

STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

CASE NO. CV-08 646797

TREMAINE EVANS,)
) CIVIL ACTION
)
Plaintiff)
)
v.) **ORDER AND OPINION**
)
STATE OF OHIO,)
)
)
Defendant)

RONALD SUSTER, JUDGE:

This case comes before the Court on Plaintiff's Petition to Contest the Adam Walsh Act. The issues were fully briefed by both parties and the case is now ripe for decision. This opinion addresses the following two questions. First, whether Ohio's Adam Walsh Act violates the retroactivity clause of the Ohio Constitution. Second, whether Ohio's Adam Walsh Act is unconstitutional as an ex post facto law.

Statement of the Facts

The Petitioner pled guilty to a single count of sexual battery on February 10, 2003. At the time, the offense was a third degree felony. At the hearing, the Judge found the Petitioner to be a sexually oriented offender and sentenced him to one year in prison. The statute in place at the time of the hearing imposed annual registration requirements on the Petitioner for a ten-year period.

In November of 2007, the Petitioner received notice that he would be required to register every ninety days for life as a Tier III sex offender under the

newly enacted Adam Walsh Act. Under the Act, the Defendant is classified as a Tier III Sex Offender and is subjected to lifetime personal registration every ninety days as well as community notification and residency restrictions.

Sexual Predator Laws in Ohio

I. HOUSE BILL 180

Ohio's first sex offender registration statute was enacted in 1963. See former R.C. Chapter 2950, 130 Ohio Laws 669. The first major revisions came in 1996, with House Bill 180. See 146 Ohio Laws, Part II, 2668. The revisions contained three provisions: classification, registration, and community notification.

A. Classification under HB 180

Under the new statute, courts were charged with classifying offenders into one of three categories: (1) sexually oriented offender; (2) habitual sexual offender; or (3) sexual predator. The sexual predator classification required a finding by the court that the defendant was likely to engage in one or more sexually oriented offenses in the future. The statute required a hearing on the predator classification unless the offender was convicted of a violent sexually oriented offense and of a specification alleging that he or she was a sexually violent predator, in which case the predator label automatically attached. See *former R.C. 2950.09(A)*.

In deciding whether an offender is a sexual predator, courts considered the following: (1) the offender's age; (2) any prior criminal record; (3) the age of

the victim; (4) the number of victims; (5) whether drugs or alcohol were used to impair the victim; (6) whether any prior convictions or pleas led to any available programs for sex offenders; (7) mental illness or mental disability; (8) the nature of the conduct with the victim and evidence of a pattern of abuse; (9) whether the offender acted with cruelty or threatened cruelty; (10) any additional behavior that contributed to the conduct. *See former R.C. 2950.09(B)(2)(a) through (j).*

B. Registration and Verification under HB 180

The registration and verification provisions applied to offenders in all classifications. The statute required offenders to register with the county sheriff; providing at a minimum a current home and business address, and a photograph. *See former R.C. 2950.04(A) and (C).* The frequency of the verification requirements varied based on the offender's classification. *See former R.C. 2950.06(B).* Sexually oriented offenders were required to verify their current home address annually for ten years. *See former R.C. 2950.07(B)(3) and 2950.06(B)(2).* Habitual offenders verified annually for twenty years. *See former R.C. 2950.07(B)(2) and 2950.06(B)(2).* Sexual predators registered every ninety days for life and were also required to provide license plate numbers for all vehicles owned by or registered to the offender. *See former R.C. 2950.07(B)(1), 2950.06(B)(1), and 2950.04(C)(2).* The sexual predators could request a hearing to reassess whether the offender continued to pose a threat to the community. *See former R.C. 2950.07(B)(1).* If the Court concluded that no such threat exists, the sexual predator classification could be revoked and the

verification requirements removed. *Id.*

C. Community Notification and HB 180

The community notification provisions of the statute applied to all offenders equally. *Id.* The sheriff was ordered to notify all community members after the offender's registration. *Id.* Those entitled to notice included: (1) adjacent neighbors; (2) local law enforcement agencies; and (3) officials responsible for the safety of children and other potential victims. *Id.*

