act.² On January 29, 2008, appellant filed a pro se petition contesting his reclassification, arguing that his reclassification under Ohio's Adam Walsh Act was unconstitutional. Appellant did not attach a copy of his reclassification notice; his new classification is therefore unknown. On December 31, 2009, the trial court dismissed appellant's petition on the basis of this court's decision in *State v. Williams*, Warren App. No. CA2008-02-029, 2008-Ohio-6195, discretionary appeal allowed 121 Ohio St.3d 1449, 2009-Ohio-1820 (upholding Ohio's Adam Walsh Act on numerous constitutional grounds).

{¶13} Appellant appeals, raising four assignments of error which will be addressed out of order.

{¶14} Assignment of Error No. 3:

{¶15} "THE EX POST FACTO CLAUSE OF BOTH THE OHIO AND U.S. CONSTITUTION ARE VIOLATED BY THE RETROACTIVE APPLICATION OF S.B. 10."

{¶16} Appellant argues Ohio's Adam Walsh Act violates the Ohio Constitution's prohibition on retroactive laws and the Ex Post Facto Clause of the United States Constitution. Appellant's arguments have been addressed and

2. Ohio's Adam Walsh Act (also known as Senate Bill 10) was enacted in July 2007 to implement the federal Adam Walsh Child Safety and Protection Act. The law amended R.C. Chapter 2950, Ohio's Sex Offender Registration and Notification Act. Under Ohio's Adam Walsh Act, convicted sex offenders subject to registration are classified under a new three-tiered system, based solely on their offense. Ohio's Adam Walsh Act went into effect on January 1, 2008.

rejected by this court. In *Williams*, 2008-Ohio-6195, we held that Ohio's Adam Walsh Act neither violates the Ohio Constitution's prohibition on retroactive laws nor the Ex Post Facto Clause of the United States Constitution. *Id.* at ¶36, 75. See, also, *Acheson v. State*, Warren App. No. CA2009-06-066, 2010-Ohio-1946. The Ohio Supreme Court has so far not addressed these constitutional claims. Appellant's third assignment of error is accordingly overruled.

{¶7} Assignment of Error No. 2:

{¶8} "THE APPLICATION OF S.B. 10 BY LAW PASSED BY OHIO LEGISLATURE AND APPLIED RETROACTIVELY TO DEFENDANT'S [SIC] WHOSE SENTENCES WERE PROPERLY IMPOSED BY THE JUDICIAL BRANCH IS UNCONSTITUTIONAL, AND A VIOLATION OF SEPARATION OF POWERS DOCTRINE."

{¶9} Appellant argues Ohio's Adam Walsh Act violates the doctrine of separation of powers. Appellant's argument was addressed and rejected by this court. See *Williams*, 2008-Ohio-6195. However, in light of the Ohio Supreme Court's recent decision in *State v. Bodyke*, Slip Opinion No. 2010-Ohio-2424, we sustain appellant's second assignment of error.

{¶10} In *Bodyke*, the supreme court held that the provisions of Ohio's Adam Walsh Act governing the reclassification of sex offenders already classified by judges under Megan's Law (Ohio's first comprehensive registration and classification system for sex offenders, enacted in 1996) violate the separation of powers doctrine. *Id.* at ¶55. Specifically, the supreme court held that:

{¶11} "R.C. 2950.031 and 2950.032, which require the attorney general to reclassify sex offenders who have already been classified by court under former law,

impermissibly instruct the legislative branch to review past decisions of the judicial branch and thereby violate the separation-of-powers doctrine.

{¶12} "[F]urther * * * R.C. 2950.031 and 2950.032, which require the attorney general to reclassify sex offenders whose classifications have already been adjudicated by a court and made the subject of a final order, violate the separation-of-powers doctrine by requiring the opening of final judgments." Id. at ¶60-61.³

{¶13} The supreme court then held that "R.C. 2950.031 and 2950.032 are severed and, that after severance, they may not be enforced. R.C. 2950.031 and 2950.032 may not be applied to offenders previously adjudicated by judges under Megan's Law, and the classifications and community-notification and registration orders imposed previously by judges are reinstated." Id. at ¶66.

{¶14} In light of the foregoing, we hold that R.C. 2950.031 and 2950.032, the provisions of Ohio's Adam Walsh Act, governing the reclassification of sex offenders, violates the doctrine of separation of powers. Our holding, however, does not end this case.

{¶15} Based upon the precise language used by the supreme court, it is clear the *Bodyke* decision solely applies to those "sex offenders that were *already classified by judges under Megan's Law*" and that were *subsequently reclassified* under Ohio's Adam Walsh Act. See id. at ¶55, 60-61, 66-67. (Emphasis added.) In *Bodyke*, the supreme court did not address the constitutionality of Ohio's Adam

3. In light of its conclusion that the reclassification scheme of Ohio's Adam Walsh Act was unconstitutional, the supreme court declined to address Christian Bodyke's other constitutional claims, that is, that Ohio's Adam Walsh Act violates (1) the Ex Post Facto Clause of the United States Constitution; (2) the Retroactivity Clause of the Ohio Constitution; (3) the Double Jeopardy Clause of the Ohio and United States Constitution; (4) due process rights; (5) constitutional protections against cruel and unusual punishment; and (6) constitutional protections against impairment of contract. *Bodyke*, 2010-Ohio-2424, fn. 1 and ¶62.

