

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

ALVIN R. HART,	:	APPEAL NO. C-090029
	:	TRIAL NO. SP-0800090
Petitioner-Appellant,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
STATE OF OHIO,	:	
	:	
Respondent-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

In 1984, petitioner-appellant Alvin R. Hart was convicted by court-martial in Fort Hood, Texas, of kidnapping, aggravated assault with intent to rape, and lewd and lascivious acts with a minor. Hart, who had been arguing with his wife and drinking, had come upon a mother and her three-year-old son who were taking a walk. When Hart approached, the mother attempted to fight off Hart and run. In the scuffle with Hart, the mother fell and broke her hand. Hart grabbed the child and drove away. Hart took the child to a country road, where he tried to make the boy perform fellatio. The child was so afraid that he urinated in his pants. Police later found the boy abandoned on a dirt road, wrapped naked in a blanket. The boy was in shock. The child had a handprint on his face, numerous bruises and scratches on his body, and a swollen face.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

When Hart moved to Ohio in 2006, he was administratively classified pursuant to former R.C. Chapter 2950 as a sexual predator. On July 31, 2006, in the case numbered M-060885, Hart filed a motion for reclassification under former R.C. 2950.09(F), challenging his classification as a sexual predator. Hart also filed a motion for a temporary restraining order to delay the posting of his sexual-predator classification on the Internet until all issues had been litigated. On September 29, 2006, the trial court journalized an entry in the case numbered M-060885, ordering the sheriff not to post Hart's sexual-predator classification on the Internet until further order of the court.

In November 2007, Hart received a notice from the Ohio Attorney General stating that he had been reclassified under Am.Sub.S.B. No. 10 ("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. The notice also stated that Hart was subject to Senate Bill 10's community-notification provisions. Hart filed an R.C. 2950.031(E) petition to contest his reclassification, challenging the constitutionality of Senate Bill 10. He also filed an R.C. 2950.11(F)(2) motion for immediate relief from the community-notification provisions. After a hearing, the trial court overruled Hart's constitutional challenges to Senate Bill 10 and denied his R.C. 2950.031(E) petition. The court also overruled Hart's R.C. 2950.11(F)(2) motion and found that he was subject to the community-notification provisions.

Hart's first assignment of error, which alleges that the retroactive application of Senate Bill 10's tier-classification and registration requirements violates the constitutional ban on ex post facto laws, is overruled.

“The Ex Post Facto Clause applies only to criminal statutes.”² We held in *Sewell v. State*³ that the tier-classification and registration provisions of Senate Bill 10 are remedial and not punitive, and that they do not have the effect of converting a remedial statute into a punitive one. Because Senate Bill 10’s classification and registration provisions are civil and remedial, not criminal, they do not violate the constitutional ban on ex post facto laws.

Hart’s second, third, and fourth assignments of error are overruled because the retroactive application of Senate Bill 10’s tier-classification and registration requirements does not violate the prohibition on retroactive laws contained in Section 28, Article II of the Ohio Constitution, the Double Jeopardy Clause of the Ohio Constitution, or the separation-of-powers doctrine.⁴ Hart’s arguments under the United States Constitution are also overruled on *Sewell’s* reasoning.

Hart’s fifth assignment of error is overruled. Hart has no standing to challenge Senate Bill 10’s residency restriction because he has not shown that he lives in or owns property within the restricted area or that he has been forced to move outside the restricted area.⁵ We note that the Ohio Supreme Court held in *Hyle v. Porter*⁶ that because the residency restriction in former R.C. 2950.031 was not expressly made retrospective, it could not be applied to an offender who had bought his home and committed his offense before the effective date of the statute.

Hart’s sixth and seventh assignments of error, which allege that reclassifying him as a Tier III sex offender under Senate Bill 10 constituted a breach of his plea

² See *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, 700 N.E.2d 570, citing *California Dept. of Corrections v. Morales* (1995), 514 U.S. 499, 504, 115 S.Ct. 1597, and *Collins v. Youngblood* (1990), 497 U.S. 37, 43, 110 S.Ct. 2715.

³ 181 Ohio App.3d 280, 2009-Ohio-872, 908 N.E.2d 995.

⁴ *Id.*

⁵ See *State v. Randlett*, 4th Dist. No. 08CA3046, 2009-Ohio-112; *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059; *State v. Duncan*, 3rd Dist. No. 7-08-03, 2008-Ohio-5830.

⁶ 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899.

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, are overruled.⁷ The retroactive application of Senate Bill 10's tier-classification and registration requirements to a sex offender who pleaded guilty to a sexually-oriented offense pursuant to a plea bargain does not violate the Contract Clause of the Ohio and United States Constitutions, because when the offender entered his plea he had no reasonable expectation that his sex offense would never be made the subject of future legislation and no vested right concerning his registration duties.⁸ Senate Bill 10's tier-classification and registration requirements are remedial, collateral consequences of the underlying criminal sex offense, and they do not affect a plea agreement previously entered between the state and the offender.⁹

The eighth assignment of error, alleging that the retroactive application of Senate Bill 10's registration requirements constitutes cruel and unusual punishment, is overruled because the statutes are civil and remedial, not punitive.¹⁰ Therefore, the registration requirements cannot be viewed as punishment.¹¹

Hart's ninth assignment of error alleges that the trial court abused its discretion in finding that Hart was subject to the community-notification provisions.¹²

⁷ Judge Mallory agrees that the sixth and seventh assignments of error are without merit not for the reasons given in the body of this judgment entry, but for the reasons set forth in his separate concurrence in *Nixon v. State*, 1st Dist. No. C-090219, 2010-Ohio-767.

