

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Supreme Court Case No. 08-2502

Appellee, : On Appeal from the

: Huron County Court of Appeals

: Sixth Appellate District

vs. :

CHRISTIAN N. BODYKE, ET. AL., :

Appellants : Court of Appeals

: Case Nos. H-07-040

: H-07-041

: H-07-042

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STATEMENT OF FACTS

(From the sealed PSI's)

State v. Bodyke

Bodyke entered his next door neighbor's second floor bedroom window after climbing a trellis. He had been drinking. He had had some prior casual conversation with his attractive twenty year old neighbor and Bodyke claimed he believed she would welcome his sudden arrival in her bed in the early morning hours. The victim had with her, her infant child in the bed. She awoke in terror to the Defendant fondling her and trying to have oral sex. She fought, screamed and he eventually fled.

In December 1999 he received a 2 year prison sentence for sexual battery. He was classified as a sexually oriented offender under the SORN law then in effect Megan's Law, O.R.C. 2950.01 et. seq. and not a predator based on his lack of criminal record, alcohol involvement, and his otherwise normal family life despite the serious nature of the crime.

Under S.B. 10, (Adam Walsh) he has been reclassified as a Tier III offender changing his registration from 10 years following his prison sentence to life. At his hearing attacking the reclassification the State agreed and the Court ordered no community notification.

State v. Schwab

Defendant Schwab was married for a number of years to a woman with a young vulnerable son who grew into his early teenage years with Mr. Schwab in the house. The victim step-son disclosed long term abuse while at a church camp in Utah. The Defendant to his credit shamefully admitted the conduct to his wife but made no such

admission to authorities on the advice of his attorney in the case. (Adam Walsh has funded a committee to study marital privilege in the abuse context.)

The Defendant had no prior felony sex record, but the abuse was extensive and long standing.

The State and Defendant agreed to a plea to Attempted Rape with a 5 year jointly recommended prison sentence.

At the predator classification hearing, the parties stipulated to a habitual sex offender categorization with a 20 years registration requirement commencing after the 5 years imprisonment. Because the situation was family based as compared to Mr. Bodyke's, no community notification was ordered. Adam Walsh (S.B. 10) reclassified the Defendant as a Tier III offender with lifetime registration. At the hearing conducted in transition cases of registration under S.B. 10, the State agreed and Defendant agreed and the Court dispensed with community notification.

State v. Phillips

Defendant Phillips was convicted in a pre-96 case. He sexually abused his two young granddaughters who were cousins over a significant period of time. When caught by family members he admitted to his family and went into treatment. The treating psychologist was a mandatory reporter and reported to the Children's Services Department. His prosecution resulted. He received a 3-10 year sentence for sexual battery on one victim and 2 years for Gross Sexual Imposition for the second victim. He was not classified at sentencing because no such law existed. After the enactment of Megan's Law, O.R.C. 2950.01 et. seq., he was classified as a Sexually Oriented Offender. The 10 year registration commenced upon his release from prison on parole.

Adam Walsh (S.B. 10) has reclassified Defendant Phillips as a Tier III Offender due to the Sexual Battery conviction. At the hearing attacking the change, the State agreed and the Court ordered no community notification.

SUMMARY OF ARGUMENT

The Appellants chiefly contend that Adam Walsh constitutes punishment and is therefore subject to *ex post facto* problems. They claim this is punishment because there is not a hearing focusing on individualized dangerousness.

Appellants in their footnote #2 claim the State agreed these Defendants were not dangerous since they dispensed with community notification. This is not true. The best predictor of future activity is what one has done in the past. As the Montgomery County Court of Appeals said in State v. Desbiens No. 22489 dcd. 3 July 2008, “By tying an offender’s classification to the offense committed rather than to an individual assessment of dangerousness, the General Assembly merely adopted an alternative approach to the regulation and categorization of sex offenders” and “did not render S.B. 10 punitive.”

The State urges this Court to consider that Mr. Schwab who abused his step-son while he was quite small may not be a terrible danger to his next-door neighbor but may be very dangerous to a woman (and her son) he is dating who has a young son. Lifetime registration and an easily accessible information cite on the web can protect a family.

Similarly, Mr. Phillips, admittedly aging significantly, is likely to be dangerous, if at all, within his family, who already know his problems and proclivities. Still, he

may teach a church Sunday school, where again, web based information may allow a family to protect itself.

Finally, Mr. Bodyke did attack his neighbor and thus at first blush would make the most sense to have community notification. Under the flexibility of the transition scheme, his community notification has been dispensed with on the likelihood his offense was a drunken one time event.

