**[Cite as *State v. Shelton*, 2004-Ohio-5484.]**

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83289

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| STATE OF OHIO | : | |
| | : | JOURNAL ENTRY |
| Plaintiff-Appellee | : | |
| | : | and |
| -vs- | : | |
| | : | OPINION |
| ERIC SHELTON | : | |
| | : | |
| Defendant-Appellant | : | |
| | : | |

DATE OF ANNOUNCEMENT OF DECISION: OCTOBER 14, 2004

CHARACTER OF PROCEEDING: Criminal appeal from Common Pleas Court Case No. CR-229891

JUDGMENT: Affirmed.

DATE OF JOURNALIZATION:

APPEARANCE:

For Plaintiff-Appellee: WILLIAM D. MASON
Cuyahoga County Prosecutor
ANNA M. FARAGLIA
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellant: ROBERT L. TOBIK
Chief Public Defender

1200 West Third Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, J.:

**{¶ 1}** Appellant Eric Shelton appeals the trial court's decision classifying him as a sexual predator and assigns the following errors for our review:

**{¶ 2}** "I. R.C. 2950.01 et seq. as applied to Mr. Shelton violates Art. I, Sec. 10, of the United States Constitution as ex post facto legislation, and violates Art. II, Sec. 28 of the Ohio Constitution as retroactive legislation."

**{¶ 3}** "II. The evidence is insufficient, as a matter of law, to prove by 'clear and convincing evidence' that Mr. Shelton 'is likely to engage in the future in one or more sexually oriented offenses.'"

**{¶ 4}** Having reviewed the record and the legal arguments of the parties, we affirm the trial court's decision. The apposite facts follow.

**{¶ 5}** In 1987, the trial court sentenced Shelton to three to ten years incarceration after he pled guilty to sexual battery. The trial court stayed the execution of Shelton's sentence and placed him on probation. While on probation, Shelton raped a sixteen-year-old girl; he pled guilty to two counts of rape, and the trial court sentenced him to eight to twenty-five years on each count, to run concurrently. Following Ohio's enactment of Chapter 2950, the State authorities filed a sexual predator charge against Shelton.

**{¶ 6}** At his sexual predator hearing, the prosecutor read into the record the statement of Shelton's first rape victim, who is the mother of Shelton's children. She and Shelton lived apart at the time of the rape. Shelton was 21 years old and the victim was 20 years

old. According to the victim, Shelton came to her house, sat down on the couch, grabbed her by her wrist, and punched her in the face. He pushed her down on the couch and continued to beat her. Shelton ordered the victim to the bedroom, where he pulled out a gun. He told her, "bitch you're going to die tonight" and fired his gun in the air. Shelton told her he would not hurt her if she did as he ordered. He then ordered her to perform oral sex and raped her vaginally and anally. When the victim attempted to escape, Shelton held the gun to the back of her head and threatened to "blow her brains out."

**{¶ 7}** Later, as the victim held their son, Shelton pointed the gun at her and threatened to kill both her and himself. Shelton attempted to strike the victim but instead struck their son. Thereafter, he called the suicide hot line, and later he raped the victim vaginally and forced her to perform oral sex. Shelton was placed on probation for the above crimes after pleading guilty to sexual battery. However, six months later, Shelton, along with an accomplice, kidnapped a sixteen-year-old girl from a bus stop. Shelton struck the girl in the back with an unknown object and forced her into a vehicle. Prior to forcing her to perform oral sex, he gagged her with a baton to "see how far she could go." The men then parked the car, beat the victim, and raped her.

**{¶ 8}** In addition to the above facts, the prosecutor submitted Shelton's institutional history report. The report showed Shelton made lewd gestures at a female employee of the prison while he was working in the prison yard. When instructed to return to work, he stated he was "allowed to look."

**{¶ 9}** In 2002, Shelton attended victim's empathy classes, but failed; he was unwilling to admit the full details of his crime. He has since graduated from the program.

Although Shelton participated in other sexual offender programs while in prison, he appeared sixteen times before the Rules Infraction Board for disciplinary problems.

**{¶ 10}** The prosecutor recommended the trial court classify Shelton as a sexual predator. He stated Shelton displayed cruelty in his crimes, had multiple victims, demonstrated a pattern of abuse, and used a gun and numchucks as weapons.

**{¶ 11}** Shelton's defense counsel argued Shelton is thirty-six years of age, has served over fifteen years in prison, and is in the "medium to low risk" category for reoffending. He stated Shelton obtained his GED while in prison and participated in various sexual offender classes.

