[Cite as *Green v. State*, 2010-Ohio-4371.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

SAM GREEN,	:	APPEAL NO. C-090650 TRIAL NO. SP-0900055
Petitioner-Appellant,	:	*D E C I S I O N.*
vs.	:	
STATE OF OHIO,	:	
Respondent-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 17, 2010

Dinsmore & Shohl, LLP, *Michael Newman*, and *Christopher R. McDowell*, for Petitioner-Appellant,

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Paula E. Adams*, Assistant Prosecuting Attorney, for Respondent-Appellee.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} In 1996, the Ohio Legislature enacted Am.Sub.H.B. No. 180 ("Megan's Law"), which rewrote Ohio's sex-offender registration statutes contained in R.C. Chapter 2950. Megan's Law became effective in 1997. Under Megan's Law, offenders who had committed a sexually oriented offense that was not registration-exempt were labeled a sexually oriented offender, a habitual sexual offender, or a sexual predator based upon the crime committed and the findings made by the trial court at a sexual-offender classification hearing.[1] An offender who had committed a sexually oriented offense as defined in former R.C. 2950.01(D) but was not classified as a sexual predator or a habitual sexual offender was designated a sexually oriented offender by operation of law.[2] No hearing was required to determine whether an offender was a sexually oriented offender because that classification arose as a matter of law.[3]

{¶2} On June 6, 1997, petitioner-appellant Sam Green pleaded guilty to and was convicted of two counts of sexual battery. He was sentenced to consecutive terms of two years' incarceration. The trial court did not hold a sexual-offender classification hearing or enter an order classifying Green as a sexual offender. Therefore, Green was a sexually oriented offender by operation of law.[4] At some point, presumably upon his release from incarceration, Green was instructed to register under former R.C. Chapter 2950 annually for ten years as a sexually oriented offender.

{¶3} In 2007, the General Assembly enacted Am.Sub.S.B. No. 10 ("Senate Bill 10") to implement the federal Adam Walsh Child Protection and Safety Act of 2006. Senate Bill 10 provides that offenders who have committed sexually oriented offenses

---

[1] See *State v. Clay*, 177 Ohio App.3d 78, 2008-Ohio-2980, 893 N.E.2d 909.
[2] See *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, 773 N.E.2d 502.
[3] See id.; *In re Abney*, 1st Dist. No. C-080053, 2008-Ohio-4379; *In re Hawkins*, 1st Dist. No. C-080052, 2008-Ohio-4381; *State v. Cooper*, 1st Dist. No. C-030921, 2004-Ohio-6428.
[4] See id.

that are not registration-exempt are to be placed in tiers based solely on the offense committed.[5] R.C. 2950.031(A) directs the attorney general to reclassify sex offenders who had registered an address under former R.C. Chapter 2950 before December 1, 2007, as Tier I, Tier II, or Tier III offenders under Senate Bill 10. R.C. 2950.032(A)(1) directs the attorney general to reclassify those offenders who were serving a prison term on December 1, 2007, for a sexually oriented offense.

{¶4} Green was notified that he had been reclassified under Senate Bill 10 as a Tier III sex offender and that he was required to register with the local sheriff every 90 days for life. Green filed an R.C. 2950.031(E) petition to contest his reclassification, challenging the constitutionality of Senate Bill 10. He also filed an R.C. 2950.11(F)(2) motion for immediate relief from the community-notification provisions. The trial court overruled Green's constitutional challenges to Senate Bill 10 and denied his R.C. 2950.031(E) petition. The court granted Green's R.C. 2950.11(F)(2) motion, exempting him from the community-notification provisions.

{¶5} Green has appealed, raising eight assignments of error that challenge the constitutionality of Senate Bill 10. We first address Green's third assignment of error, which alleges that Senate Bill 10's requirement that the attorney general reclassify him as a Tier III sex offender violates the separation-of-powers doctrine inherent in Ohio's Constitution. We addressed and rejected Green's argument in *Sewell v. State*,[6] holding that the retroactive application of Senate Bill 10's tier classification and registration requirements did not violate the separation-of-powers doctrine. However, we must revisit the separation-of-powers issue in light of the Ohio Supreme Court's decision in *State v. Bodyke*.[7]

---

[5] See *Sewell v. State*, 181 Ohio App.3d 280, 2009-Ohio-872, 908 N.E.2d 995, at ¶2.
[6] See id.
[7] ___ Ohio St.3d ___, 2010-Ohio-2424, ___ N.E.2d ___.

