

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-1192
v.	:	(C.P.C. No. 95CR-5425)
	:	
Shon D. Gardner,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on August 30, 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.

DORRIAN, J.

{¶1} Defendant-appellant, Shon D. Gardner ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas denying his petition to contest his reclassification as a Tier I sex offender. For the reasons that follow, we reverse and remand this matter with instructions.

{¶2} On September 21, 1995, appellant was indicted on one count of aggravated burglary and one count of attempted rape. On February 2, 1996, appellant pled guilty to the lesser-included offenses of burglary, a third-degree felony in violation of R.C. 2911.12, and gross sexual imposition, a fourth-degree felony in violation of R.C. 2907.05. The trial

court sentenced appellant to two years' incarceration on the burglary charge and 18 months' incarceration on the gross sexual imposition charge, with the sentences to be served consecutively.

{¶3} In 1996, the General Assembly enacted Am.Sub.H.B. 180 ("Megan's Law") which amended the state's sex offender registration process. *State v. Cook*, 83 Ohio St.3d 404, 406, 1998-Ohio-291. Portions of Megan's Law became effective January 1, 1997, and other portions of the law became effective July 1, 1997. *Id.* Under Megan's Law, gross sexual imposition was classified as a "sexually oriented offense." R.C. 2950.01(D)(1), 146 Ohio Laws, Part II, 2560, 2601; *State v. Maser* (Apr. 20, 1999), 10th Dist. No. 98AP-689. Although appellant was sentenced prior to the effective date of Megan's Law, the sexually oriented offender classification attached as a matter of law. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, paragraph two of the syllabus; *State v. Small*, 162 Ohio App.3d 325, 2005-Ohio-2291, ¶16. On December 24, 1997, appellant was notified that he was classified as a sexually oriented offender and was subject to certain reporting requirements.

{¶4} In 2007, the General Assembly enacted Am.Sub.S.B. 10, which repealed Megan's Law and replaced it with Ohio's version of the Adam Walsh Act ("S.B. 10" or "Adam Walsh Act"). *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶20. S.B. 10 eliminated the categories of sexually oriented offender, habitual sex offender, and sexual predator under Megan's Law and replaced them with a three-tier classification system. *Id.* at ¶21. The law directed the attorney general to reclassify existing offenders within one of the three tiers; these assignments were made solely based on the offense. *Id.* at ¶22.

{¶5} On February 17, 2009, appellant filed a petition in the Franklin County Court of Common Pleas asserting that he had "recently [become] aware" of being classified as a Tier I sex offender under S.B. 10 and contesting this reclassification. The trial court denied appellant's petition.

{¶6} Appellant appeals from the trial court's judgment denying his petition, assigning the following errors for this court's review:

First Assignment of Error: The trial court erred in failing to find application of Senate Bill 10's tier system of reclassifying sex offenders sentenced prior to its January 1, 2008 effective date violates the Separation of Powers doctrine.

Second Assignment of Error: Retroactive application of the provisions of Senate Bill 10 to those convicted of offenses committed before its January 1, 2008 effective date violates the ban on ex post facto lawmaking by the states set forth in Article I, Section 10 of the United States Constitution.

Third Assignment of Error: Application of the provisions of Senate Bill 10 to those convicted of offenses committed before its January 1, 2008 effective date violates the ban on retroactive laws set forth in Article II, Section 28, of the Ohio Constitution.

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

{¶7} Similar to our recent decision in *State v. Stapleton*, 10th Dist. No. 09AP-570, 2011-Ohio-3785, we find that appellant's first and third assignments of error are dispositive of his appeal. Therefore, we begin by addressing those two assignments of error.