**{¶ 12}** Shelton's Static-99 test score indicated a 12% risk of reoffending within five years, a 14% risk of reoffending after 10 years, and a 19% risk of reoffending within 15 years. The psychiatric report also listed several non-risk factors associated with Shelton such as: 1) he displayed no sexual interest in children, 2) had no deviant sexual preferences, 3) participated in sexual offender treatment programs, 4) did not possess an antisocial personality disorder, 5) was older than 25 years of age, and 6) his crimes did not involve male children.

**{¶ 13}** After the above evidence was presented, the trial court considered the factors set forth in R.C. 2950.09 and found Shelton to be a sexual predator. Shelton now appeals.

**{¶ 14}** In his first assigned error, Shelton argues we should declare the recently amended version of Megan's Law, R.C. 2950.09(D), an unconstitutional ex post facto law. He argues it eliminates the right of a labeled sex offender to remove the label at a later date. We are unpersuaded.

**{¶ 15}** Senate Bill 5 amends R.C. 2950.09(D) by removing the provision of that section which granted an opportunity to a previously labeled sex offender to seek removal of the

label and its obligations, which are notification and registration. However, the removal provision is not the defining guideline on whether an otherwise after the fact law is unconstitutional. The United States Supreme Court has held historically that an after the fact law is unconstitutional when its intent is criminal and its effects punitive. Conversely, of course, when a law is civil in its intent and nonpunitive in its effects, it is constitutional.[1]

**{¶ 16}** In *Kennedy v. Mendoza-Martinez,* the United States Supreme Court set forth seven factors to be considered.[2] The Ohio Supreme Court held the original R.C. 2950.09(D) constitutional after analyzing that law under those seven factors.[3] In *Hudson v. United States*, the United States Supreme Court held these factors are not definitive but "useful guide posts."[4] Ultimately, the United States Supreme Court recently adopted the reasonableness standard in reviewing an Alaska law similar to the one at issue here. The Court held the standard is whether the law is reasonable in light of its stated non-punitive objective.[5]

**{¶ 17}** The non-punitive objective of the Ohio law is to protect the public.[6] This objective was not lost when the statute was amended to eliminate the label-removal provision.

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[1]*Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144; *Kansas v. Hendricks* (1997), 521 U.S. 346; *Smith v. Doe I* (2003), 538 U.S. 84.

[2]*Kennedy*, supra at 168.

[3]*State v. Cook* (1998), 83 Ohio St.3d 404.

[4](1997), 522 U.S. 93, 99.

[5]Id. at 105-106.

[6]*State v. Cook,* supra at 442.

As the United States Supreme Court pointed out in *Smith v. Doe I* after reviewing anecdotal evidence, sex offenders do not reoffend in the early years of release. Thus, the Court held, with this information and with the advent of the internet, it is not unreasonable to have lifetime notification and registration laws designed to protect the public from those sex offenders likely to reoffend.[7] Furthermore, the Court pointed out that registration and notification by their nature are less burdensome than the indefinite confinement law used for sex offenders in *Kansas v. Hendricks*.[8]

**{¶ 18}** Nevertheless, Shelton argues that Ohio's former removal provision was the basis for the Ohio Supreme Court's decision in *State v. Cook*, where it held the previous law constitutional. In *State v. Cook*, the Ohio Supreme Court under its analysis titled "Excessiveness in Relation to Alternative Purpose" does reference this right to remove the label and does give it weight when analyzing the seventh factor of the *Kennedy v. Mendoza-Martinez* case.[9] The Court addressed this issue because Cook argued that the lifetime address verification requirement for sexual predators was onerous. The Ohio Supreme Court pointed out that the sexual predator has a more frequent verification requirement because this offender is more likely to reoffend and thus justifies the need for more monitoring. The Court recognized that this need for more monitoring was designed to protect the public from the most dangerous offender and its effect was not excessive in light of this purpose.

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[7] *Smith v. Doe I*, supra at 103.

[8] Id. at 105.

[9] Id. at 24.

**{¶ 19}** The ultimate issue in this case is whether the Ohio law as presently constituted is reasonable in light of its stated non-punitive purpose. From all indication, the Ohio law is designed to regulate labeled sex offenders likely to reoffend. This kind of law was held constitutional in *Smith v. Doe I*. We also note this court has held the Senate Bill 5 amendment constitutional as well.[10]

**{¶ 20}** We decline to address the retroactive issue. The Ohio Supreme Court sufficiently addressed that issue in *State v. Cook*. Consequently, Shelton's first assigned error is overruled.

**{¶ 21}** In his second assigned error, Shelton argues the evidence failed to show clearly and convincingly that he was likely to commit a sexually-oriented offense in the future.