{¶6} The supreme court stated in *Bodyke* that "R.C. 2950.031 and 2950.032, which require the attorney general to reclassify sex offenders who have already been classified by court order under former law, impermissibly instruct the executive branch to review past decisions of the judicial branch and thereby violate the separation-of-powers doctrine."[8] The court further stated that "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."[9] The court severed the statutes and held that "R.C. 2950.031 and 2950.032 may not be applied to offenders previously adjudicated by judges under Megan's Law."[10]

{¶7} The supreme court reaffirmed the *Bodyke* holding in *Chojnacki v. Cordray*.[11] Chojnacki had been convicted of a sex offense and, after a hearing, had been classified by the trial court as a sexually oriented offender under Megan's Law. While he was incarcerated, Chojnacki was notified that he had been reclassified under Senate Bill 10 as a Tier II sex offender. Chojnacki filed a petition to challenge his reclassification and a motion for appointed counsel. The trial court denied the motion for appointed counsel. The Twelfth Appellate District dismissed the appeal because it was not taken from a final appealable order. Chojnacki appealed to the Ohio Supreme Court. The supreme court dismissed the appeal as moot because, pursuant to *Bodyke*, Chojnacki could not have been reclassified under Senate Bill 10. The *Chojnacki* court stated, "In *Bodyke*, we severed R.C. 2950.031 and 2950.032, the reclassification provisions of the Adam Walsh Act, and held that after severance, those provisions could not be enforced.

---

[8] See id. at paragraph two of the syllabus.
[9] See id. at paragraph three of the syllabus.
[10] See id. at ¶66.
[11] ___ Ohio St.3d ___, 2010-Ohio-3212, ___ N.E.2d ___.

We further held that R.C. 2950.031 and 2950.032 may not be applied to offenders previously adjudicated by judges under 'Megan's Law.' "[12]

{¶8} The Twelfth Appellate District held in *Boswell v. State*[13] that *Bodyke* does not apply to cases where there is no prior court order classifying the offender under Megan's Law. The *Boswell* court stated, "Based upon the precise language used by the supreme court, it is clear that 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. [Citations omitted.] In *Bodyke*, the supreme court did not address the constitutionality of Ohio's Adam 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."[14]

{¶9} We hold that the supreme court's decision in *Bodyke* does not apply to cases in which there is no prior court order classifying the offender under a sex-offender category.[15] If there is no prior judicial order classifying the sex offender, then reclassification by the attorney general under Senate Bill 10 does not violate the separation-of-powers doctrine because it does not require the opening of a final court order or a review by the executive branch of a past decision of the judicial branch. In cases where there has been no prior judicial adjudication of the offender under a sex-offender category, our holding in *Sewell* is still applicable.

{¶10} Because Green was never adjudicated by a court under a sex-offender category pursuant to Megan's Law, there is no final judicial order classifying him. Green was "automatically" classified as a sexually oriented offender by operation of the former

---

[12] See id. at ¶5.
[13] 12th Dist. No. CA2010-01-006, 2010-Ohio-3134.
[14] See id. at ¶15.
[15] We note that in *State v. Smith*, 8th Dist. No. 92550, 2010-Ohio-2880, the Eighth Appellate District applied *Bodyke* without analysis to an offender who had been classified as a sexually oriented offender by operation of law under Megan's Law.

law.[16] Therefore, the *Bodyke* decision does not apply to Green, and pursuant to our holding in *Sewell*, his reclassification by the attorney general under Senate Bill 10 does not violate the separation-of-powers doctrine. The third assignment of error is overruled.

{¶11} We turn now to Green's remaining assignments of error.

{¶12} Green's first assignment of error, which alleges that the retroactive application of Senate Bill 10's tier-classification and registration requirements violates the constitutional ban on ex post facto laws, is overruled.