Walsh Act under the separation of powers doctrine as to those offenders that were not classified as sex offenders before the enactment of Ohio's Adam Walsh Act.

{¶16} In the case at bar, based upon the record before us, it is not clear whether appellant was already classified as a sex offender when he received a letter from the Ohio Attorney General informing him he had been reclassified as a sex offender as a result of Ohio's Adam Walsh Act. Appellant makes several assertions as to his sex offender status. However, the record before us either does not support the assertions or does not allow for a ready determination of appellant's sex offender status without additional evidence.

{¶17} Appellant first asserts he has never been ordered to register as a sex offender in Michigan. However, this assertion is belied by his petition challenging his reclassification under Ohio's Adam Walsh Act in which he stated: "I complete my time in the state of Michigan (discharged) *Registering under Michigan Laws. As courts required.*" (Emphasis added.) Under Michigan's Sex Offenders Registration Act (SORA), effective October 1, 1995, an individual who is convicted of a listed offense on or before October 1, 1995 and who on October 1, 1995 is committed to jail or to the jurisdiction of the department of corrections for that offense is required to register as a sex offender. MCL 28.723(1)(b). "Listed offense," as defined in MCL 28.722, includes criminal sexual conduct, the offense for which appellant was convicted in Michigan. SORA, a regulatory statute, does not violate the constitutional ban on ex post facto laws and can be applied retroactively. See *People v. Pennington* (2000), 240 Mich.App. 188, 610 N.W.2d 608.

{¶18} Appellant is currently incarcerated in the Lebanon Correctional Institution in Warren County, Ohio. The record does not indicate, and appellant has

not specified, the criminal offense(s) he is in prison for. Appellant asserts he is currently incarcerated in Ohio for a non-sexually oriented offense. There is no evidence to prove or disprove that claim.

{¶19} The magistrate and the trial court both found that based on appellant's assertion he is currently incarcerated for a nonsexually-oriented offense, "presumably at some point before December 1, 2007, [appellant] registered as a sex offender in Ohio thus triggering his reclassification notice." Appellant does not claim he did not register as a sex offender in Ohio before Ohio's Adam Walsh Act became effective. In fact, in his petition challenging his reclassification under Ohio's Adam Walsh Act, appellant specifically states he "resides in Ross County and *registers with the sheriff of that county pursuant to R.C. [C]hapter 2950.*" (Emphasis added.)

{¶20} Former R.C. Chapter 2950 imposed a duty to register on a person who was convicted of or pled guilty to a sexually oriented offense in another jurisdiction. Specifically, under former R.C. 2950.04(A)(3)(a), offenders moving to Ohio on or after July 1, 1997, who had been convicted of a sexually-oriented offense in another state, were required to register as a sex offender in Ohio if the offender had a duty to register as a sex offender under the law of the jurisdiction in which the conviction occurred. Under former R.C. 2950.04(A)(3)(b), offenders who had been convicted of a sexually-oriented offense in another state and who were released from imprisonment on or after July 1, 1997, were required to register as a sex offender upon moving to Ohio on or after July 1, 1997 regardless of any duty to register in the other jurisdiction. Both statutory provisions applied regardless of when the sexually oriented offense was committed.

{¶21} The trial court found that appellant's Michigan conviction for criminal

sexual conduct⁴ corresponded to the Ohio offense of gross sexual imposition of a child under the age of 13 as codified in R.C. 2907.05(A)(4). We agree. Appellant does not challenge this finding on appeal. Under R.C. 2950.01, the offense of gross sexual imposition in violation of R.C. 2907.05 is a sexually oriented offense. See former R.C. 2950.01(D)(1)(a); current R.C. 2950.01(A)(1); see, also, *State v. Thomas*, Wayne App. No. 04CA0073, 2005-Ohio-3307. A sexually-oriented offense also includes "[a] violation of any * * * existing or former * * * law of another state * * * that is or was substantially equivalent to" the offense of gross sexual imposition in Ohio. See former R.C. 2950.01(D)(1)(f); current R.C. 2950.01(A)(11). Appellant was therefore convicted of a sexually-oriented offense in another jurisdiction such that upon moving to Ohio, he was required to register as a sex offender, regardless of whether he had a duty to register as a sex offender in Michigan. See former R.C. 2950.04(A)(3).

