

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-00177
JOHN BEN RODGERS	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of Common Pleas, Case No. 2008-CV-00479

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: January 19, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Gwin, P.J.

{¶1} Petitioner-appellant, John Ben Rodgers, appeals the Stark County Court of Common Pleas ruling finding that the retroactive application of Senate Bill ["S.B."] 10, Ohio's sexual offender classification and registration scheme, to him did not constitute a breach of his plea agreement. The State of Ohio, through the Stark County Prosecuting Attorney's Office, is the Respondent-appellee.

STATEMENT OF THE FACTS AND CASE¹

{¶2} On January 22, 1998, petitioner-appellant was indicted on one count of Sexual Battery under Case No. 1997-CR-0842 in the Stark County Court of Common Pleas.

{¶3} On April 10, 1998, petitioner-appellant entered a plea of guilty to the indictment. That plea agreement included a stipulation that petitioner-appellant be classified as a sexually oriented offender.

{¶4} Petitioner-appellant was initially classified as a sexually oriented offender under Ohio's Megan's Law (R.C. 2950.01, *et seq.*). On November 26, 2007, the Attorney General sent appellant a letter informing him that he was going to be reclassified under a newly enacted law, Ohio's Adam Walsh Act (AWA) (R.C. 2950.01, *et seq.*) as a "Tier III Sex Offender."

{¶5} Enacted on June 30, 2007, Ohio's Adam Walsh Act (SB 10) fundamentally transforms Ohio's sex offender classification process and offender registration requirements, notification requirements, and residency restrictions. Unlike sex offender

¹ A Statement of the Facts underlying appellant's original conviction is unnecessary to our disposition of this appeal. Any facts needed to clarify the issues addressed in appellant's assignment of error shall be contained therein.

classifications under Ohio's Megan's Law which were based on an offender's likelihood of committing future sex offenses, Ohio's AWA assigns sex offenders to one of three tiers based solely on the offense of conviction with no consideration of the offenders' risk to the community or likelihood of reoffending.

{¶6} Ohio's AWA imposes more onerous obligations and responsibilities on petitioner-appellant. This reclassification of appellant under Ohio's AWA, does, among other things, requires him to register every 90 days for life as a Tier III Sex Offender rather than annually for 10 years as a sexually oriented offender; be subject to community notification requirements for the first time; and be subject to more stringent restrictions on where appellant could lawfully reside.

{¶7} Petitioner-appellant, contested his reclassification. Petitioner-appellant challenged the constitutionality of Ohio's Senate Bill 10, effective January 1, 2008 pursuant to R.C. 2950.031(E) and 2950.032(E), challenging both the level of his classification and the application of the Act itself. Petitioner-appellant argued that R.C. Chapter 2950, as amended by S.B. 10, is unconstitutional as applied to him on the basis that it violates the right to contract pursuant to Article II, Section 28 of the Ohio Constitution. Petitioner-appellant requested a hearing on his petition.

{¶8} The trial court dismissed petitioner-appellant's petition by Judgment Entry filed June 2, 2009. The trial court found it was bound by this Court's decisions in *Sigler v. State*, 5th Dist. No. 08-CA-79, 2009-Ohio-2010, appeal accepted, 122 Ohio St.3d 1520, 2009-Ohio-4776, 913 N.E.2d 457 and *In re Adrian R.*, 5th Dist. No. 08-CA-17, 2008-Ohio-6581, appeal accepted 121 Ohio St.3d 1472, 2009-Ohio-2045, 905 N.E.2d 653.

{¶9} It is from the trial court's June 2, 2009 Judgment Entry that petitioner-appellant has timely appeal, raising the following assignment of error:

{¶10} "I. APPELLANT WAS DEPRIVED OF A FULL AND FAIR HEARING ON WHETHER HE WAS PROVIDED AN OPPORTUNITY TO SHOW THAT HIS RECLASSIFICATION VIOLATED THE TERMS AND CONDITIONS OF HIS PLEA AGREEMENT."