{¶13} "The Ex Post Facto Clause applies only to criminal statutes."[17] We held in *Sewell*[18] that the tier-classification and registration provisions of Senate Bill 10 are remedial and not punitive, and that they do not have the effect of converting a remedial statute into a punitive one. Because Senate Bill 10's classification and registration provisions are civil and remedial, not criminal, they do not violate the constitutional ban on ex post facto laws.

{¶14} Green's second and fourth assignments of error are overruled because the retroactive application of Senate Bill 10's tier-classification and registration requirements does not violate the prohibition on retroactive laws contained in Section 28, Article II of the Ohio Constitution or the Double Jeopardy Clause of the Ohio Constitution.[19] Green's arguments under the United States Constitution are also overruled on *Sewell's* reasoning.

{¶15} Green's fifth assignment of error is overruled. Green has no standing to challenge Senate Bill 10's residency restriction because he has not shown that he lives in

---

[16] See *State v. Hayden*, supra, at fn. 2; *In re Abney*, supra, at fn. 3; *In re Hawkins*, supra, at fn. 3.
[17] See *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, 700 N.E.2d 570, citing *California Dept. of Corrections v. Morales* (1995), 514 U.S. 499, 504, 115 S.Ct. 1597, and *Collins v. Youngblood* (1990), 497 U.S. 37, 43, 110 S.Ct. 2715.
[18] See *Sewell v.* State, supra, at fn. 5.
[19] Id.

or owns property within the restricted area or that he has been forced to move outside the restricted area.[20] We note that the Ohio Supreme Court held in *Hyle v. Porter*[21] that because the residency restriction in former R.C. 2950.031 was not expressly made retrospective, it could not be applied to an offender who had bought his home and committed his offense before the effective date of the statute.

{¶16} Green's sixth and seventh assignments of error, which allege that reclassifying him as a Tier III sex offender under Senate Bill 10 constituted a breach of his plea agreement and an impairment of an obligation of contract, in violation of Section 28, Article II of the Ohio Constitution and Clause I, Section 10, Article I of the United States Constitution, are overruled. The retroactive application of Senate Bill 10's tier-classification and registration requirements to a sex offender who pleaded guilty to a sexually-oriented offense pursuant to a plea bargain does not violate the Contract Clause of the Ohio and United States Constitutions, because when the offender entered his plea he had no reasonable expectation that his sex offense would never be made the subject of future legislation and no vested right concerning his registration duties.[22] Senate Bill 10's tier-classification and registration requirements are remedial, collateral consequences of the underlying criminal sex offense, and they do not affect a plea agreement previously entered between the state and the offender.[23]

{¶17} The eighth assignment of error, alleging that the retroactive application of Senate Bill 10's registration requirements constitutes cruel and unusual punishment,

---

[20] See *State v. Randlett*, 4th Dist. No. 08CA3046, 2009-Ohio-112, reversed in part and remanded on other grounds, *In re Sexual Offender Reclassification Cases*, ___ Ohio St.3d ___, 2010-Ohio-3753, ___ N.E.2d ___; *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059; *State v. Duncan*, 3rd Dist. No. 7-08-03, 2008-Ohio-5830.
[21] 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899.
[22] See *White v. State*, 1st Dist. No. C-090177, 2010-Ohio-234; *Burbrink v. State*, 185 Ohio App.3d 130, 2009-Ohio-5346, 923 N.E.2d 626, reversed in part and remanded on other grounds, *In re Sexual Offender Reclassification Cases*, ___ Ohio St.3d ___, 2010-Ohio-3753, ___ N.E.2d ___.
[23] See id.

is overruled because the statutes are civil and remedial, not punitive.[24] Therefore, the registration requirements cannot be viewed as punishment.[25]

{¶18} The judgment of the trial court is affirmed.

Judgment affirmed.

CUNNINGHAM, P.J., HILDEBRANDT and **DINKELACKER, JJ.,** concur.

Please Note:

The court has recorded its own entry this date.

[24] See *Sewell v. State*, supra, at fn. 5.
[25] See id.; *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195; *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051.