

ORIGINAL

IN THE SUPREME COURT OF OHIO

ROBERT BURBRINK,
Petitioner-Appellant,

vs.

STATE OF OHIO,
Respondent-Appellee.

09-2108

Case No. _____

On Appeal from the Hamilton
County Court of Appeals
First Appellate District

Case No. C0801075

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ROBERT BURBRINK**

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NOV 19 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This Court has not yet ruled on the constitutionality of Ohio’s version of the federal Adam Walsh Act, Senate Bill 10 (“S.B. 10”). This case presents this Court with the opportunity to address the Hamilton County Court of Common Pleas’ decision, and Hamilton County Court of Appeals Presiding Judge Hendon’s dissenting opinion, that Mr. Burbrink should not be classified as a Tier III Sex Offender under S.B. 10 because that classification would violate the plea agreement that Mr. Burbrink entered into with the State of Ohio, and would amount to a breach of contract. Mr. Burbrink’s issue similarly affects hundreds of other defendants in Ohio.

This Court should accept jurisdiction in Mr. Burbrink’s case due to this Court’s acceptance of *State v. Bodyke, et. al.*, Case No. 2008-2502. This case presents one of the same issues that is before this Court in *Bodyke*—whether S.B. 10 impairs the obligation of contracts as protected by the Ohio and United States Constitutions.

STATEMENT OF THE CASE AND FACTS

On April 29, 2005, Robert Burbrink pleaded guilty to sexual battery in the Hamilton County Court of Common Pleas as part of a negotiated plea agreement. At the plea change hearing, the trial court noted that there was an agreement between Mr. Burbrink and the State that he would be classified as a sexually-oriented offender. The court explained to Mr. Burbrink that his registration requirement would be that he annually register as a sex offender for ten years, and that he would be subject to criminal charges if he failed to comply with his registration.

In 2007, Mr. Burbrink received notice from the Ohio Attorney General that he was going to be reclassified under the Adam Walsh Act (“S.B. 10”) as a Tier III Sex Offender, which carries the most onerous registration requirements of the three tiers created by that law. Mr.

Burbrink would now be required to register as a sex offender every ninety days for the rest of his life.

Mr. Burbrink petitioned the Hamilton County Court of Common Pleas to contest his reclassification under S.B. 10. On October 16, 2008, the trial court conducted a hearing on Mr. Burbrink's petition, and determined that Mr. Burbrink should not be reclassified under S.B. 10, but should remain a sexually-oriented offender, as that was the classification agreed upon by the State and Mr. Burbrink when he entered his guilty plea.¹ *Robert Burbrink v. State of Ohio*, Hamilton County C.P. No. SP-0800354, October 17, 2008 Entry.

The State of Ohio appealed. The First District Court of Appeals reversed, holding that Mr. Burbrink's reclassification under S.B. 10 did not breach his plea agreement. *Burbrink v. State*, 1st Dist. No. C-0801075, 2009-Ohio-2010. This memorandum timely follows.

¹ The Court's entry is captioned "Entry Denying Petition for Reclassification," but the entry itself states, "The Court denies the State's motion to reclassify. He remains a sexual offender with all reporting requirements in place." It is clear from the court's statements at the October 16, 2008 hearing that the court upheld Mr. Burbrink's sexually-oriented offender classification because it was part of his original plea agreement.

PROPOSITION OF LAW

Senate Bill 10 impairs the obligation of contracts as protected by the Ohio and United States Constitutions, when it is applied to offenders who, under an agreement with the State and before the Bill's effective date, entered a plea of guilty.

Mr. Burbrink's reclassification as a Tier III sex offender breaches the contract that the State made with Mr. Burbrink, and is a violation of the right to contract under the Ohio and United States Constitutions. A plea agreement is a contract that binds the State and is governed by principles of contract law. *State v. Butts* (1996), 112 Ohio App.3d 683, 686, 679 N.E.2d 1170; see, also, *Layne v. Ohio Adult Parole Authority*, 97 Ohio St.3d 456, 2002-Ohio-6719, 780 N.E.2d 548. Moreover, "the law in effect at the time a plea agreement is entered is part of the contract." *Ridenour v. Wilkinson*, 10th Dist. No. 07AP-200, 2007-Ohio-5965, ¶21. When a plea agreement is breached, the breach may be remedied by specific performance. *Santobello v. New York* (1971), 404 U.S. 257.

Mr. Burbrink resolved the criminal charges against him by entering into a plea agreement with the State of Ohio, and he understood that as part of that agreement, his sex offender classification would be that of a sexually-oriented offender. At his plea change hearing, the court stated what his registration requirements as a sexually-oriented offender would be—annual registration for ten years, and the risk of criminal charges for violating those requirements.

