

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-545 (C.P.C. No. 07CR-08-5606)
Byron Clayborn,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on April 19, 2011

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*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

*Yeura R. Venters*, Public Defender, and *Allen V. Adair*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Byron Clayborn, appeals from a judgment of the Franklin County Court of Common Pleas finding defendant guilty of one count of pandering sexually oriented matter involving a minor, sentencing him to two years in prison, and classifying him as a Tier II sexually oriented offender. Because (1) this court in *State v. Wade*, 10th Dist. No. 10AP-159, 2010-Ohio-6395 considered and rejected

defendant's ex post facto, retroactive, separation of powers, double jeopardy, and cruel and unusual punishment challenges to S.B. 10, and (2) defendant lacks standing to challenge the constitutionality of the residency restrictions contained in R.C. 2950.034, we affirm.

### **I. Facts and Procedural History**

{¶2} On May 27, 2008, defendant entered a guilty plea to one count of pandering sexually oriented matter involving a minor, in violation of R.C. 2907.322, a felony of the second degree. The trial court sentenced defendant to two years in prison and notified defendant of his classification as a Tier II sexual offender, informing defendant of the registration and notification requirements associated with his classification. The trial court journalized defendant's conviction and sentence in a May 30, 2008 judgment entry.

{¶3} Defendant initially filed a notice of appeal on July 15, 2008, 46 days after the entry of judgment in the trial court. Although defendant argued this court should treat his appeal as a civil appeal in which the trial court failed to meet the applicable service requirements under Civ.R. 58(B), this court dismissed defendant's appeal for failure to comply with the 30-day timeframe applicable to criminal cases under App.R. 4(A). *State v. Clayborn*, 10th Dist. No. 08AP-593, 2009-Ohio-1751.

{¶4} The Supreme Court of Ohio accepted review of defendant's appeal and affirmed this court's decision to dismiss defendant's appeal. The court concluded "[a]n appeal from an R.C. Chapter 2950 sexual-offender classification judgment is an appeal in a criminal case that must be filed pursuant to App.R. 4(A) within 30 days after judgment is entered," even though the classification is civil in nature. *State v. Clayborn*, 125 Ohio

St.3d 450, 2010-Ohio-2123, syllabus. The Supreme Court, however, noted defendant could seek leave to appeal pursuant to App.R. 5(A). *Id.* at ¶16.

{¶5} On June 9, 2010, defendant filed a motion for delayed appeal, which the state did not oppose. This court granted defendant's motion for leave to appeal on September 27, 2010.

## II. Assignments of Error

{¶6} On appeal, defendant assigns the following errors:

First Assignment of Error: Application of the Senate Bill 10 version of R.C. Chapter 2950 to those convicted of offenses committed before its January 1, 2008 effective date, but sentenced after that date, violates the ban on ex post facto lawmaking by the states set forth in Article I, Section 10 of the United States Constitution.

Second Assignment of Error: Application of the Senate Bill 10 version of R.C. Chapter 2950 to those convicted of offenses committed before its January 1, 2008 effective date, but sentenced after that date, violates the ban on retroactive laws set forth in Article II, Section 28, of the Ohio Constitution.

Third Assignment of Error: Retroactive imposition of Senate Bill 10's tier system of classification violates the Separation of Powers Doctrine.

Fourth Assignment of Error: The residency restrictions within Chapter 2950, as amended, violate the substantive due process provisions of the United States Constitution and Article I, Section 16 of the Ohio Constitution. Furthermore, such restrictions violate the privacy guarantee of Article I, Section 1 of the Ohio Constitution.

Fifth Assignment of Error: Retroactive application of S.B. 10 revisions of R.C. Chapter 2950 violates the Double Jeopardy Clauses of the United States Constitution's Fifth Amendment and Article I, Section 10 of the Ohio Constitution.

Sixth Assignment of Error: As applied to appellant, Senate Bill 10 revisions of R.C. Chapter 2950 constitutes [sic] cruel and

unusual punishment in violation of the Eighth Amendment of the United States Constitution.

For ease of discussion, we jointly address defendant's first, second, third, fifth, and sixth assignments of error, but examine defendant's fourth assignment of error separately.

### **III. First, Second, Third, Fifth, and Sixth Assignments of Error – Constitutional Challenges**

{¶7} Defendant's first, second, third, fifth, and sixth assignments of error assert various constitutional challenges to the tier classification system and corresponding registration and notification requirements of S.B. 10, Ohio's version of the Adam Walsh Child Protection and Safety Act that is codified at R.C. Chapter 2950. Defendant's assignments of error contend the new statutory scheme violates the constitutional protections against ex post facto and retroactive lawmaking, double jeopardy, and cruel and unusual punishment. Additionally, defendant argues the tier classification scheme violates the constitutional guarantee of separation of powers.

