

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

JOHN P. WILEY,	:	APPEAL NO. C-090859
	:	TRIAL NO. SP-0900072
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 the United States District Court for the Southern District of Ohio in 2006, petitioner-appellant John P. Wiley pleaded guilty to and was convicted of possession of images of a minor engaging in sexually explicit conduct. He was sentenced to 41 months' incarceration. The record does not contain a court order classifying Wiley as a sexual offender. When Wiley was released from prison, a federal probation officer designated him a Tier II sex offender under the federal sex-offender notification law, requiring him to "report in person every six months" and to "remain registered for 25 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. Wiley was notified that he had been classified under Senate Bill 10 as a Tier II sex offender and

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

² Subsection 16913, Article 42, U.S.Code.

that he was required to register with the local sheriff every 180 days for 25 years. Wiley filed an R.C. 2950.031(E) petition to contest his reclassification, challenging the constitutionality of Senate Bill 10. After a hearing, the trial court overruled Wiley's constitutional challenges to Senate Bill 10 and denied his R.C. 2950.031(E) petition. The court found that Wiley's correct classification was a Tier II sex offender.

Wiley'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."³ We held in *Sewell v. State*⁴ 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.

Wiley's second 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 or the Double Jeopardy Clause of the Ohio Constitution.⁵ Wiley's arguments under the United States Constitution are also overruled on *Sewell's* reasoning.

Wiley's third assignment of error alleges that his reclassification as a Tier II sex offender under Senate Bill 10 violates the separation-of-powers doctrine. We addressed

³ 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.

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

⁵ *Id.*

and rejected that argument in *Sewell v. State*,⁶ holding that the retroactive application of Senate Bill 10’s tier-classification and registration requirements did not violate the separation-of-powers doctrine. In *Green v. State*,⁷ we revisited the separation-of-powers issue in light of the Ohio Supreme Court’s decision in *State v. Bodyke*.⁸ The supreme court held in *Bodyke* that “R.C. 2950.031 and 2950.032, which require the attorney general to reclassify sex offenders whose classifications have already been adjudicated by a court and made the subject of a final order, violate the separation-of-powers doctrine by requiring the reopening of final judgments.”⁹ Further, the *Bodyke* court held that the statutes violate the separation-of-powers doctrine because they “impermissibly instruct the executive branch to review past decisions of the judicial branch.”¹⁰ We held in *Green* that the supreme court’s decision in *Bodyke* did not apply to cases in which there is no prior court order classifying the offender under a sex-offender category.¹¹ In cases where there has been no prior judicial adjudication of the offender under a sex-offender category, our holding in *Sewell* is still applicable.¹²

Although the record does not contain a prior court order classifying Wiley under a sex-offender category, it does not provide a sufficient basis for us to reliably determine whether the *Bodyke* decision applies to him, and whether his reclassification under Senate Bill 10 violates the separation-of-powers doctrine.¹³ This case must be remanded to the trial court for a determination as to whether Wiley was classified under a sex-offender category by a court, and if he was so classified, what his prior

⁶ Id.

⁷ *Green v. State*, 1st Dist. No. C-090650, 2010-Ohio-4371.

⁸ ___ Ohio St.3d ___, 2010-Ohio-2424, ___ N.E.2d ___.

⁹ See id. at paragraph three of the syllabus.

¹⁰ See id. at paragraph two of the syllabus.

¹¹ See *Green v. State*, supra, ¶9, at fn. 7.

¹² See id.

¹³ See id. at ¶10.

classification and registration and notification requirements were under that category. We point out that the burden is on Wiley to show any prior judicial adjudication. Finally, the trial court must determine whether the *Bodyke* decision applies to Wiley.

Wiley's fifth assignment of error is overruled. Wiley 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.¹⁴ We note that the Ohio Supreme Court held in *Hyle v. Porter*¹⁵ 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.

Wiley's sixth assignment of error, which alleges that reclassifying him as a Tier II sex offender under Senate Bill 10 constituted a breach of his plea agreement, a violation of his right to contract, 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, is overruled.¹⁶ 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

¹⁴ See *State v. Randlett*, 4th Dist. No. 08CA3046, 2009-Ohio-112, reversed in part and remanded on other grounds, *In re Sexual Offender Reclassification Cases*, ___ Ohio St.3d ___, 2010-Ohio-3753, ___ N.E.2d ___; *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059; *State v. Duncan*, 3rd Dist. No. 7-08-03, 2008-Ohio-5830.

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

¹⁶ Judge Hendon agrees that the sixth assignment of error is without merit not for the reasons given in the body of this judgment entry, but because there is no evidence that Wiley's registration requirement was a term of any plea agreement. Judge Mallory agrees that the sixth assignment of error is 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.

offense would never be made the subject of future legislation and no vested right concerning his registration duties.¹⁷ 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 prosecutor and the offender.¹⁸

Wiley's seventh 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.¹⁹ Therefore, the registration requirements cannot be viewed as punishment.²⁰

Therefore, this case is remanded to the trial court for the reasons set forth under the third assignment of error. The judgment of the trial court is affirmed in all other respects.

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.

SUNDERMANN, P.J., HENDON and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 22, 2010

per order of the Court _____.
Presiding Judge

¹⁷ See *White v. State*, 1st Dist. No. C-090177, 2010-Ohio-234; *Burbrink v. State*, 185 Ohio App.3d 130, 2009-Ohio-5346, 923 N.E.2d 626, reversed in part and remanded on other grounds, *In re Sexual Offender Reclassification Cases*, ___ Ohio St.3d ___, 2010-Ohio-3753, ___ N.E.2d ___.

¹⁸ See *id.*

¹⁹ See *Sewell v. State*, *supra*, at fn. 4.

²⁰ 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.