

[Cite as *State v. Zerla*, 2010-Ohio-749.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 08 JE 8
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
TERRANCE E. ZERLA)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Jefferson County, Ohio Case No. 07 MI 15
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JUDGMENT:	Affirmed.
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APPEARANCES:

For Plaintiff-Appellee:	Atty. Thomas R. Straus Prosecuting Attorney Jefferson County Justice Center 16001 State Route 7 Steubenville, Ohio 43952
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For Defendant-Appellant:	Terrance E. Zerla, Pro se 139 Forestview Drive Wintersville, Ohio 43953
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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: February 24, 2010

WAITE, J.

{¶1} Appellant, Terrance E. Zerla, acting pro se, appeals his reclassification as a Tier III sex offender pursuant to the “Sex Offender Registration and Notification Act,” found in R.C. Chapter 2950, effective January 1, 2008 (“S.B. 10”). On December 28, 2007, Appellant filed a petition contesting his reclassification under the amended registration and notification statutes. On January 17, 2008, the Jefferson County Court of Common Pleas concluded that Appellant had failed to prove by clear and convincing evidence that the new registration requirements do not apply to him and denied his requested relief. This timely appeal followed.

{¶2} Appellant was convicted on August 24, 1993 following a jury trial in the Franklin County Court of Common Pleas on one count of kidnapping and three counts of rape. He was sentenced to a prison term of 10 to 25 years on each count. See *State v. Zerla* 10th Dist. No. 04AP-1087, 2005-Ohio-5077. On August 10, 2004, the common pleas court conducted a hearing pursuant to former R.C. 2950.09 and ultimately classified Appellant as a “sexually oriented offender” in a September 2, 2004, judgment entry. Due to his classification under the former statute, Appellant had a duty to register annually for a period of ten years. Pursuant to S.B. 10, Appellant must register in person with the local sheriff’s office every ninety days for life.

{¶3} Appellant asserts numerous constitutional challenges to the amended classification and registration requirements in S.B. 10. Because appellate courts from every district in Ohio have previously rejected arguments identical to those raised by Appellant, his sole assignment of error is overruled.

Assignment of Error

{¶4} “The retroactive application of Senate Bill 10 violates the Ex Post Facto, Due Process, and Double Jeopardy Clauses of the United States Constitution and the Retroactivity Clause of Section 28, Article II of the Ohio Constitution, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution; Section 10, Article I of the United States Constitution; and Sections 10 and 28, Articles I and II, respectively, of the Ohio Constitution.”

{¶5} Appellant’s assignment of error tracks word for word the assignment of error raised in *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051. However, in his brief, Appellant limits his analysis to his ex post facto, due process, separation of powers, and retroactivity clause claims. In *Byers*, we summarized the practical effect of S.B. 10 on Ohio’s sex offender registration requirements as follows:

{¶6} “Under pre-Senate Bill 10, depending on the crime committed and the findings by the trial court at the sexual classification hearing, an offender who committed a sexually oriented offense that was not registry exempt could be labeled a sexually oriented offender, a habitual sex offender, or a sexual predator. Each classification required registration and notification requirements. For instance, for a sexually oriented offender, the registration requirement was once annually for 10 years and there was no community notification requirement; for a habitual sex offender the registration requirement was for every 180 days for 20 years and the community notification could occur every 180 days for 20 years; and for a sexual

predator, the registration duty was every 90 days for life and the community notification could occur every 90 days for life.

{¶7} “Now, under Senate Bill 10, those labels are no longer used and the registration requirements are longer in duration. An offender who commits a sexually oriented offense is found to be either a ‘sex offender’ or a ‘child-victim offender’. Depending on what crime the offender committed, they are placed in Tier I, Tier II or Tier III. The tiers dictate what the registration and notification requirements are. Tier I is the lowest tier. It requires registration once annually for 15 years, but there are no community notification requirements. Tier II requires registration every 180 days for 25 years, but it also has no community notification requirements. Tier III, the highest tier and similar to the old sexual predator finding, requires registration every 90 days for life and the community notification may occur every 90 days for life.” *Id.*, ¶8-9.