Adam Walsh changes the nomenclature from Sexual Predator/Habitual Offender to Tier I, II or III. The prison website no longer prints Sexual Predator in bold letters across an inmate's data. Some particularly troublesome crimes have been removed from registration all together, i.e. indecent exposure, public urination type offenses, some voyeurism, and some consensual activities between teens.

What has been toughened is the length of registration. It should be noted this is not quite as tough as it looks. The Sexual Oriented Offender requirement was ten years commencing after the prison sentence. Under the new law, Tier I is fifteen years but includes the prison time within the fifteen years. Similarly, the Habitual Offender requirement was twenty years and Tier II is now twenty-five years but again includes the prison time. What is really objected to is in some cases, Sexual Oriented Offenders and Habitual Offenders, now have lifetime registration under Tier III.

This counsel would acknowledge that some components of Adam Walsh (S.B. 10) are broader than counsel would enact if he were a legislator, but few can dispute the terrible toll sex offenders bring to their victims and the desirability as a society of giving victims and parents of victims a fighting chance to protect themselves from such crimes. To be forewarned is to be forearmed.

Walsh (S.B. 10) ideally is an information gathering and disbursement instrument to allow Law Enforcement a head start in curbing serial crimes and to allow concerned citizens some protection and warning from those so classified. It is civil in nature and especially as applied to these Defendants.

RESPONSES TO PROPOSITIONS OF LAW

Response to Proposition of Law 1:

Appellants claim, applying S.B. 10 to offenders whose crimes occurred before its effective date violates the Ex Post Facto Clause of the United States Constitution.

Regularly enacted statutes are entitled to a presumption of constitutionality. It is said that it must be established beyond a reasonable doubt the statute is incompatible with the constitution before a Court may declare the statute unconstitutional. State ex rel. Dickman v. Defenbacher (1955) (16 Ohio St. 142).

The prior SORN Law, Megan's Law was held to be civil in nature and not punitive in intent or effect in State v. Cook (1998) 83 Ohio St 3d 404.

The United States Supreme Court agreed on similar statutes in Smith v. Doe (2003) 538 US 84.

Appellant argues that the prior statute was less burdensome and that "the frequency, duration and burdensomeness of registration, community notification increased from Oriented Offender to Habitual to Sexual Predators."

While different offenses are covered and offenders are in different categories, Adam Walsh (S.B. 10) remains a ratcheted and tiered system. Tier I is the least burdensome and this increases through Tier III.

According to Appellants, the offender's likelihood of committing future crimes is totally irrelevant under S.B. 10.

This is not true. The legislature instead has determined that numerous sex offenders will reoffend in large numbers. The amicus brief filed from Iowa argues that recidivism is small or on a par with other crimes. The weight of the arguments on recidivism is for the legislature as pointed out in State v. Ferguson, 20 Ohio St.3d 7 (2000). Appellee would note that where children are victims, there is less likelihood of the crimes being reported. The perpetrators, like Schwab and Phillips herein, are often trusted adult figures. So a known recidivism rate of 9/10 percent probably means a huge actual recidivism rate. One of the purposes of a strong on-line information site and community notification is to increase the chances of the reporting of these offenses. The likelihood and severity of the societal risk is greatest for enumerated offenses involving either Rape, or Sexual Battery, i.e. offenses of great violence or where there are child victims. Gone are the days where one could be convicted of voyeurism and end up a Predator based on a psychological exam.

Adam Walsh is based solely on the nature of the convicted offense and not on any individualized analysis of speculations on future dangerousness. Gone are all the claims of clear and convincing evidence and psychological prediction of high risk, low risk, low to medium, medium. It may be said that the law can know that a certain percentage of rapists will re-offend. There is statistical evidence that adult rape victims tend to live near the residences of repeat perpetrators. As to which defendants will re-offend, this is more speculative than we like to admit. Here, under Adam Walsh,

parents will be allowed to take precautions for their children. Women may take precautions. Being forewarned is being forearmed.

In the pre-Megan days, the original 2950 statute required Rape and repeat offenses; few were registered, but many sex crimes still occurred.

Adam Walsh (S.B. 10) retains Megan's language of remedial purpose. Appellants cite R.C. 2929.19(B)(4)(a) requiring the Court to include the statement in the Sentencing Entry that the offender is a Tier III sex offender.

Yet, this is not a change. Megan's Law approved in Cook required prison officials to cite on the prison file the Predator status of the offender.

Appellants also complain that failure to register results in criminal offenses. So does failing to file income tax returns or registering for the draft as well as the prior Megan's Law.