II. Constitutional Challenges to HB 180

The new statute drew significant criticism and was immediately challenged. *State v. Cook* (1998), 83 Ohio St. 3d 404. The defendant in *Cook* pled guilty to two counts of gross sexual imposition in late 1996, prior to the effective date of HB 180. *State v. Cook* (1998), 83 Ohio St. 3d 404. The defendant was then sentenced in early 1997 and found to be a sexual predator under the new statute. *Id.* The Appellate Court declined to address the ex post facto claim, but found the new statute unconstitutional under the Ohio Constitution because it was retroactive. *Id.* The Supreme Court reversed holding that the law was neither "impermissibly retroactive nor an ex post facto law." *Id.* In so holding, the Supreme Court noted: "the registration objectively served the remedial purpose of protecting the local community. Because the registration and address verification were remedial in nature they did not violate the ban on retroactive laws." *Id.*

III. Additional Statutory Amendments

The legislature amended the statute two additional times before the Adam Walsh Act. The 2001 amendments provided for the creation of a sex offender internet database readily accessible to the public. Former R.C. 2950.13.

Amended Substitute Senate Bill 5, enacted in 2003, eliminated the possibility of revisiting the sexual predator classification effectively making the sexual predator classification a life long title regardless of the offender's continued risk to the community. Under Senate Bill 5, sexually oriented offenders were barred from residing within 1000 feet of a school for the first time. Landlords and municipalities were statutorily granted the right to seek injunctive relief against offenders residing within the 1000 feet proximity. In addition, offenders were required to register not only in their county of residence, but their county of employment and/or school as well. Finally, the amendments expanded the amount of personal information included on the sex offender database.

IV. The Adam Walsh Act

In 2006, President George W. Bush signed the Federal Adam Walsh Act. The Federal Adam Walsh Act required states to enact similar laws or face a reduction or loss of federal funds for law enforcement programs. Ohio, like many states, complied with the mandate, enacting the Ohio Adam Walsh Act in 2007.

Ohio's Adam Walsh Act significantly changes the sex offender laws in the state. The Act amends the statute in five ways: (1) re-classification; (2) increased frequency and prolonged duration of registration requirements; (3)

heightened notification requirements; (4) expanded residency restrictions; (5) heightened penalties for non-compliance.

A. Classification Under Ohio's Adam Walsh Act

The Adam Walsh Act classifies offenders into three tiers. The list of offenses included below is not exhaustive. Offenders who attempt or conspire to commit the crimes classified under each tier are also subject to that classification.

Tier One offenders are those who plea guilty to or are convicted of any of the following: (1) sexual imposition pursuant to R.C. 2907.06; (2) importuning pursuant to R.C. 2907.07; (3) voyeurism pursuant to R.C. 2907.08; (4) pandering obscenity pursuant to R.C. 2907.32; (5) unlawful sexual conduct with a minor pursuant to R.C.2907.04 when the offender is less than four years older than the other person, where the other person did not consent and the offender has not been convicted of or plead guilty to a violation of 2907.02, 2907.03, or unlawful sexual conduct with a minor pursuant to R.C. 2907.04; (6) gross sexual imposition pursuant to R.C. 2907.05(A)(1),(2),(3), or (5); (7) Illegal use of a minor in nudity oriented material or performance pursuant to R.C. 2907.323(A)(3); (8) menacing by stalking with sexual motivation pursuant to R.C. 2903.211(A)(3), or unlawful restraint with sexual motivation pursuant to R.C. 2905.03(B), or enticement with sexual motivation pursuant to R.C. 2905.05(B). See R.C. 2950.01(E).