{¶8} In *Byers*, we held that the registration and notification requirements of S.B. 10 were constitutional, relying in large measure on the Ohio Supreme Court’s decision in *State v. Cook* (1998), 83 Ohio St.3d 404, 700 N.E.2d 570. In that case, the previous version of R.C. Chapter 2950 survived the same challenges asserted by *Byers* and Appellant to the current version. Furthermore, we acknowledged in *Byers* that the post-*Cook* Supreme Court has consistently held that sex offender classifications are civil in nature. See *State v. Williams* (2000), 88 Ohio St.3d 513, 528, 728 N.E.2d 342; *State v. Wilson*, 113 Ohio St.3d 382, 865 N.E.2d 1264, 2007-Ohio-2202, ¶30.

{¶9} We first recognized in *Byers* that, “[s]tatutes enjoy a strong presumption of constitutionality,” and that such a presumption, “cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution.” (Internal citations omitted.) *Id.* at ¶11. With the foregoing rule of law in mind, we rejected each of Byers’ specific constitutional claims.

{¶10} Appellant in this case first asserts that S.B. 10 violates the Ohio Constitution’s separation of powers doctrine. “Although the Ohio Constitution does not contain explicit language establishing the doctrine of separation of powers, it is inherent in the constitutional framework of government defining the scope of authority conferred upon the three separate branches of government.” *State v. Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790, at ¶22. “The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others.” *State ex rel. Bryant v. Akron Metro. Park Dist.* (1929), 120 Ohio St. 464, 473, 166 N.E.2d 407.

{¶11} Appellant argues that the application of S.B. 10 divests the judiciary branch of its power to sentence a defendant by effectively overruling final orders of the court. In other words, Appellant contends that the judgment entry of the Franklin County Common Pleas Court classifying him as a “sexually oriented offender” is a final order, and the legislature violated the separation of powers doctrine by

reclassifying him as a Tier III sex offender through the application of S.B. 10. In *Byers*, we rejected the same claim, holding instead that the legislature does not abrogate a final judicial decision when it amends the law underlying that decision. *Id.* at ¶73.

{¶12} Next, Appellant argues that S.B. 10 violates the Ohio Constitution's retroactivity clause. After concluding that the general assembly intended that the S.B. 10 amendments would have retroactive application, we held in *Byers* that R.C. Chapter 2950 was remedial in nature, and, therefore, did not violate the retroactivity clause. *Id.* at ¶63, 69. Although we conceded that the registration and notification requirements were more burdensome than the earlier version of the statute, we acknowledged that *Cook*, *supra*, and *Wilson*, *supra*, were still controlling law. *Byers* at ¶69.

{¶13} Appellant also contends that S.B. 10 violates the Ohio Constitution's Due Process Clause. He argues that he had a substantive right and settled expectation in the sexual predator classification to which he was originally placed. The due process challenge raised in *Byers* was based on the S.B. 10's residency restrictions. Therefore, *Byers* does not govern Appellant's due process claim.

{¶14} In support of his argument, Appellant cites an Alaska Supreme Court case, *Doe v. State, Dept. of Public Safety* (2004), 92 P.3d 398. However, Ohio courts have distinguished *Doe* because the *Doe* Court decided the case strictly on an interpretation of the Alaska Constitution and because the conviction in that case was set aside by a court before imposition of the registration requirements. See *State v.*

Sewell, 4th Dist. No. 08CA3042, 2009-Ohio-594, ¶15, *State v. King*, 2d. Dist No. 08-CA-02, 2008-Ohio-2594, ¶32.