{¶8} Recently, this court considered virtually identical challenges to R.C. Chapter 2950 in *Wade*. Like the present case, *Wade* involved an offender who committed an offense before the effective date of S.B. 10 but was sentenced after its effective date. *Wade* addressed and expressly "reject[ed] appellant's challenges to S.B. No. 10 on the grounds that it is an impermissibly retroactive and ex post facto scheme that exposes offenders to double jeopardy and imposes cruel and unusual punishment." *Wade* at ¶56. *Wade* "also disagree[d] with appellant's assertion that S.B. No. 10 violates the separation of powers doctrine." *Id.* at ¶62.

{¶9} Consistent with this court's precedent, we overrule defendant's first, second, third, fifth, and sixth assignments of error.

#### IV. Fourth Assignment of Error – Residency Restrictions

{¶10} Defendant's fourth assignment of error asserts the residency restrictions in R.C. Chapter 2950 violate both the United States and Ohio Constitutions. Defendant contends R.C. 2950.034 violates the substantive component of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the comparable guarantee of Section 16, Article I of the Ohio Constitution, and the privacy guarantee in Section 1, Article I of the Ohio Constitution.

{¶11} As relevant here, R.C. 2950.034 provides "[n]o person who \* \* \* has pleaded guilty to, or pleads guilty to a sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises or preschool or child day-care center premises." R.C. 2950.034(A). Defendant argues the statute unconstitutionally restrains his liberty and his right to live where he chooses. The state responds that defendant lacks standing because his challenge to the residency restrictions is not ripe for review.

{¶12} A party must have standing to be entitled to have a court decide the merits of a dispute. *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, ¶22, citing *Ohio Contrs. Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 1994-Ohio-183. As a prudential matter, standing is a question of whether a party "can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal." *Secy. of State of Maryland v. Joseph H. Munson Co., Inc.* (1984), 467 U.S. 947, 956, 104 S.Ct. 2839, 2846. See generally *Warth v. Seldin* (1975), 422 U.S. 490, 95 S.Ct. 2197. As the Ohio Supreme Court explained in *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, "it is the duty of every judicial tribunal to decide actual controversies between

parties legitimately affected by specific facts and to render judgments which can be carried into effect." As a result, it is the "judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies," including "enactments of the General Assembly." *Id.*

{¶13} Accordingly, to have standing to challenge the constitutionality of a legislative enactment, a litigant must have a direct interest in the legislation of such a nature that its enforcement adversely will affect the party's rights. *N. Canton v. Canton*, 114 Ohio St.3d 253, 2007-Ohio-4005, ¶11. The litigant must generally show it has "suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 469-70.

{¶14} As the state notes, defendant does not allege, nor does the record indicate, he resides within 1,000 feet of a school, preschool, or day-care, he has immediate plans to move within 1,000 feet of such a prohibited location, or he was forced to vacate a residence because of its proximity to such a prohibited location. Instead, defendant complains of hypothetical future injury should he ever seek to reside within 1,000 feet of a prohibited location.

{¶15} Other Ohio appellate districts have concluded a defendant lacks standing to challenge the constitutionality of the residency restrictions in R.C. 2950.034 when the defendant alleges only a hypothetical or potential injury. See *State v. Hall*, 2d Dist. No. 22969, 2009-Ohio-3020, ¶16-17 (concluding defendant lacks standing to challenge the

constitutionality of R.C. 2950.034 where "[t]here is no evidence in the record \* \* \* that [the defendant] either occupies a residence within 1,000 feet of a school, preschool, or daycare center," "that he has been forced to move from such an area" or that he has "any present intent to move to a residence within the proscribed area"); *State v. Coburn*, 4th Dist. No. 08CA3062, 2009-Ohio-632, ¶23, 26 (holding the incarcerated defendant "failed to show standing to challenge the constitutionality of the residency restriction contained in R.C. 2950.034, or that the claim was ripe for review" where "there is no evidence that [the defendant] owns a home at all, or, if he does, whether it falls within 1,000 feet of a school, preschool or day-care center"); *State v. Peak*, 8th Dist. No. 90255, 2008-Ohio-3448, ¶8 (concluding the defendant lacks standing to challenge R.C. 2950.031, the predecessor to R.C. 2950.034, where "the record fails to show whether the defendant has suffered an actual deprivation of his property rights by operation of" the residency restrictions in the statute).

{¶16} Because defendant failed to assert the injury he alleges is anything other than hypothetical, we conclude defendant lacks standing to challenge the constitutionality of R.C. 2950.034 at this time. Accordingly, we overrule defendant's fourth assignment of error for lack of ripeness.

## **V. Disposition**

{¶17} In summation, this court's decision in *Wade* controls defendant's first, second, third, fifth, and sixth assignments of error, and we overrule those assignments of error consistent with *Wade*. Further, because defendant lacks standing to challenge the constitutionality of the residency restrictions in R.C. 2950.034, we overrule defendant's

fourth assignment of error. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

SADLER and TYACK, JJ., concur.

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