Tier Two offenders are those who are convicted of or plead guilty to any of

the following statutory violations: (1) compelling prostitution pursuant to R.C. 2907.21, pandering obscenity involving minors pursuant to R.C. 2907.321, or pandering sexually oriented material involving a minor pursuant to R.C. 2907.322; (2) R.C. 2907.04 where the offender is at least four years older than the other person or where the offender is less than four years older than the victim but has been previously convicted or plead guilty to an offense under 2907.02, 2907.03, or 2907.04; (3) gross sexual imposition where the victim is under the age of thirteen pursuant to R.C. 2907.05(A)(4) or illegal use of a minor in nudity oriented material or performance pursuant to R.C. 2907.323(A)(1) or (3); (4) kidnapping with sexual motivation pursuant to R.C. 2905.01(A)(1),(2),(3), or (5) when the offense is committed with a sexual motivation; (5) kidnapping pursuant to R.C. 2905.01(A)(f) when the victim is eighteen or older; and (6) abduction with sexual motivation pursuant to R.C. 2905.02(B) or R.C. 2919.22(B)(5). See R.C. 2950.01(F).

Tier Three offenders are those convicted of or who plead guilty to any of the following: (1) rape pursuant to R.C. 2907.02 or sexual battery pursuant to R.C. 2907.03; (2) gross sexual imposition pursuant to R.C. 2907.05(B); (3) aggravated murder pursuant to R.C. 2903.01, murder pursuant to R.C. 2903.02, or felonious assault pursuant to R.C. 2903.11, when committed with a sexual motivation; (4) unlawful death or termination of pregnancy as a result of committing or attempting to commit a felony pursuant to R.C. 2903.04(A) when the offender committed or attempted to commit the felony that is the basis of the

violation with a sexual motivation; (5) kidnapping pursuant to R.C. 2905.01(A)(1) when the victim is under the age of eighteen; and (6) kidnapping of a minor pursuant to R.C. 2905.01(B) where the victim is under the age of eighteen and the offender is not a parent of the victim. See R.C. 2950.01(G)

B. Registration Under the Adam Walsh Act

Tier One offenders register annually on the anniversary of the initial registration for fifteen years. Tier Two offenders register every 180 days following the initial registration for a period of twenty-five years. Tier Three offenders register every ninety days following the initial registration for life. R.C. 2950.06(B) and R.C. 2950.07(B). All offenders are required to submit specific detailed information including, but not limited to, their name, e-mail address, license plate numbers for each owned vehicle and for vehicles driven for work or otherwise made available to the offender. R.C. 2950.04(C).

C. Notification Under Ohio's Adam Walsh Act

Tier Three offenders are subjected to heightened community notification provisions under the Adam Walsh Act. 2950.10(B) and 2050.11(F)(1). The Sheriff with whom the offender registers is required to inform all those living within one thousand feet of the offender's residence. R.C. 2950.11(A). The notice includes the offender's name, address, offense or conviction, classification, and photograph. R.C. 2950.11(A). The Sheriff must also provide the information to schools, day care facilities, law enforcement agencies, and other groups who have contact with minors within the specified geographic

vicinity. *Id.*

D. Residency Requirements Under Ohio's Adam Walsh Act

All sexually oriented offenders, regardless of their classification, are prohibited from residing within 1000 feet of a school premises, pre-school, or child day care center. R.C. 2950.034. The Act permits landlords to terminate rental agreements. R.C. 1923.02. In addition, the Act allows the owner of property within 1000 feet of the school or the chief legal officer of the county, municipal corporation or township to file for injunctive relief in an effort to oust the offender from his/her home. R.C. 2950.034

E. Penalties for Non-Compliance with the Adam Walsh Act

Failure to comply with the registration and notification provisions is a felony. R.C. 2950.99

Law and Argument

Ohio's Adam Walsh Act is unconstitutional. Although statutes are presumed constitutional, courts may declare a statute unconstitutional upon a finding "that the legislation and constitutional provisions are clearly incompatible."