{¶22} In *Miller v. Cordray*, 184 Ohio App.3d 754, 2009-Ohio-3617, Jerry Miller was convicted of a sexually-oriented offense in Illinois and upon being released, moved to Ohio. Miller never registered in Ohio as a sex offender. In 2008, after pleading guilty to attempted failure to register, Miller filed a complaint for declaratory judgment, seeking a declaration he was not subject to R.C. Chapter 2950 as amended by Ohio's Adam Walsh Act. The trial court found that Miller's out-of-state conviction was substantially equivalent to the Ohio offense of gross sexual imposition, a sexually-oriented offense under R.C. 2950.01. As a result, Ohio's

4. We note that both the magistrate and the trial court stated appellant was convicted in Michigan of criminal sexual conduct of the first degree. However, both appellant's petition challenging his reclassification under Ohio's Adam Walsh Act and a copy of appellant's Michigan Department of Corrections record for his criminal sexual conduct conviction indicate he was convicted of criminal sexual conduct in the *second* degree.

Adam Walsh Act was applicable to Miller.

{¶23} On appeal, Miller argued the Ohio Attorney General had no authority to reclassify him under Ohio's Adam Walsh Act because he had never registered as a sex offender in Ohio. In other words, Miller argued his prior failure to register rendered him exempt from having to register as a sex offender in Ohio. The Tenth Appellate District upheld the trial court's decision on the grounds that (1) Miller's duty to register as a sex offender was not contingent upon the Ohio Attorney General first classifying him as a sex offender; (2) rather, the duty to register required only that the offender be convicted of a sexually oriented offense; (3) because Miller met the criteria under R.C. Chapter 2950, he was required to register as a sex offender in Ohio notwithstanding his conviction for attempted failure to register; and (4) once Miller registered as required, the Ohio Attorney General had the authority to reclassify him under Ohio's Adam Walsh Act. *Id.* at ¶23,28-30.

{¶24} Based upon the record before us as developed by the parties, the only undisputed evidence is that appellant was convicted of a sexually-oriented offense in another jurisdiction, moved to Ohio after November 1, 2006 (his release date from a Michigan prison) and before the enactment of Ohio's Adam Walsh Act, subsequently registered with the sheriff of Ross County, Ohio pursuant to R.C. Chapter 2950, and is currently incarcerated in Ohio. It is not clear and we cannot determine whether appellant was already classified as a sex offender by an Ohio judge under former R.C. Chapter 2950 when he received the letter from the attorney general. In fact, appellant asserts he has never been classified as a sex offender either in Michigan or Ohio; thus, his reclassification by the Ohio attorney general is in fact a new classification.

{¶25} Appellant's second assignment of error is therefore well-taken with respect to the assertion that Ohio's Adam Walsh Act violates the separation of powers doctrine. Because appellant's status with respect to Ohio's Adam Walsh Act is not clear, we further reverse the trial court's decision dismissing appellant's petition challenging his reclassification as a sex offender under Ohio's Adam Walsh Act, and remand the matter to the trial court to determine (1) what criminal offense(s) appellant is currently incarcerated in the Lebanon Correctional Institution for; (2) whether an Ohio judge adjudicated appellant to be a sex offender under former R.C. Chapter 2950 before, at the time, or after appellant registered with the sheriff of Ross County "pursuant to R.C. [C]hapter 2950;" (3) if appellant was so classified as a sex offender, whether he was classified as a sexually-oriented offender, habitual sex offender, or sexual predator, and what community notification and registration requirements were imposed upon appellant as a result; and (4) any other issues that may arise, so that the trial court can determine whether Ohio's Adam Walsh Act or former R.C. Chapter 2950 (Megan's Law) applies to appellant.

{¶26} Assignment of Error No. 1:

{¶27} "THE TRIAL COURT ERRED IN DETERMINING THAT SENATE BILL 10 APPLIES TO THIS APPELLANT IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

{¶28} Appellant argues that given (1) he is currently incarcerated in Ohio for a nonsexually-oriented offense; (2) he has never been convicted of a sexually-oriented offense in Ohio; (3) he was convicted of a sexually-oriented offense in the state of

Michigan and released from prison in 2006; (4) he has never been classified as a sex offender in Michigan and has never been ordered to register as a sex offender in Michigan; and (5) he has no previous classification and cannot be reclassified, the trial court erred in determining Ohio's Adam Walsh Act applies to him.

{¶29} Assignment of Error No. 4:

{¶30} "APPLICATION OF S.B. 10 IS VIOLATIVE OF THE DUE PROCESS CLAUSE OF BOTH THE OHIO AND THE U.S. CONSTITUTION."

{¶31} Appellant argues Ohio's Adam Walsh Act violated his procedural due process rights by reclassifying him without first affording him a hearing. That is, appellant challenges the fact that under Ohio's Adam Walsh Act, a defendant is not afforded a hearing *before* he is reclassified.

{¶32} In light of our holding under appellant's second assignment of error and the need to remand the case to the trial court for it to determine whether appellant was already classified as a sex offender before Ohio's Adam Walsh Act became effective, the first and fourth assignments of error are moot.

{¶33} Judgment affirmed in part, reversed in part, and remanded for further proceedings in compliance with the law and consistent with this opinion.

BRESSLER and RINGLAND, JJ., concur.