Senate Bill 10 eliminated Mr. Burbrink's right to reside where he wished. R.C. 2950.034. Moreover, Mr. Burbrink must register as a sex offender every ninety days for the rest of his life, instead of having to register annually, for a finite, ten-year period. R.C. 2950.07(B)(1). The State's enactment and retroactive application of S.B. 10 to reclassify Mr. Burbrink and impose new and additional obligations materially breached that plea agreement. That breach of Mr. Burbrink's plea agreement impaired an obligation of contract, which violated

Section 28, Article II of the Ohio Constitution and Article I, Section 10, Clause 1 of the United States Constitution (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts). As such, Mr. Burbrink is entitled to specific performance of the State’s obligation not to impose any additional obligations beyond his original agreement.

CONCLUSION

This case involves a substantial constitutional question, as well as a question of public or great general interest. This Court should grant jurisdiction, and hold this case for its decision in *State v. Bodyke, et. al.*, Case No. 2008-2502.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



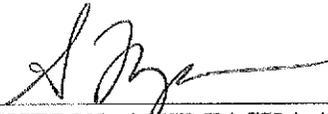
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ROBERT BURBRINK

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION has been sent by regular U.S. mail to Joseph T. Deters, Hamilton County Prosecuting Attorney, and Paula E. Adams, Assistant Hamilton County Prosecuting Attorney, 230 E. Ninth St., Suite 4000, Cincinnati, Ohio 45202, this ^{19th} day of November, 2009.



SHERYL A. TRZASKA #0079915
Assistant State Public Defender

COUNSEL FOR PETITIONER-APPELLANT,
ROBERT BURBRINK

IN THE SUPREME COURT OF OHIO

ROBERT BURBRINK,	:	
	:	Case No. _____
Petitioner-Appellant,	:	
	:	On Appeal from the Hamilton
vs.	:	County Court of Appeals
	:	First Appellate District
STATE OF OHIO,	:	
	:	Case No. C0801075
Respondent-Appellee.	:	

**APPENDIX TO MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ROBERT BURBRINK**

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

ROBERT BURBRINK,
Petitioner-Appellee,

APPEAL NO. C-081075
TRIAL NO. SP-0800354

vs.

FILED
COURT OF APPEALS

DECISION.

STATE OF OHIO,
Respondent-Appellant.

OCT - 9 2009

PRESENTED TO THE CLERK
OF COURTS FOR FILING

FATH
CLERK OF COURTS
HAMILTON COUNTY

OCT 09 2009

COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: October 9, 2009

Herbert J. Haas, for Petitioner-Appellee,

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

FILED
OCT - 9 2009
CLERK OF COURTS
HAMILTON COUNTY

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



D85396431

SUNDERMANN, Judge.

{¶1} On April 29, 2005, petitioner-appellee Robert Burbrink pleaded guilty in a plea bargain to sexual battery in violation of R.C. 2907.03(A)(3). Prior to accepting the plea, the trial court stated, "There is an agreement that he be a sexually-oriented offender." Defense counsel stated that he had explained to Burbrink that sexually-oriented offender was the lowest classification. The court informed Burbrink about his registration requirements. The court then accepted the plea, found Burbrink guilty of sexual battery, imposed sentence, and found that Burbrink was a sexually-oriented offender. Under former R.C. Chapter 2950, Burbrink was required to annually register as a sexual offender for ten years.

{¶2} 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 amended various sections of R.C. Chapter 2950. Burbrink 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.

{¶3} On February 14, 2008, Burbrink filed a petition contesting his reclassification. At the October 16, 2008, hearing on Burbrink's petition, defense counsel submitted a copy of the transcript of the April 29, 2005, plea hearing. The trial court stated, "And then as part of the plea we talked about what classification he was going to be, and that was all part of the whole agreement of the case." The court further stated, "I don't think - - I don't like to go back on deals when you promise somebody something. * * * I'll grant your motion contesting reclassification based on the fact that I think there was an agreement here." The court noted that Burbrink would still have to register as a sexually-oriented offender until the ten years expired.

{¶4} We note that the trial court's entry, captioned "entry denying petition for reclassification," is confusing. The court's entry states that "the court denies the

state's motion to reclassify. He remains a sexual offender with all reporting requirements in place." It is clear from the record that the court granted Burbrink's petition to contest his reclassification and determined that Burbrink was not subject to Senate Bill 10's tier-classification and registration requirements.

{¶5} The state has appealed and has raised one assignment of error for our review, which alleges that "the trial court erred in finding that a plea agreement as to a criminal charge constituted a contractual agreement as to a sexual offender's registration duties." The state argues that the retroactive application of Senate Bill 10's tier-classification and registration requirements did not violate the Contract Clause of the Ohio and United States Constitutions because it did not impair Burbrink's rights under any contract with the state of Ohio that, under his plea agreement, he would be obligated to register as a sex offender for only ten years. The application of Senate Bill 10's registration requirements, the state argues, does not constitute a breach of Burbrink's plea agreement or an impairment of his right to contract.