⁸ See *White v. State*, 1st Dist. No. C-090177, 2010-Ohio-234; *Burbrink v. State*, 185 Ohio App.3d 130, 2009-Ohio-5346, 929 N.E.2d 626.

⁹ See *id.*

¹⁰ See *Sewell v. State*, *supra*, at fn. 3.

¹¹ See *id.*; *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195; *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051.

¹² Hart does not argue that he was entitled to a separate sexual-offender-classification hearing under former R.C. Chapter 2950.

Under Senate Bill 10, Tier III offenders are subject to community notification by the sheriff. R.C. 2950.11(F)(2) provides that the community-notification provisions do not apply “if a court finds at a hearing after considering the factors described in this division that the person would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment.” Under R.C. 2950.11(F)(2), the trial court has the discretion to determine whether a Tier III sex offender should be made subject to community notification.¹³ “[C]urrent R.C. 2950.11(F)(2) generally reflects a continuation of that prior discretion and authority that the court had in determining when community notification best serves the interest of justice.”¹⁴

R.C. 2950.11(F)(2) provides that the court shall consider the following factors in determining whether a Tier III sex offender would have been subject to the community-notification provisions under prior law: “(a) The offender’s * * * age; (b) The offender’s * * * prior criminal or delinquency record regarding all offenses, including, but not limited to all sexual offenses; (c) The age of the victim of the sexually oriented offense * * *; (d) Whether the sexually oriented offense * * * involved multiple victims; (e) Whether the offender * * * used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting; (f) If the offender * * * previously has been convicted of or pleaded guilty to * * * a criminal offense, whether the offender * * * completed any sentence * * * imposed for the prior offense and if the prior offense * * * was a sex offense or a sexually oriented offense, whether the offender * * * participated in available programs for sexual offenders; (g) Any mental illness or mental disability of the offender * * *; (h) The nature of the offender’s * * * sexual

¹³ See *State v. McConville*, ___ Ohio St.3d ___, 2010-Ohio-958, 925 N.E.2d 133, at ¶11; *Acheson v. State*, 12th Dist. No. CA2009-06-066, 2010-Ohio-1946, at ¶27

¹⁴ See *State v. McConville*, supra, at ¶12.

conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse; (i) Whether the offender * * * displayed cruelty or made one or more threats of cruelty; (j) Whether the offender * * * would have been a habitual sex offender or a habitual child victim offender under the definitions of those terms set forth in section 2950.01 of the Revised Code as that section existed prior to the effective date of this amendment; (k) Any additional behavioral characteristics that contribute to the offender's * * * conduct.”

Hart was 27 years old at the time of his offense, and his victim was three. The victim had bruises and scratches on his body, and he had a handprint on his swollen face, indicating cruelty and the use of force. While Hart had been incarcerated for his crimes, he had received a disciplinary report for disrespect and breach of the peace. He had violated his parole at some point, and he had been reincarcerated and then paroled again.

The trial court was provided with reports from the court clinic and a forensic psychologist. The reports revealed Hart's history of deviant sexual thoughts and behavior. There were unproved allegations that he had sexually abused the granddaughter of his partner at one time. Hart admitted to raping a woman in 1983. Hart acknowledged that he had had sexual fantasies about picking up hitchhikers and raping them. He also admitted to making obscene telephone calls, “typing dirty” to someone on the computer, peeking in windows and doors, and watching others having sex. Hart admitted that he had engaged in sexual conduct with a horse, had watched a dog lick his first wife's vagina, and had rubbed raw meat on his penis so that a dog would lick it. In the past, Hart had been diagnosed with Borderline Personality

Disorder. Hart's score on the Static-99 test placed him in the moderate-high risk category for recidivism.

Hart argued that the evidence showed that he had been extremely successful in his treatment; that he had lived offense-free for a significant time; that he was now in a stable relationship with his second wife; that he had addressed his substance-abuse problems; that he had maintained employment; that he had exhibited insight into his psychological problems; that the Static-99 test results, when adjusted for an individual who had lived in the community offense-free for at least four years, indicated a low to moderate risk for recidivism; and that his federal parole required him to be subject to polygraph evaluations, during which no deception had been detected.

Based upon our review of the record, we hold that the trial court did not abuse its discretion in finding that Hart is subject to the community-notification provisions. The ninth assignment of error is overruled. We note that our holding in this case nullifies the trial court's order entered September 29, 2006, in the case numbered M-060885.

Therefore, the judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., DINKELACKER and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on June 2, 2010

per order of the Court _____
Presiding Judge