Appellants also claim that for these Defendants, registration increases from 10 years to life and this equates to punishment. Yet in Cook, this Court upheld convicted criminals going from zero registration to life or 10 or 20 years. Also, the Sixth Circuit upheld Tennessee's Megan's Law with all felony sex offender registration periods being determined by the nature of the felony conviction. Cutshall v. Sundquist 193 F. 3d 466 (6th Cir. 1999). In Cutshall, community notification was ordered by the Court based on dangerousness. But under Adam Walsh, none of these three defendants face community notification.

As the Sixth Circuit said, "The act provides for the collection and dissemination of information. Cutshall has not cited and we have not found any evidence that dissemination of information has historically been considered punishment."

The United States Supreme Court rejected a due process challenge where the statute predicated registration upon prior convictions and not upon current dangerousness in Connecticut Dept. of Public Safety v. Doe 538 U.S. 1 (2003).

Response to Proposition of Law 2:

Appellants claim S.B. 10 violates the Retroactivity Clause of the Ohio Constitution.

Simply because the United States Supreme Court has approved of sex offender registration systems in Smith v. Doe supra and Connecticut Dept. of Public Safety v. Doe and because the U.S. Supreme Court referred scoffingly to attacks on sexual offender registration as a novel use of double jeopardy in Hudson v. United States, 522 U.S. 93 (1997) citing E. B. v. Verniero 119 F. 3d 1077 (original challenge to New Jersey's Megan's Law), this Court may grant additional protection under the Ohio Constitution.

Appellants argue that these Defendants had run the gauntlet and had vested rights in their registration for 10 years in the cases of Bodyke and Phillips and 20 years in the case of Schwab.

Yet, Phillips thought he faced no registration at all when he was convicted. How vested is this right? The State relies on Bielat v Bielat (2000) 87 Ohio St.3d 350 for its analysis of vested rights. The State also points out the same was addressed in State v. Ferguson, 20 Ohio St.3d 7 (2000).

As the Court stated in Cook "Dissemination provisions do not impinge on any reasonable expectation of finality defendant may have had with regard to his conviction." A remedial law may have some substantive effect without altering its overarching remedial purpose. Cook, 411. The law is remedial. "We have no reason to

doubt that the additional disclosures uniformly required properly assist government in its pursuit of public safety.” In re GES 2008 Ohio-4076 Summit County Court of Appeals No. 24079 dcd. 8/13/2008.

As the 5th Appellate District said in Sigler v. State No. 08-CA-79 dcd. 4/27/09, “Nor can Appellee claim a reasonable expectation of finality because he was initially processed under the old system without community notification. No one has a vested right in having the law remain the same over time. If by relying on existing law arrangements in his affairs, a citizen were made secure against any change in legal rules, the whole body of our law would be ossified forever” citing East Liverpool v. Columbiana Cty. Budget Comm. 114 Ohio St. 3d 133.

If entirely new registration was permissible under Cook, a change is also reasonable.

Response to Proposition of Law 3:

Application of S.B. 10 to offenders previously classified vacates judicial orders and violates the separation of powers.

Again this reasoning was answered in the original Megan’s cases. Under Megan, the prison was to label inmates preliminarily. A system was set in place for prosecutor review and a judicial hearing. Under Adam Walsh, the Attorney General had no discretion. The A.G.’s office merely reviews the prior convictions and places the Defendants in certain categories. The Appellees have acknowledged herein that they have been placed in the proper categories under the statute and a hearing was afforded each of these Defendants. Each was allowed to avoid the community notification provisions.

The legislature has enacted bills requiring forfeiture of certain professional licenses for failing to pay child support not in effect when the licenses were obtained. Felons have been removed from voting rolls following the Community Control sentencing enacted in 1996.

Because Megan's Law and Adam Walsh are principally remedial laws, the Appellants reliance on State v. Sterling 113 Ohio St.3d 255 (2007) is misplaced.

Response to Proposition of Law 4:

Appellants claim Adam Walsh (S.B. 10) cannot be applied to previously classified individuals because of double jeopardy.

This requires the acceptance that registration is punishment. This view has been disputed by the Court in both Cook and Ferguson and by the United State Supreme Court. As applied to these Defendants, it involves registration requirements only because community notification was dispensed with.

Registration does allow law enforcement and the public to know where the Defendant lives which is true under Cook and where the Defendant works and goes to school, which also was required under the law reviewed in Ferguson.

This device allows a convenient clearing house for the public to access information about sex offenders.

