ORIGINAL

IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	**NO. 2014-0363**
Plaintiff-Appellee	:	On Appeal from the Clark County Court of Appeals, Second Appellate District
vs.	:	
TRAVIS BLANKENSHIP	:	Court of Appeals Case Number 2012-CA-74
Defendant-Appellant	:	

AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION MERIT BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO

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STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association ("OPAA") offers this amicus brief in support of the State of Ohio's merit brief. The OPAA is a private non-profit membership organization that was founded in 1937 for the benefit of the 88 elected county prosecutors. Its mission is to increase the efficiency of its members in the pursuit of their profession, to broaden their interest in government, to provide cooperation and concerted action on policies that affect the office of the Prosecuting Attorney, and to aid in the furtherance of justice.

STATEMENT OF THE CASE AND FACTS

The OPAA joins in Plaintiff-Appellee's Statement of the Case and Facts.

ARGUMENT

Amicus Curiae Proposition of Law No. I: The R.C. Chapter 2950 Tier II registration requirements for those persons convicted of having unlawful sexual conduct with a minor when the offender is twenty-one years old and the person with whom he engaged in sexual conduct is fifteen years old are not so extreme as to be grossly disproportionate to the crime or shocking to a reasonable person and to the community's sense of justice.

The defendant-appellant claims that the Tier II sex offender status mandatorily attached to his conviction for unlawful sexual conduct with a minor constitutes cruel and unusual punishment. Although this Court determined that the S.B. 10 version of R.C. Chapter 2950 is punitive and could not constitutionally be applied retroactively to offenders who committed their sexually oriented offense prior to the enactment of S.B. 10, the defendant-appellant's claim goes well beyond this Court's analysis and holding in *State v. Williams,* 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108.

Legislative enactments are entitled to a strong presumption of constitutionality. *See State v. Collier*, 62 Ohio St.3d 267, 581 N.E.2d 552 (1991); *State v. Young*, 37 Ohio St.3d 249, 525 N.E.2d 1363 (1988); *Beatty v. Akron City Hospital*, 67 Ohio St.2d 483, 424 N.E.2d 586 (1981); and *State ex rel. Jackman v. Court of Common Pleas*, 9 Ohio St.2d 159, 224 N.E.2d 906 (1967). When a statute is challenged as unconstitutional, a court must apply all presumptions and rules of construction so as to uphold the statute if at all possible. *State v. Dorso*, 4 Ohio St.3d 60, 446 N.E.2d 449 (1983). Furthermore, this strong presumption of constitutionality is rebuttable only by proving the existence of a constitutional infirmity "beyond a reasonable doubt." *State v. Gill*, 63 Ohio St.3d 53, 584 N.E.2d 1200 (1992); *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955).

Both the United States and Ohio Constitutions prohibit the infliction of cruel and unusual punishments. Eighth Amendment, United States Constitution; Section 9, Article I, Ohio Constitution. "A punishment does not violate the constitutional prohibition against cruel and unusual punishments, if it be not so greatly disproportionate to the offense as to shock the sense of justice of the community." *State v. Chaffin*, 30 Ohio St.2d 13, 282 N.E.2d 46 (1972), paragraph three of the syllabus. "Generally, when a sentence imposed on a defendant falls within the terms of a valid statute, the sentence does not constitute cruel or unusual punishment, and a reviewing court must defer to the discretion of the trial judge." *State v. Hunter*, 1st Dist. No. C-960431, 1997 WL 78598 (Feb. 26, 1997), citing *McDougle v. Maxwell, Warden*, 1 Ohio St.2d 68, 69, 203 N.E.2d 334 (1964).

In an effort to make sex offender registration consistent throughout the nation, the United States Congress enacted the Adam Walsh Child Protection and Safety Act ("AWA") and its subsection, the Sex Offender Registration and Notification Act ("SORNA"), on July 27, 2006. 42 U.S.C. §§ 16901, et seq. In compliance with this federal legislation, the Ohio General Assembly enacted S.B.10 amending R.C. Chapter 2950 (Sex Offender Registration and Notification Law) to be consistent with AWA and SORNA. Am.Sub.S.B. No.10, effective July 1, 2007 and January 1, 2008. The federal registration scheme for which Ohio's was patterned has been deemed a civil regulatory scheme rather than a punishment. *U.S. v. Shannon,* 511 Fed.Appx. 487, 2013 WL 141779 (6th Cir.2013).

The registration categories under both the state and federal statutory schemes are organized into three tiers. Unlike the prior "labeling" classification system, the "tier" classification system is based solely upon the offense for which a person is convicted. In certain scenarios, an offender will be in a higher tier if he has a prior conviction for a sexually oriented or child-victim oriented offense and an offender will automatically fall into Tier III if he was previously classified as a sexual predator. Still, the tier classification system occurs by operation of law much like the "sexually oriented offender" classification occurred under the former version of R.C. Chapter 2950. *See State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, 773 N.E.2d 502.