State ex rel. Dickman v. Defenbacher (1955), 164 Ohio St. 142. The constitutional challenges raised here arise out of the retroactivity clause of the Ohio Constitution and the ex post facto clause of the United States Constitution. Each challenge is addressed separately below.

I. The Adam Walsh Act violates the Ohio Constitution.

Ohio's Adam Walsh violates the retroactivity clause of the Ohio

Constitution. The Ohio Constitution prohibits retroactive application of laws. Ohio Constitution, Article II, Section 28. Statutes are presumed to be prospective unless the legislature specifically makes the law retroactive. *State v. Cook* (1998), 83 Ohio St.3d 404, 410. The bar on retroactive application applies to laws affecting substantive rights as opposed to procedural or remedial aspects of the law. *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 137. The question thus presented is whether the Adam Walsh Act is substantive or remedial.

The Supreme Court of Ohio stated that a “law is substantive if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligations or liabilities as to a past transaction, or creates a new right.” *State v. Cook* (1998), 83 Ohio St.3d 404, 411 (citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100). Remedial laws are those affecting only the remedy provided and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right. *Id.* Laws that address procedures are typically considered remedial and as such do not violate the retroactivity clause. *Id.*

The 1996 amendments to the statute as presented in House Bill 180 were upheld because the bulk of the amendments dealt with additional requirements placed on the officials as opposed to the offenders. *State v. Cook* (1998), 83 Ohio St.3d 404, 411. In so holding, the Court relied heavily on *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, which held that 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.” *State v. Cook* (1998), 83 Ohio St.3d 404 (citing *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279). In fact, the Court adopted the following language: “felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.” *State v. Cook* (1998), 83 Ohio St.3d 404, 412 (citing *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281-82). The *Cook* Court upheld the statute finding the effect of registration and notification provisions to be “de minimis.” *Id.*

At least one Ohio Court upheld Ohio’s Adam Walsh Act. *Slagle v. State*, (Clermont County 2008), 145 Ohio Misc.2d 98. This Court disagrees with that decision because *Cook* is distinguishable. Unlike the statute presented in *Cook*, the statute here does more than alter the notification and verification procedures.

The amendments impose a change in the classification of the Petitioner from a sexually oriented offender to a Tier III Sex Offender, increasing the frequency and duration of the reporting requirements from once a year for ten years to four times a year for life. The amendments also impose a severe criminal penalty for failure to comply with the reporting requirements (R.C. 2950.99), and preclude the Petitioner from residing within 1000 feet of a school or day care center. To find the amendments remedial in nature is to turn a blind eye to the practical realities offenders face in complying with the new law.

Ohio’s Adam Walsh Act is not remedial in nature. As Justice Lanziger

stated: “these restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender’s actions.” *State v. Wilson* (2007), 113 Ohio St.3d 382, 392 (Lanziger J. *concurring in part and dissenting in part*). The amendments as applied to the Petitioner amount to an unlawful retroactive application that violates the retroactivity clause of the Ohio Constitution.

II. The Adam Walsh Act violates the ex post facto clause.

The United States Constitution protects citizens from ex post facto laws. The United States Supreme Court held: “any statute which makes more burdensome the punishment for a crime, after its commission, . . . is prohibited as an ex post facto law.” *Beazell v. Ohio* (1925), 269 U.S. 167, 169-70. The clause ensures that citizens have fair warning while simultaneously preventing the “legislature from abusing its authority by enacting arbitrary or vindictive legislation aimed at disfavored groups.” *State v. Cook* (1998), 83 Ohio St.3d 404, 414-15 (citing *Miller v. Florida* (1987), 482 U.S. 423, 429). The act at issue arbitrarily modifies the reporting and verification requirements, imposes residency restrictions without justification, and reclassifies the offenders without a hearing, further targeting the disfavored group of sexual offenders.