As Cook noted criminal convictions have long been public records. "The harsh consequences of classification and notification come not as a direct result of the sexual offender law, but instead as a direct societal consequence of the offender's past actions." Sigler page 15.

In the trial Court, Richland County Common Pleas Judge DeWeiss, quoted by the Appellants' points out the criminal Defendants were very concerned about their

labeling. Yet, Adam Walsh, actually tries to tame the labeling by removing the nomenclature of Sexual Predator. The nature of the sexual offenses committed should require Appellants to be ashamed of what they have done.

In the cases of Phillips and Schwab, small children were impacted for life. The knowledge by similar defendants in Judge DeWeese's Court is to see that their neighbors and the public will know what they have done is a terrible thing, but it is not punishment. The label "felon" is a severe label but it does not constitute the punishment for the crime.

As some commentators have pointed out, the issue is "Does one have a right as a convicted sex offender to return to anonymity?" Other than in the areas of sealing of criminal records which is limited, no such right exists for those convicted of crime. But it is not second punishment. The U.S. Supreme Court has rejected such claim in Hudson, supra.

And in State v. Ferguson, 20 Ohio St.3d 7 (2000) this Court pointed out deportation, deprivation of livelihood and financial support termination have not been considered sufficient to transform a regulatory measure into punishment.

Response to Proposition of Law 5:

Appellants claim applying S.B. 10 to Megan's Law violates Due Process and constitutes cruel and unusual punishment.

Before we can decide that cruelty is grossly disproportionate, one had to decide that the registration does constitute punishment. If it does not, one never gets to the disproportionate analysis.

In Hudson, supra the U.S. Supreme Court used a two –point inquiry. First, relying on Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), the Court listed factors as:

- 1) does the sanction include an affirmative disability or restriction
- 2) historically regarded as punishment
- 3) is scienter required
- 4) retribution and deterrence
- 5) is the behavior to which it applies already a crime
- 6) is there a legitimate alternative purpose
- 7) is it excessive in regards to its stated alternative purpose

Hudson went on to limit a prior holding in U.S. v. Halper 490 U.S. 435 (1989) which concentrated on the second point of inquiry i.e. is the sanction so grossly disproportionate to the harm as to constitute punishment?

Essentially, Appellants argue Sexually Oriented Offenders under Megan’s Law were those not likely to commit another offense. Actually, there was not clear and convincing evidence of the likelihood. From Appellants’ standpoint, that makes the new requirement of lifetime registration grossly disproportionate and thus punishment. But as the U.S. Supreme Court has pointed out they have skipped the first part of the Hudson analysis. As the Ferguson court noted that the legislation is not perfect is not the issue. Registration is not a disability or restraint; not punishment historically, require no scienter. It perhaps will deter some but is not retribution. Thus, registration is not punishment and cannot be double jeopardy.

Response to Proposition of Law 6:

Appellants say S.B. 10 violates the prior plea bargain to the extent of violation of the contract clause of the Ohio and U. S. Constitution.

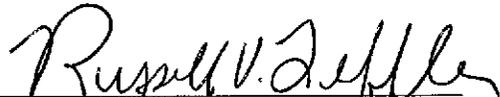
The State has not promised the General Assembly would not alter sex offender registration. All parties to the plea bargaining understand changes can occur. In the area of Gerald Phillips, his plea bargain did not require him to be labeled, the law did not exist. Yet, Cook, allowed the registration scheme. Registration is merely a collateral consequence of a plea. In the case of Bodyke, no bargain relating to his labeling occurred.

In Schwab, it is true, a stipulation occurred by the parties that he was an Habitual Offender. “If the General Assembly itself cannot bar future legislative actions then certainly an Executive Branch Officer cannot do so by a mere contract, especially a contract that is silent on the matter.” Sigler at 29.

CONCLUSION

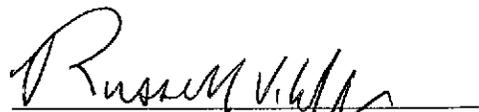
Wherefore, the State requests the decision of the Court of Appeals be affirmed.

Respectfully submitted,


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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing instrument was sent by ordinary U.S. mail or hand delivered to Jeffrey M. Gamso, Legal Director, American Civil Liberties Union of Ohio Foundation, Inc., 4506 Chester Avenue, Cleveland, Ohio 44103-3621 and John D. Allton, Esq., Hiltz, Wiedemann, Allton & Koch Co., L.P.A., 49 Benedict Avenue, Suite C, Norwalk, Ohio 44857 on the 31 day of August, 2009.


RUSSELL V. LEFFLER, #0026024
Huron County Prosecutor