{¶6} Burbrink argues that reclassifying him as a Tier III sex offender under Senate Bill 10 would constitute 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.

{¶7} Section 28, Article II of the Ohio Constitution and Clause I, Section 10, Article I of the United States Constitution provide that no laws shall be passed that impair the obligation of contracts. "[A]ny change in the law which impairs the rights of either party, or amounts to a denial or obstruction of the rights accruing by contract, is repugnant to the Constitution."¹ Plea agreements are contracts between

¹ See *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 503 N.E.2d 753.

OHIO FIRST DISTRICT COURT OF APPEALS

the state and criminal defendants.² Principles of contract law are applicable to the interpretation and enforcement of plea agreements.³

{¶8} The Fifth Appellate District stated in *Sigler v. State*⁴ that the “real issue is whether the law” in effect at the time the defendant entered into his plea bargain “provided that the General Assembly could change things, and * * * ex post facto and retroactivity principles do allow the General Assembly to impose new community notification on prior offenders. ‘Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.’”⁵

{¶9} At the time he entered his plea, Burbrink had no reasonable expectation that his sex offense would never be made the subject of future sex-offender legislation and no vested right concerning his registration duties.⁶ “[W]here no vested right has been created, ‘a later enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, unless the past transaction or consideration * * * created at least a reasonable expectation of finality.’”⁷ Sex offenders have no expectation of finality in the consequences of the judgments against them.⁸ The state could not and did not contract to bar the legislature from modifying sex-offender registration and notification statutes.⁹ Burbrink had no vested contractual right with which the legislature could interfere.¹⁰

² See *State v. Netherland*, 4th Dist. No. 08CA3043, 2008-Ohio-7007, citing *State v. Adkins*, 161 Ohio App.3d 114, 2005-Ohio-2577, 829 N.E.2d 729.

³ See *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150; *State v. Vega*, 1st Dist. No. C-020486, 2003-Ohio-1548.

⁴ 5th Dist. No. 08-CA-79, 2009-Ohio-2010.

⁵ See *id.*, citing *El Paso v. Simmons* (1965), 379 U.S. 497, 85 S.Ct. 577.

⁶ See *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, 700 N.E.2d 570.

⁷ See *id.*, citing *State ex rel. Maltz v. Brown* (1988), 37 Ohio St.3d 279, 525 N.E.2d 805; *State v. Randlett*, 4th Dist. No. 08CA3046, 2009-Ohio-112.

⁸ See *State v. Cook*, *supra*, at fn. 5; *Sewell v. State*, 181 Ohio App.3d 280, 2009-Ohio-872, 908 N.E.2d 995.

⁹ See *Sigler v. State*, *supra*, at fn. 3.

¹⁰ See *State v. Randlett*, *supra*; *Gildersleeve v. State*, 8th Dist. Nos. 91515 through 91519 and 91521 through 91532, 2009-Ohio-2031; *Moran v. State*, 12th Dist. No. CA2008-05-057, 2009-Ohio-1840; *Ritchie v. State*, 12th Dist. No. CA2008-07-073, 2009-Ohio-1841.

OHIO FIRST DISTRICT COURT OF APPEALS

Therefore, the retroactive application of Senate Bill 10's tier-classification and registration requirements does not violate the Contract Clause of the Ohio and United States Constitutions.

{¶10} Future sex-offender registration and notification statutes are remedial and not punitive.¹¹ They are not punishment and they are not part of any sentence imposed on the sex offender.¹² The new tier-classification and registration requirements are merely collateral consequences of the underlying criminal offense.¹³ Therefore, they do not affect any plea agreement previously entered between the state and the defendant.¹⁴

{¶11} Under former R.C. Chapter 2950, Burbrink was a sexually-oriented offender by operation of law. The state fulfilled its part of the plea agreement by not requesting a higher sexual-offender classification under the former law. The trial court accepted the plea agreement and classified Burbrink as a sexually-oriented offender. Once Burbrink had pleaded guilty and the trial court had sentenced him, both Burbrink and the state had performed their respective parts of the plea agreement.¹⁵ No action taken after that time could have breached the plea agreement.¹⁶ The assignment of error is sustained.

{¶12} The judgment of the trial court is reversed, and the cause is remanded with instructions to the trial court to enter an order that Burbrink is subject to Senate Bill 10's tier-classification and registration requirements as a Tier III sex offender.

Judgment reversed and cause remanded.

DINKELACKER, J., concurs separately.
HENDON, P.J., dissents.

¹¹ See *Sewell v. State*, supra, at fn. 7.