Specifically with regard to the offense of unlawful sexual conduct with a minor in violation of R.C. 2907.04, the Generally Assembly's efforts to ensure that the offenders of such an offense are not subject to cruel and unusual punishment are apparent in that the offense spans several offense levels and two classifications tiers. Generally, R.C.

2907.04 (unlawful sexual conduct with a minor) prohibits sexual conduct between a person eighteen years of age or older and a person who is thirteen, fourteen, or fifteen years of age. The offense is a fourth degree felony. It is reduced to a misdemeanor of the first degree if the age span is less than four years. It is increased to a felony of the second degree if the offender has certain prior offenses and to a felony of the third degree if the age span is ten or more years. The Ohio General Assembly included unlawful sexual conduct with a minor in violation of R.C. 2907.04 in the list of offenses defined as "sexually oriented offenses." R.C. 2950.01(A)(2) and (3). A "sex offender" is defined as a person who is convicted of "any sexually oriented offense." R.C. 2950.01(B)(1). There is, however, a statutory exception for persons who have been convicted of a sexually oriented offense involving consensual sexual conduct or contact if the victim is eighteen or older and not under the offender's custodial control or if the victim is thirteen or older and the offender is not more than four years older than the victim. R.C. 2950.01(B)(2)(a) and (b). A person convicted of unlawful sexual conduct with a minor in violation of R.C. 2907.04 is a "Tier I sex offender" if the offender was less than four years older than the victim, there was no consent, and the offender does not have a conviction for certain prior offenses. R.C. 2950.01(E)(1)(b). A person convicted of unlawful sexual conduct with a minor in violation of R.C. 2907.04 is a "Tier II sex offender" if offender is at least four years older than the victim or if the offender is less than four years older but has a conviction for certain prior offenses. R.C. 2950.01(F)(1)(b).

In the present case, the defendant-appellant was convicted of the fourth-degree felony version of R.C. 2907.04 because he was six years older than the person with

whom he engaged in sexual conduct. While the offense level of his conviction did not subject him to a mandatory prison term but rather a level in which a community sanction is favored, his conviction does place him in the Tier II classification level requiring him to register for twenty-five years and verify his addresses semi-annually. The Tier II classification, however, does not subject the defendant-appellant to community notification. Therefore, his claim relates to whether the duration and frequency of his registration obligation is cruel and unusual.

Shortly, after the S.B. 10 version of R.C. Chapter 2950 was determined to be punitive and therefore in violation of the Ohio constitutional prohibition against retroactive laws by this Court in *Williams*, the First District Court of Appeals determined that the Tier II registration requirements associated with a conviction for unlawful sexual conduct with a minor did not amount to cruel and unusual punishment. *State v. Bradley,* 1st Dist. No. C-100833, 2011-Ohio-6266. The First District relied on *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, noting that '[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.' *Id.* at ¶13, quoting *State v. Weibrecht,* 86 Ohio St.3d 368, 373, 1999-Ohio-113, 715 N.E.2d 167; *Harmelin v. Michigan,* 501 U.S. 957, 997, 111 S.Ct. 2680 (1991). " 'Cases in which cruel and unusual punishments have been found are limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person,' and that 'the penalty must be so greatly disproportionate to the offense as to shock the sense of justice of the community.' " *Weibrecht* at 371, quoting *McDougle v. Maxwell,* 1 Ohio St.2d 68 , 70, 203 N.E.2d 334 (1964), and citing *State v. Chaffin,* 30 Ohio St.2d 13,

282 N.E.2d 46 (1972), paragraph three of the syllabus. The First District also relied upon the legislature's determination that "the way to protect the public from sexual offenders such as Bradley [and the defendant-appellant] is to classify them as Tier II offenders and require them to register for 25 years and to verify their information every 180 days." *Bradely* at ¶12. The First District further concluded that the registration requirements may well deter such offenders from future sexual crimes and it could not be said that requiring such an offender to register for 25 years and verify information every 180 days constitutes "one of those rare cases where the punishment is so extreme as to be grossly disproportionate to the crime or that it is shocking to a reasonable person and to the community's sense of justice."

CONCLUSION

Therefore, the OPAA asks the Court to affirm the decision of the Second District Court of Appeals.

Respectfully,

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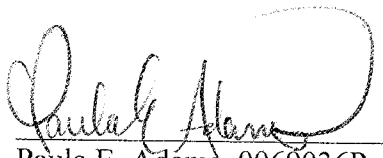
CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Merit Brief of Amicus Curiae, by United States mail, addressed to Ryan A. Saunders, Assistant Prosecuting Attorney, 50 East Columbia Street, Ste 449, Springfield, Ohio 45502, and to Katherine R. Ross-Kinzie, Assistant Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, this 25th day of September, 2014.



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