

[Cite as *State v. Sabol*, 2010-Ohio-993.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellant	:	C.A. CASE NOS. 23220 23374
v.	:	T.C. NO. 08 CR 960 08 CR 4168
RICHARD C. SABOL	:	(Criminal appeals from Common Pleas Court)
Defendant-Appellee	:	

**OPINION**

Rendered on the 12<sup>th</sup> day of March, 2010.

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FROELICH, J.

{¶ 1} This is a consolidated appeal by the State of Ohio from two judgments of the Montgomery County Court of Common Pleas, which dismissed indictments against Richard Sabol in two cases on the ground that R.C. Chapter 2950, as amended by Senate Bill 10, is unconstitutional. Sabol has not filed an appellate brief in either appeal. For the following reasons, the trial court’s judgment will be

reversed, and the cases will be remanded for further proceedings.

I

{¶ 2} In May 1998, Sabol was convicted of rape, in violation of R.C. 2907.02, in the Montgomery County Court of Common Pleas. The court sentenced him to six years in prison, and he was designated a sexually oriented offender under Ohio's Sex Offender Registration and Notification Act, R.C. Chapter 2950 ("SORN"). Under SORN, Sabol was required to register annually for ten years. In 1999, we affirmed Sabol's conviction. *State v. Sabol* (Sept. 30, 1999), Montgomery App. No. 17274.

{¶ 3} In 2007, the General Assembly enacted Senate Bill 10 ("S.B. 10") to implement the federal Adam Walsh Child Protection and Safety Act of 2006. Among other changes, S.B. 10 modified the classification scheme for offenders who are subject to the Act's registration and notification requirements. S.B. 10 created a three-tiered system, in which a sex offender's classification is determined based on the offense of which the offender was convicted.

{¶ 4} In accordance with S.B. 10, the Ohio Attorney General sent a notice to Sabol, informing him of recent changes to SORN and that he had been reclassified as a Tier III sex offender. As a Tier III sex offender, Sabol is required to register with the local sheriff's office every 90 days for life and is subject to community notification. According to the notice, Sabol was to report to the Sheriff's Office on February 22, 2008.

{¶ 5} In his motion to dismiss before the trial court, Sabol stated that the Attorney General's notice was returned to the Attorney General's Office unclaimed.

When Sabol did not appear at the Sheriff's Office on February 22, 2008, the Sheriff's Office sent a seven day warning letter to Sabol's last known address, advising him to verify his current address. This letter was also returned unclaimed.

On March 3, 2008, a sheriff's detective unsuccessfully attempted to contact Sabol by telephone and in person at his last known address.

{¶ 6} On March 20, 2008, Sabol was indicted for failure to verify his address, as required by R.C. 2950.06. Montgomery C.P. No. 2008 CR 960. Sabol moved to dismiss the indictment on the ground that S.B. 10 was unconstitutional. He argued that retroactive application of S.B. 10 violated the prohibitions on ex post facto laws, retroactive laws, and double jeopardy. He further claimed that reclassification violated the separation of powers doctrine and his right to procedural due process, substantive due process, and privacy. Sabol requested a stay of the application of S.B. 10 until the constitutionality of the statute could be determined.<sup>1</sup>

{¶ 7} On October 28, 2008, Sabol was indicted for three counts of failure to notify, in violation of R.C. 2950.05(D) and (F)(1). Montgomery C.P. No. 2008 CR 4168. In December 2008, the trial court found in Case No. 2008 CR 960 that S.B. 10 was unconstitutional and dismissed the indictment against Sabol for failure to verify. The court concluded that the reclassification "impermissibly interferes with

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<sup>1</sup>Sabol also filed objections to his reclassification in his original criminal case, Montgomery C.P. No. 1997 CR 1651. The objections were heard by a different judge of the common pleas court. In October 2008, the trial court in his original criminal case overruled his objections. Relying on *State v. Barker*, Montgomery App. No. 22963, 2009-Ohio-2774, we affirmed that judgment. *State v. Sabol* (June 23, 2009), Montgomery App. No. 23099.

the Court's discretion and prior ruling" and thus violated the separation of powers doctrine. The trial court further found that S.B. 10 violated the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution. The State moved for reconsideration of the trial court's decision and for a stay of judgment; the trial court did not rule on these requests.

{¶ 8} Relying on the court's ruling in Case No. 2008 CR 960, Sabol subsequently moved to dismiss the indictment in Case No. 2008 CR 4168. The trial court granted the motion, reasoning:

{¶ 9} "\*\*\*\* The State has recognized that the facts and circumstances of the 2008 indictments for failure to register by the Defendant pursuant to S. B. 10 requirements was a failure due to requirements added by S. B. 10 which did not exist under the old law. Accordingly, and for the reasons set forth in this Court's decision in *State of Ohio v. Richard Sabol*, Case No. 08CR960, the Defendant's Motion to Dismiss is **sustained** by reason of the unconstitutionality of the statute.

{¶ 10} "The State's reliance on the 2<sup>nd</sup> District Court's decision of *State of Ohio v. Robert D. Moore*, Case No. 07CA093 is misplaced for the reason that the constitutional grounds urged in that case, being

{¶ 11} ". violation of Section 28, Article 2 of the Ohio Constitution

{¶ 12} ". Ex Post Facto Clause violation Article 1, section 10 of the U.S. Constitution

{¶ 13} were not a basis for this Court's finding of unconstitutionality by reason of the legislature's unlawful intrusion into a legitimate judicial function in which the legislature sought to undo previous judicial decisions.