I.

{¶11} In his sole assignment of error, appellant argues that the trial court erred by not conducting a hearing on his petition in which he alleged that 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 disagree.

{¶12} In *State v. Winfield*, Richland App. No. 2005-CA-32, 2006-Ohio-721, this Court reviewed the nature of a plea agreement between a defendant and the state. We noted that a plea agreement is generally "contractual in nature and subject to contract-law standards." *Winfield*, supra at ¶ 22, citing *State v. Butts* (1996), 112 Ohio App.3d 683, 686, 679 N.E.2d 1170; *State v. Namack*, Seventh Dist. No. 01BA46, 2002-Ohio-5187 at ¶25. Plea agreements should be construed strictly against the government. *State v. Ford* (Feb. 18, 1998), 4th Dist. No. 97 CA 32, at 3; *United States v. Fitch* (C.A.6, 2002), 282 F.3d 364, 367. "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*

(1971), 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427. "When an allegation is made that a plea agreement has been broken, the defendant must merely show that the agreement was not fulfilled." *State v. Legree* (1988), 61 Ohio App.3d 568, 571, 573 N.E.2d 687. A prosecutor's failure to comply with the terms of a plea agreement may, in some circumstances, render a defendant's plea involuntary and undermine the constitutional validity of a conviction based upon that plea. *Id.*; *Blackledge v. Allison* (1977), 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136; *State v. Namack*, *supra*.

{¶13} In order to determine whether a plea agreement has been breached, courts must examine what the parties reasonably understood at the time the defendant entered his guilty plea. See *United States v. Partida-Parra* (C.A.9, 1988), 859 F.2d 629; *United States v. Arnett* (C.A.9, 1979), 628 F.2d 1162. *Smith v. Stegall* (6th 2004), 385 F.3d 993, 999. Therefore, we must identify the terms of the plea agreement before we can determine if the state breached the agreement. *State v. Thompson*, Fourth Dist. 03CA766, 2004-Ohio-2413; *Winfield*, *supra*, 2006-Ohio-721 at ¶ 25; *State v. Nice*, Morgan App. No. 07-CA-2, 2008-Ohio-5799 at ¶ 11.

{¶14} We do not have either appellant's plea agreement or the transcript of appellant's change of plea hearing in the record before us. However, even if we assume for the sake of argument that appellant's original classification was the result of a plea agreement, we do not find an impairment of contract.

{¶15} 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*, Cuyahoga App. No. 85195, 2005-Ohio-3587.

{¶16} 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.

{¶17} “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.” *In re J.M.*, Cuyahoga App. No. 91800, 2009-Ohio-2880 at ¶ 36.² See, also *State v. Howell*, Richland App. No. 2008-CA-0155, 2009-Ohio-3985 at ¶ 24-25.

{¶18} The record in the case at bar reflects that by Judgment Entry filed January 28, 2008, the trial court ordered “a hearing on all issues relative to the constitutionality of the statute and/or its enforceability in these specific cases, shall be held on March 19, 2008 at 1:00 p.m. in Courtroom Number 2. Briefs by both Petitioners and the State of Ohio are due on or before January 31, 2008 and reply briefs by all parties are due on or before February 14, 2008...” The trial court then stayed the matter in light of the stay

² We recognize that other appellate courts have reached contrary conclusions. Thus, in *State v. Garner*, Lake App. No. 2008-L-087, 2009-Ohio-4448, the Eleventh District sustained a breach of contract argument on the basis that a valid plea agreement entered by the state with a defendant is a contract incorporating the terms of the classification made, and therefore, the legislature cannot change substantially the terms of a civil contract previously entered by the state without consideration. ¶ 48-51. See also, *Burbrink v. State*, Hamilton App. No. C-081075, 2009-Ohio-5346 at ¶ 18. (Hendon, P.J., dissenting). The Ohio Supreme Court has accepted the *Garner* decision for review. *State v. Gardner*, 123 Ohio St.3d 1507, 2009-Ohio-6210, 917 N.E.2d 810.

issued by the United States District Court for the Northern District of Ohio, Eastern Division in *Doe v. Dann* (June 9, 2008), Case No. 1:08 CV 220, 2208 WL 2390778³.