{¶8} In his first assignment of error, appellant claims that the portion of S.B. 10 authorizing the attorney general to reclassify offenders sentenced prior to January 1,

2008, violates the separation-of-powers doctrine. On June 3, 2010, after appellant filed his notice of appeal in this case, the Supreme Court of Ohio released its decision in *Bodyke*. In that decision, the Supreme Court held that "R.C. 2950.031 and 2950.032, the reclassification provisions in [S.B. 10], are unconstitutional because they violate the separation-of-powers doctrine." *Bodyke* at ¶2. The Supreme Court concluded that the proper remedy was severance of these provisions and held that they "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.

{¶9} In its response to the first assignment of error, plaintiff-appellee, State of Ohio ("the state"), argues that appellant cannot obtain relief through a petition to contest his reclassification based on the Supreme Court of Ohio's decision in *Chojnacki v. Cordray*, 126 Ohio St.3d 321, 2010-Ohio-3212. In *Chojnacki*, the Supreme Court held that R.C. 2950.031 and 2950.032 were facially severed and could not be enforced. *Id.* at ¶5. Thus, the state argues that the petition contest and petition-contest hearing procedures under R.C. 2950.031(E) and 2950.032(E) were among the severed provisions and, therefore, the trial court had no authority to entertain appellant's petition. As we recently explained in *Stapleton*, "we have repeatedly rejected this argument and have instead recognized that, as a result of *Bodyke*, reclassifications made under the severed statutes must be vacated and the prior judicial classifications must be reinstated." *Stapleton* at ¶11, citing *State v. Lawson*, 10th Dist. No. 09AP-672, 2011-Ohio-1255; *State v. Miliner*, 10th Dist. No. 09AP-643, 2010-Ohio-6117; *State v. Hickman*, 10th Dist. No. 09AP-617, 2010-Ohio-5548.

{¶10} The state also argues that appellant is not entitled to relief under *Bodyke* because his original classification attached as a matter of law, not as the result of a judicial determination. However, "even if [defendant's] classification as a sexually oriented offender did not arise from a specific judicial determination to which *Bodyke* would apply, we have nevertheless recognized that offenders whose pre-Adam Walsh Act classification arose purely as a matter of law still must receive the benefit of the *Bodyke* remedy returning those offenders to their pre-Adam Walsh Act classifications because of *Bodyke's* complete severance of the statutory provisions governing reclassification by the attorney general." *State v. Johnson*, 10th Dist. No. 10AP-932, 2011-Ohio-2009, ¶15.

{¶11} Accordingly, based on *Bodyke*, *Chojnacki*, and our prior decisions in similar cases such as *Stapleton*, we sustain appellant's first assignment of error.

{¶12} In his third assignment of error, appellant asserts that applying the classifications in S.B. 10 to those convicted of offenses committed before the effective date of the law violates the ban on retroactive laws in the Ohio Constitution. Recently, in *State v. Williams*, \_\_\_ Ohio St.3d \_\_\_, 2011-Ohio-3374, the Supreme Court of Ohio held that "S.B. 10, as applied to defendants who committed sex offenses prior to its enactment, violates Section 28, Article II of the Ohio Constitution, which prohibits the General Assembly from passing retroactive laws." *Id.* at ¶20. The Supreme Court reversed and remanded for resentencing under the law in effect at the time Williams committed his offense. *Id.* at ¶22. Accordingly, based on this precedent, we sustain appellant's third assignment of error.

{¶13} In his second and fourth assignments of error, appellant asserts that retroactive application of S.B. 10 violates the ban on ex post facto laws and the Double

Jeopardy Clause. Based on our resolution of the first and third assignments of error, these assignments of error are rendered moot and we need not consider them.

{¶14} For the foregoing reasons, appellant's first and third assignments of error are sustained, and his second and fourth assignments of error are moot. We reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court with instructions to: (1) vacate appellant's Tier I sexual offender classification pursuant to S.B. 10, and (2) reinstate his prior classification as a sexually oriented offender and the applicable registration requirements pursuant to Megan's Law.

*Judgment reversed; cause remanded with instructions.*

SADLER and CONNOR, JJ., concur.

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