{¶ 14} “Accordingly, and to the extent that statute disturbs this Court’s prior determination of S.O.R.N. requirements, the statute is unconstitutional and the indictment upon which it rests is dismissed.”

{¶ 15} The State appeals from the dismissals of the indictments in Case Nos. 2008 CR 960 and 2008 CR 4168. We ordered the cases consolidated for purpose of appeal.

## II

{¶ 16} The State’s sole assignment of error states:

{¶ 17} “THE TRIAL COURT ERRED WHEN IT DISMISSED SABOL’S INDICTMENT FOR FAILURE TO VERIFY FINDING THAT SENATE BILL 10 VIOLATED SABOL’S CONSTITUTIONAL RIGHTS.”

{¶ 18} We have previously addressed and rejected each of the trial court’s bases for finding S.B. 10 unconstitutional.

{¶ 19} In *State v. Desbiens*, Montgomery App. No. 22489, 2008-Ohio-3375, we held that S.B. 10 does not offend the Ex Post Facto Clause of the United States Constitution, because S.B. 10 is civil and non-punitive and the Ex Post Facto Clause applies only to criminal statutes. *Id.* at ¶30. We reiterated that holding in *State v. Moore*, Greene App. No. 07CA093, 2008-Ohio-6238, and further held that S.B. 10 does not violate the Retroactivity Clause of the Ohio Constitution. *Id.* at ¶28. Because S.B. 10 is civil and non-punitive, it likewise does not violate the Double Jeopardy Clause. *State v. Heys*, Miami App. No. 09-CA-04, 2009-Ohio-5397, ¶17.

{¶ 20} In Case No. 2008 CR 4168, the trial court relied primarily on the

separation of powers doctrine to hold that S.B. 10 was unconstitutional. We rejected this basis in *State v. Barker*, Montgomery App. No. 22963, 2009-Ohio-2774, which was decided after the trial court's rulings in these cases. In *Barker*, the defendant claimed that the legislature violated the separation of powers doctrine when it enacted S.B. 10 by unilaterally changing the sexual classification she received in 1997 under previous legislation. Barker argued that the trial court made a judicial determination when she was classified a sexually oriented offender in 1997, and that the State, by applying the provisions of S.B. 10, unilaterally changed that result to a Tier III sex offender, with harsher registration and notification requirements. We rejected Barker's argument, reasoning, in part:

{¶ 21} “\*\*\* [T]he new Tier classifications under S.B. 10 operate as a matter of law, not by judicial determination. S.B. 10 abolished the former classifications of sexually oriented offenders, habitual sex offenders, or sexual predators. A legal designation of a ‘sexual predator,’ which previously required a hearing, no longer exists. See, e.g., *State v. Williams*, Warren App. No. 2008-02-029, 2008-Ohio-6195, ¶15. Rather, sex offenders are now classified within Tiers based solely on the offense of their conviction. *Id.*, ¶16, quoting *State v. Clay*, 177 Ohio App.3d 78, 893 N.E.2d 909, 2008-Ohio-2980.

{¶ 22} “S.B. 10 also provides for the reclassification of all offenders who were classified and still had duties under the former law when S.B. 10 came into effect. The act of reclassifying sex offenders does not encompass a judicial determination, but it is determined solely upon the offense for which the offender was convicted. Nor does it disturb a prior judicial determination. For example, a

sex offender who received a sexual predator hearing where the judge judicially determined that there was a likelihood of recidivism and that the offender would have to register every 90 days for life was automatically reclassified to a Tier III offender, which contains the same registration requirements as before.” *Id.* at ¶ 9-10.

{¶ 23} Although the trial court did not expressly address Sabol’s arguments based on procedural and substantive due process, we addressed procedural and substantive due process arguments in *Heys*. There, *Heys* argued that the new requirements of S.B. 10 denied him procedural due process because he has a vested right, or liberty interest, in his original classification and registration requirements and, therefore, he was entitled to notice and the opportunity to be heard prior to the reclassification and attendant requirements taking effect. We rejected his argument, stating: “*Heys* has no vested interest or settled expectation in his previous classification and requirements because ‘a convicted felon has no reasonable expectation that his or her criminal conduct will not be subject to further legislation,’ including the registration requirements of R.C. Chapter 2950.” *Heys* at ¶11. We further noted that no liberty interest was implicated, because S.B. 10 was non-punitive in nature. *Id.* at ¶12.

{¶ 24} *Heys* had further claimed that he was denied substantive due process, because his property interest is hindered by the residency requirements. We noted, initially, that an individual must actually suffer a deprivation of property rights in order to have standing to challenge the constitutionality of the residency restriction. *Id.* at ¶14; *State v. Hall*, Montgomery App. No. 22969, 2009-Ohio-3020,

¶16-17. Because Sabol has not alleged, much less established, that he has been deprived of his property rights, he lacks standing to challenge the residency restrictions. However, even if Sabol had standing, we have previously rejected his assertion that the residency restrictions impose an unconstitutional restraint and infringe on a fundamental right. *State v. King*, Miami App. No. 08-CA-02, 2008-Ohio-2594, ¶16; *Hall* at ¶20-22.

{¶ 25} Based on our respect for stare decisis and our prior opinions holding S.B. 10 to be constitutional, the State's assignment of error is sustained.

### III

{¶ 26} The judgments of the trial court will be reversed, and the cases will be remanded for further proceedings.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

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