{¶19} In the trial court's June 2, 2009 Judgment Entry which dismissed appellant's petition, the trial court noted, "Further, as all the parties to this action have agreed that this matter is a declaratory judgment action, the Court finds that no further hearing on the matter is necessary and that this entry resolves all issues presented by the petition. See Judgment Entry filed Jan. 18, 2008, in Stark County Case No. 2008MI00015."

{¶20} In pertinent part, R.C. 2950.031(E) provides the following:

{¶21} "An offender * * * may request as a matter of right a court hearing to contest the application to the offender * * * of the new registration requirements under Chapter 2950. of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008. The offender * * * may contest the manner in which the letter sent to the offender * * * specifies that the new registration requirements apply to the offender * * * or may contest whether those new registration requirements apply at all to the offender * * *."

{¶22} The statute goes on to state that, in order to request a hearing, the offender shall file a petition with the appropriate court within 60 days of the offender's

³ The federal case is a putative class action brought pursuant to 42 U.S.C. § 1983 on behalf of sex offenders whose classification status was previously governed by Ohio's Megan's Law (H.B. 180) and whose classification status was changed on January 1, 2008 by Ohio's Adam Walsh Act (S.B. 10). On January 25, 2008, a Complaint for Declaratory and Injunctive Relief with Class Allegations was filed against the Ohio Attorney General and the 88 county sheriffs. Also on that date, the Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction was filed. In essence, Plaintiffs in the federal case contend that procedural due process requires that they receive a hearing to challenge their reclassification before they are to be subject to the heightened obligations and duties imposed by the AWA. On June 9, 2008, the United States District Court for the Northern District of Ohio denied the plaintiffs' motion for a preliminary injunction. On August 11, 2008, that Court dismissed the complaint as to the county sheriffs, finding that the plaintiffs failed to state a claim for violation of their procedural due process rights against the sheriffs.

receipt of notice of reclassification from the Attorney General. Id. Once the petition is timely filed with the appropriate court, the offender must serve a copy of the petition on the county prosecutor. Thereafter, according to the statute, “[t]he court shall schedule a hearing, and shall provide notice to the offender * * * and prosecutor of the date, time, and place of the hearing.” Id. *Brewer v. State*, Butler App. No. 2009-02-041, 2009-Ohio-3157 at ¶ 9.

{¶23} We think it clear from a reading of R.C. 2950.031(E) that the plain language of the statute mandates a hearing upon a timely and properly filed petition under that section. *Brewer* at ¶ 10.

{¶24} In the case at bar, petitioner-appellant was represented by counsel. It appears from the record that the parties met with the trial court on multiple occasions. Further, petitioner-appellant’s arguments were conveyed to the court in the petition itself.

{¶25} "In order to comport with due process, the type of hearing contemplated by the statute must be one at which both parties are given the opportunity to present evidence, in accordance with R.C. 2950.031(E), relevant to the propriety of the manner in which the new registration requirements have been applied to the offender or whether the new registration requirements should be applied to the offender at all." *Brewer* at ¶ 16

{¶26} In the case at bar, the trial court’s decision not to hold additional hearings on the petition was based upon this Court’s finding the new registration requirements to be constitutional in all respects. This Court has previously rejected appellant’s arguments. See, *State v. Howell*, Richland App. No. 2008-CA-0155, 2009-Ohio-3985 at

¶ 24-25. Accordingly, we cannot find any prejudice to appellant by the trial court's actions in failing to conduct a further hearing on appellant' petition.

{¶27} Appellant's sole assignment of error is overruled.

{¶28} The judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

By Gwin, P.J.,
Hoffman, J., and
Wise, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

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