**{¶ 22}** The Ohio Revised Code defines a sexual predator as "a person who has been convicted of or pleaded guilty to committing a sexually-oriented offense and is likely to engage in the future in one or more sexually-oriented offenses."[11]

**{¶ 23}** In prescribing a framework for a sexual predator determination, R.C. 2950.09(B)(3) states:

**{¶ 24}** "In making a determination under divisions (B)(1) and (4) of this section as to whether an offender or delinquent child is a sexual predator, the judge shall consider all relevant factors, including, but not limited to, all of the following:

**{¶ 25}** "(a) The offender's or delinquent child's age;

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[10]*State v. Baron* (2004), 156 Ohio App.3d 241, 2004-Ohio-747.

[11]R.C. 2950.01(E); *State v. Winchester* (2001), 145 Ohio App.3d 92.

**{¶ 26}** "(b) The offender's or delinquent child's prior criminal or delinquency record regarding all offenses, including, but not limited to, all sexual offenses;

**{¶ 27}** "(c) The age of the victim of the sexually-oriented offense for which sentence is to be imposed or the order of disposition is to be made;

**{¶ 28}** "(d) Whether the sexually-oriented offense for which sentence is to be imposed or the order of disposition is to be made involved multiple victims;

**{¶ 29}** "(e) Whether the offender or delinquent child used drugs or alcohol to impair the victim of the sexually-oriented offense or to prevent the victim from resisting;

**{¶ 30}** "(f) If the offender or delinquent child previously has been convicted of or pleaded guilty to, or been adjudicated a delinquent child for committing an act that if committed by an adult would be, a criminal offense, whether the offender or delinquent child completed any sentence or dispositional order imposed for the prior offense or act and, if the prior offense or act was a sex offense or a sexually-oriented offense, whether the offender or delinquent child participated in available programs for sexual offenders;

**{¶ 31}** "(g) Any mental illness or mental disability of the offender or delinquent child;

**{¶ 32}** "(h) The nature of the offender's or delinquent child's sexual 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;

**{¶ 33}** "(i) Whether the offender or delinquent child, during the commission of the sexually-oriented offense for which sentence is to be imposed or the order of disposition is to be made, displayed cruelty or made one or more threats of cruelty;

**{¶ 34}** "(j) Any additional behavioral characteristics that contribute to the offender's or delinquent child's conduct."

**{¶ 35}** Furthermore, at a sexual predator classification hearing, the burden of proof is on the state to show by clear and convincing evidence that the offender has been convicted of a sexually-oriented offense and that the offender is likely to engage in the future in one or more sexually-oriented offenses.[12]

**{¶ 36}** "Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal."[13]

**{¶ 37}** Moreover, in a sexual predator determination, a trial court's duty is to "consider the statutory factors listed in R.C. 2950.09(B)(3), and should discuss on the record the particular evidence and factors upon which it relies in making its determination regarding the likelihood of recidivism."[14]

**{¶ 38}** Shelton argues a number of factors weighed in his favor. The R.C. 2950.09(B)(3) factors, however, provide only a guideline for a court to consider.[15] No magic

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[12]*State v. Eppinger* (2001), 91 Ohio St.3d 158.

[13]Id., citing *Cross v. Ledford* (1954), 161 Ohio St. 469, 477.

[14]Id. at 166.

[15]*State v. Jordan*, 6th Dist. No. OT-03-009, 2004-Ohio-277; *State v. Tracy* (May 20, 1998), 9th Dist. No. 18623.

number of factors exist to determine whether one is a sexual predator or not.[16] The balance of the factors does not necessarily have to weigh in favor of a sexual predator finding.[17]

**{¶ 39}** The hearing transcript indicates the trial court engaged in the requisite discussion and consideration. Although the trial court was mistaken in its finding of multiple victims, this does not result in reversible error. The fact that Shelton raped two women in two separate offenses was relevant in finding his conduct exhibited a pattern. The first rape occurred just months after he was on probation for the first sexual offense. He also used weapons, displayed cruelty, and made threats of cruelty in both incidents.

**{¶ 40}** The court also noted Shelton attended a sexual offender class in 1991, but failed to attend another until 2002. In 2002, he failed a victim empathy class, 14 years after the offense. Although he finally passed the class, the court was concerned that it took him so long to do so. The court also considered the numerous infractions Shelton committed during his first four years of imprisonment.

**{¶ 41}** Therefore, based on the foregoing, we conclude sufficient evidence supports the trial court's classifying Shelton a sexual predator. Accordingly, Shelton's second assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

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[16] *State v. Jordan,* supra.

[17] See, *State v. Osborne* (July 28, 1999), 9th Dist. No. C.A. 18848; *State v. Mollohan* (Aug. 19, 1999), 4th Dist. No. 98 CA 13.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN, A.J., and

JAMES J. SWEENEY, J., CONCUR.

PATRICIA ANN BLACKMON
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).