To determine whether a law violates the ex post facto clause, courts consider both the intent of the legislature and the effect of the law. The first inquiry focuses on whether the legislature expressly or impliedly intended to create a criminal punishment. If the legislature intended to create a criminal

punishment, the inquiry ends and the statute deemed unconstitutional. In *Cook*, the Supreme Court of Ohio looked at the purpose behind the act which the legislature clearly defined as “promot[ing] public safety and bolster[ing] the public’s confidence in Ohio’s criminal and mental health systems.” *State v. Cook* (1998), 83 Ohio St.3d 404, 417. This Court declines to end the inquiry with the self-serving language of the statute.

The language of the statute is not dispositive. A recent case from the United States District Court for the Northern District of Ohio is instructive on this point. *Mikaloff v. Walsh*, 2007 U.S. Dist. LEXIS 65076, *13-23. In *Mikaloff*, the court considered the residency restrictions contained in the 2003 amendments to the sexual offender laws. *Mikaloff v. Walsh*, 2007 U.S. Dist. LEXIS 65076, *13-23. Intent, although expressed as a civil penalty, may be implied through the language and placement within the statutory scheme. *Id.* Ohio’s Adam Walsh Act is found in the criminal section of the Revised Code, indicating the intent to impose criminal punishment. *Id.* In finding the amendments to be a form of punishment, the *Mikaloff* Court considered the placement of the provisions within the statutory scheme as well as the nature of the provision and its effect on the violators. *Id.*

The nature and effect of the provisions at issue here are indicative of legislative intent. The language of the statute imposes penalties without any regard to the likelihood that the offender will commit future sex offenses, a fact which significantly distinguishes the statute at issue from that present in *Cook*.

In addition, the increased frequency and expanded duration of reporting and verification requirements support a finding of criminal intent. The reporting and verification requirements are a mandated part of the punishment. Further, the fact that the legislature revoked the opportunity for tier two and three offenders to request a future hearing to assess the future threat of harm is indicative of intent to punish. Taken together, the intent to punish and ostracize this unpopular group is undeniable. Therefore, it is this Court's position that the Adam Walsh Act is unconstitutional.

Regardless, the Act is unconstitutional due to its punitive effect on offenders. If legislative intent is civil in nature, then courts move on to determine whether the statutory scheme is so punitive in either purpose or effect that it negates the legislative intent. *United States v. Ward* (1980), 448 U.S. 242, 248-49. In assessing the effect, courts consider the following: (1) whether the statute was historically regarded as punishment; (2) whether the statute operates as a disability or restraint; (3) whether the statute furthers traditional notions of punishment; (4) whether the statute has a connection to a non-punitive purpose; and (5) whether the statute is excessive in relation to the alternative purposes assigned. *Smith v. Doe* (2003), 538 U.S. 84, 97.

Sexual Predator Laws are Classic Forms of Punishment

The overall text of the statute is historically regarded as punishment. The United States Supreme Court concluded that registration restrictions are more remedial in nature than punishment. *Smith v. Doe* (2003), 538 U.S. 84, 97.

However, the types of restrictions at issue here subject the offenders to banishment and exile, both of which have been historically viewed as punishment. *Kennedy v. Mendoza-Martinez* (1963), 373 U.S. 144, 170. Ohio's Adam Walsh Act goes beyond mere "official archives of criminal records" into a system that effectively ostracizes offenders and subjects the offenders to harassment and ridicule as well as potential abuse. *Id.* In 2007, Justice Lanziger stated: "I do not believe we can continue to label these proceedings as civil in nature . . . [they] should be recognized as part of the punishment." *State v. Wilson* (2007), 113 Ohio St.3d 382, 392 (Lanziger, J. *concurring in part and dissenting in part*). The provisions should be construed as traditional forms of punishment.

The Residency Restrictions Operate as a Disability

The statute operates as a disability or restraint. The United States Supreme Court found an Alaskan statute constitutional because it did not restrain activities of sex offenders, leaving offenders free to change jobs and/or residences. *Smith v. Doe* (2003), 538 U.S. 84, 100. Ohio's Adam Walsh Act is distinguishable from *Smith v. Doe* because the Alaskan statute did not require the offenders to make periodic updates in person as is required under Ohio's Adam Walsh Act. *Smith v. Doe* (2003), 538 U.S. 84.