{¶15} In Ohio, “[e]xcept with regard to constitutional protections against *ex post facto* laws * * * felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.” (Emphasis in original.) *Cook* at 412, citing *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281-282, 525 N.E.2d 805. As a result, convicted sex offenders, “have no reasonable expectation that [their] criminal conduct would not be subject to future versions of R.C. Chapter 2950.” *King* at ¶33.

{¶16} Based on *Cook*, Ohio courts have held that, “convicted sex offenders have no reasonable ‘settled expectations’ or vested rights concerning the registration obligations imposed on them.” *Id.* Therefore, Appellant has no settled expectation regarding his registration obligations, and his reclassification as a Tier III sex offender did not deprive him of any liberty interest.

{¶17} Next, Appellant argues that S.B. 10 violates the Ex Post Facto and Double Jeopardy Clauses of the Ohio and Federal Constitutions. “[A]ny statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, * * * is prohibited as *ex post facto*.” *Beazell v. Ohio* (1925), 269 U.S. 167, 169-170, 46 S.Ct. 68, 70 L.Ed. 216. However, the Ex Post Facto Clause only applies to criminal statutes. *Cook* at 415.

{¶18} In *Byers*, we conceded that the S.B. 10 amendments to R.C. Chapter 2950 include greater registration and notification requirements and that the information provided on the internet may exceed the narrowly tailored dissemination of information that was contemplated by *Cook*. However, we ultimately concluded that *Cook* and *Wilson* are controlling law, and that it is clear that the Ohio Supreme Court is still of the opinion that the system of sex offender classification is remedial and not punitive in nature.

{¶19} Likewise, the threshold question in a double jeopardy analysis is whether the government's conduct involves criminal punishment. *Williams* at 528, 728 N.E.2d 342, citing *Hudson v. United States* (1997), 522 U.S. 93, 101, 118 S.Ct. 488, 139 L.Ed.2d 450. In *Williams*, the Ohio Supreme Court held that former R.C. Chapter 2950 did not violate the Double Jeopardy Clause, because that chapter was deemed to be remedial and not punitive by the Ohio Supreme Court in *Cook*. Since we found in *Byers* that amended R.C. Chapter 2950's sexual offender classification is remedial like its predecessor, we rejected the double jeopardy argument.

{¶20} In summary, every appellate district court in Ohio has held the registration and notification requirements of S.B. 10 are constitutional. See *Sewell v. State*, 1st Dist. No. C-080503, 2009-Ohio-872 (no retroactive law, double jeopardy, due process, or separation of powers violation); *State v. Desbiens*, 2d Dist. No. 22489, 2008-Ohio-3375 (no ex post facto or due process violation); *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234 (no ex post facto, retroactive law, or separation of powers violation) (currently before the Ohio Supreme Court); *State v. Longpre*, 4th

Dist. No. 08CA3017, 2008-Ohio-3832 (no ex post facto or retroactive law violation); *State v. Hughes*, 5th Dist. No.2008-CA-23, 2009-Ohio-2406 (no ex post facto, retroactive law, separation of powers, or double jeopardy violation); *State v. Bodyke*, 6th Dist. Nos. H-07-040, H-07-041, H-07-042, 2008-Ohio-6387 (no ex post facto, retroactive law, obligation of contract, separation of powers, substantive due process, double jeopardy, or cruel and unusual punishment violation); *State v. Holloman-Cross*, 8th Dist. No. 90351, 2008-Ohio-2189 (no ex post facto violation); *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076 (no ex post facto or separation of powers violation); *State v. Gilfillan*, 10th Dist. No. 08AP-317, 2009-Ohio-1104 (S.B. 10 is not punitive; no separation of powers or due process violation); *Adamson v. State*, 11th Dist. No. 2008-L-045, 2009-Ohio-6996; *Ritchie v. State*, 12th Dist. No. CA2008-07-073, 2009-Ohio-1841 (no separation of powers, retroactive law, ex post facto, double jeopardy, or right to contract violation). Accordingly, Appellant's sole assignment of error is overruled.

Donofrio, J., concurs.

DeGenaro, J., concurs.