¹² See *id.*

¹³ See *State v. Paris*, 3rd Dist. No. 2-2000-04, 2000-Ohio-1886.

¹⁴ See *In re J.M.*, 8th Dist. No. 91800, 2009-Ohio-2880; *State v. Patterson*, 6th Dist. No. E-08-052, 2009-Ohio-1817; *State v. Paris*, supra, at fn. 12.

¹⁵ See *In re J.M.*, supra, at fn. 10; *State v. Netherland*, supra, at fn. 1; *Slagle v. State*, 145 Ohio Misc.2d 98, 2008-Ohio-593, 884 N.E.2d 109.

¹⁶ See *id.*

DINKELACKER, Judge, concurring.

{¶13} I concur with the foregoing well-reasoned decision. I further write separately because I would also hold that the record in this case does not support the trial court's finding that there was an agreement between the state and Burbrink as to his sexual-offender classification and registration requirements. For a court to enforce a contract, the record must contain evidence of the terms of the contract. The record does not demonstrate that a ten-year registration requirement was a term of Burbrink's plea agreement.

{¶14} Under former R.C. Chapter 2950, Burbrink was classified by operation of law as a sexually-oriented offender. As a sexually-oriented offender, Burbrink had to register annually for ten years. The ten-year registration requirement existed by operation of law and not by virtue of any plea agreement.

HENDON, Presiding Judge, dissenting.

{¶15} I respectfully dissent. Both the Ohio and the United States Constitutions provide that no laws shall be passed that impair the obligations of contracts.¹⁷ Any change in the law impairing the rights of parties to a contract, or denying or obstructing the rights accruing to either party under a contract, is unconstitutional.¹⁸

{¶16} A plea agreement is a contract between a criminal defendant and the state that is governed by contract-law principles.¹⁹ The law in effect at the time a plea is entered is part of the contract.²⁰ The nature of the plea agreement must be

¹⁷ See Section 28, Article II, Ohio Constitution; Clause I, Section 10, Article I, United States Constitution.

¹⁸ See *Kiser v. Coleman*, supra, at fn. 1.

¹⁹ See *Ridenour v. Wilkinson*, 10th Dist. No. 07AP-200, 2007-Ohio-5965, citing *Ankrom v. Hageman*, 10th Dist. No. 04AP-984, 2005-Ohio-1546, *State v. Butts* (1996), 112 Ohio App.3d 683, 679 N.E.2d 1170, and *Santobello v. New York* (1971), 404 U.S. 257, 92 S.Ct. 495.

²⁰ See *id.*

examined to determine the understanding of the parties at the time of the plea.²¹ The United States Supreme Court stated in *Santobello v New York*²² that "when 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."

{¶17} Burbrink resolved the criminal charge against him by entering into a plea agreement with the state of Ohio. Prior to accepting the plea, the trial court stated that there was an agreement that Burbrink was to be classified as a sexually-oriented offender. In fact, the trial court informed Burbrink about his registration requirements as a sexually-oriented offender before accepting the plea. There was a clear meeting of the minds between the prosecutor and Burbrink that he was to be classified as a sexually-oriented offender and that he would be required to register as a sex offender annually for ten years. The record supports the trial court's determination that Burbrink's sexual-offender classification under former R.C. Chapter 2950 was a bargained-for term of the plea agreement.

{¶18} I would hold that the plea agreement entered by Burbrink and the state was a valid contract, the terms of which provided that Burbrink was to be classified as a sexually-oriented offender with a ten-year annual registration requirement, and that applying Senate Bill 10 to change Burbrink's classification and registration requirements violates the constitutional prohibition against laws that impair the obligation of contracts. I would affirm the judgment of the trial court.

Please Note:

The court has recorded its own entry this date.

²¹ See *State v. Pointer*, 8th Dist. No. 85195, 2005-Ohio-3587, at ¶7.

²² See, *Santobello*, supra, at fn. 17.

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

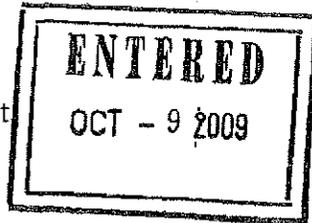
ROBERT BURBRINK,
Petitioner-Appellee,

: APPEAL NO. C-081075
: TRIAL NO. SP-0800354

vs.

: *JUDGMENT ENTRY.*

STATE OF OHIO,
Respondent-Appellant



This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is reversed and cause remanded for the reasons set forth in the Decision filed this date.

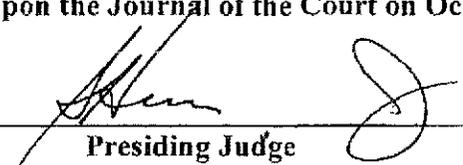
Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on October 9, 2009 per Order of the Court.

By: _____


Presiding Judge



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