Furthermore, the Ohio statute now imposes residency restrictions on all offenders. Judge Gwin of the United States District Court for the Northern District of Ohio found residency restrictions analogous to parole and probation

stating “the residency restriction imposes an onerous affirmative disability and restraint.” *Mikaloff v. Walsh*, 2007 U.S. Dist. LEXIS 65076, *26-28. The statute is a restraint on liberty that operates as a disability on all offenders.

Sexual Predator Laws Further Traditional Notions of Punishment

The statute furthers a traditional notion of punishment. The statute operates as a deterrent by classifying all offenders regardless of their likelihood of committing future offenses. This deterrent effect is particularly evident by the enhanced penalty for those who commit a second offense. R.C. 2950.99. As noted by Judge Gwin in *Mikaloff*, the “lack of any case-by-case determination demonstrates that the restriction is vengeance for its own sake.” *Mikaloff v. Walsh*, 2007 U.S. Dist. LEXIS 65076, *30. This Court agrees. The statute furthers traditional forms of punishment.

The AWA is not tailored to meet a non-punitive purpose.

The Act is punitive because it is not tailored to a non-punitive purpose. The Adam Walsh Act fails to consider an offender’s likelihood to re-offend. The expanded notification provisions ostracize offenders. The residency restrictions are arbitrary. The Act is not tailored because it imposes new restrictions and obligations without any regard for offender’s potential for future harm.

Ohio’s Adam Walsh Act fails to consider an offender’s likelihood to re-offend. Unlike the statute at issue in *State v. Cook* (1998), 83 Ohio St. 3d 404, Ohio’s Adam Walsh Act fails to consider the individual’s future risk to the community. In deeming the prior amendment constitutional, the *Cook* Court

relied heavily on the fact that the offender had the opportunity to submit evidence contradicting the perceived risk of future harm. *Id.* No such opportunity lies under the Adam Walsh Act for tier two and three offenders who are subjected to registration requirements for a term of 25 years to life.

The United States Supreme Court found an Alaskan statute non punitive in large part due to the fact that an individual seeking information about potential sexual predators had to take affirmative steps to locate the information. *Smith v. Doe* (2003), 538 U.S. 84. No affirmative action is necessary in Ohio because Ohio's Adam Walsh Act forces local law enforcement to provide notice through direct mail.

Similarly, the residency restrictions are overly broad. There is no evidence that residential proximity to schools increases the risk of re-offending. Even if such were true, the Act imposes the restrictions regardless of whether the sexual offense involved children. Therefore, the restrictions unnecessarily interfere with an offender's freedoms without any relation to a potential for harm.

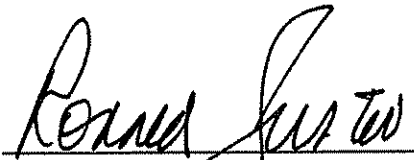
Ohio's Adam Walsh Act is an ex post facto law. Despite the express language which states an intent to protect the public, the language of the Act as well as its placement within the statutory scheme evidence an intent to treat the legislation as criminal in nature. A comprehensive review of the *Doe* factors makes clear the punitive effect of the Adam Walsh Act. The Adam Walsh Act punishes offenders by restraining basic liberties and furthering traditional forms of punishment with obvious punitive purposes. The Adam Walsh Act fails as an

ex post facto law.

Conclusion

This Court concludes that the Adam Walsh Act is unconstitutional under both the retroactivity clause of the Ohio Constitution and the ex post facto clause of the United States Constitution. Judgment is hereby entered for the Petitioner, and Defendants are enjoined from enforcing the law as against Tremaine Evans.

IT IS SO ORDERED.


RONALD SUSTER, JUDGE

DATE: May 9, 2008

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