[Cite as *State v. Hutton*, 2003-Ohio-494.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 01-BA-61
VS.	)	
	)	OPINION
RALPH J. HUTTON, III,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court Case Nos. 92CR043; 92CR195A
JUDGMENT:	Affirmed
APPEARANCES:	
For Plaintiff-Appellee:	Frank Pierce Prosecuting Attorney Thomas M. Ryncarz Assistant Prosecuting Attorney 147-A West Main Street St. Clairsville, Ohio 43950
For Defendant-Appellant:	Ralph J. Hutton, III, pro se Warren Correctional Institution P.O. Box 120 Lebanon, Ohio 45036

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite

Hon. Mary DeGenaro

Dated: January 30, 2003

DONOFRIO, J.

{¶1} Defendant-appellant, Ralph J. Hutton, III, appeals from a judgment of the Belmont County Court of Common Pleas adjudicating him a sexual predator.

{¶2} On December 10, 1992, a jury convicted appellant of one count of rape of a child under the age of 13 and one count of felonious sexual penetration in lower Case Number 92-CR-043. The court sentenced appellant to two consecutive life sentences. On July 21, 1993, appellant was convicted of seven counts of rape of a child under the age of 13 following a jury trial in Case Number 92-CR-195A. The trial court sentenced appellant to a life sentence on each count to be served consecutively, and to be served consecutively to the sentences in case 92-CR-043.

{¶3} On July 27, 2001, the trial court held a hearing to give appellant notice that it planned to hold a sexual offender determination hearing. The court held the sexual offender determination hearing on October 19, 2001. After listening to two witnesses' and appellant's testimony, the court determined appellant was a sexual predator. The court journalized its determination in its November 1, 2001 judgment entry. Appellant filed his timely notice of appeal on November 19, 2001.

{¶4} Appellant now raises two assignments of error, the first of which states:

{¶5} "THE TRIAL COURT ERRED IN ADJUDICATING THE DEFENDANT A SEXUAL PREDATOR WHEN THE ADJUDICATION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶6} Appellant argues that the court's determination labeling him a sexual predator is against the manifest weight of the evidence. He points out that there were no allegations of any drug or alcohol use, there was no demonstration of a pattern of abuse, and there was no evidence of any mental illness or disability. Appellant also notes that although he has a prior criminal history, he has no other convictions for sexually oriented offenses. He further argues that plaintiff-appellee, the State of Ohio,

failed to present any evidence that he is likely to engage in sexually oriented offenses in the future. Next, appellant contends that the trial court failed to consider the trial transcripts or the opinions from this court affirming his convictions.[1] Finally, appellant argues that the court was required to discuss on the record the evidence and relevant factors it relied on in reaching its decision.

{¶7} A sexual predator is one 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." 2950.01(E)(1). When determining whether an offender is a sexual predator, the trial court shall consider all of the testimony, evidence and R.C. 2950.09(B)(2) factors and then determine by clear and convincing evidence whether the offender is a sexual predator. R.C. 2950.09(B)(2).[2] As stated in *State v. Eppinger* (2001), 91 Ohio St.3d 158, 164, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, 477: "'[c]lear 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.'"

{¶8} On review of a sexual predator determination, the appellate court will affirm the sexual predator determination if it is supported by some competent credible evidence. *State v. Harrison*, 7th Dist. No. 99-CA-154, 2001-Ohio-3320.

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[1] This court affirmed appellant's convictions in *State v. Hutton* (Aug. 30, 1995), 7th Dist. No. 93-B-2 and in *State v. Hutton* (Aug. 30, 1995), 7th Dist. No. 93-B-30.

[2] The legislature has amended R.C. 2950.09(B) since appellant's sexual offender determination hearing. The current version of the statute provides no material changes relevant to this case; however, we note that the subsection numbers are no longer the same.

{¶9} R.C. 2950.09(B)(2) provides that when making a sexual predator determination the court shall consider:

{¶10} "(a) The offender's age;

{¶11} "(b) The offender's prior criminal record regarding all offenses, including, but not limited to, all sexual offenses;

{¶12} "(c) The age of the victim of the sexually oriented offense for which sentence is to be imposed;

{¶13} "(d) Whether the sexually oriented offense for which sentence is to be imposed involved multiple victims;

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

{¶15} "(f) If the offender previously has been convicted of or pleaded guilty to any 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;

{¶16} "(g) Any mental illness or mental disability of the offender;

{¶17} "(h) The nature of the offender'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;

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

{¶19} "(j) Any additional behavioral characteristics that contribute to the offender's conduct."

{¶20} The trial court stated on the record that it considered the R.C. 2905.09(B)(2) factors, the evidence and arguments by both parties, and the entire record in both case 92-CR-043 and 92-CR-195A. The trial court made the following findings of fact. Appellant was age 30 at the time he committed the offenses. Appellant had a prior criminal history consisting of convictions for forgery, theft, and passing bad checks. Appellant sexually abused 15 children, primarily at his home, which was a registered day-care center. The victims ranged in age from three to 11 years old. Appellant did not use drugs or alcohol to impair the victims. Other than the numerous counts in these cases, appellant had no prior sexual offense convictions. Appellant did not suffer from any mental illness nor was he impaired by drugs or alcohol while committing the offenses. The nature of appellant's sexual conduct with the victims included fellatio, vaginal intercourse, anal intercourse, and/or different forms of sexual penetration with boys and girls. Numerous victims have undergone counseling. The nature of appellant's conduct, including the use of his position as child care provider; the numerous occasions of sexual contact with numerous children; the perpetration of sexual abuse on his own children; and his interaction in a sexual context with the children is indicative of highly aberrant behavior. Evidence demonstrated that appellant threatened to kill the children with a gun if they told anyone. Appellant has undergone little or no sexual abuse counseling while incarcerated, continues to deny he committed the crimes, fails to accept any responsibility for his actions and shows no remorse. No evidence exists that appellant

has engaged in any type of deviant sexual behavior during his ten years in the penitentiary.

{¶21} The evidence supports each of the trial court's findings. At the hearing, the parties presented the following testimony. Fred Thompson, the detective who investigated appellant's case, testified first. He stated that he investigated allegations of sexual abuse involving over 15 children at the daycare center appellant and his wife ran in their home. (Tr. 9-10). As a result of the investigation, appellant was indicted. (Tr. 10). He was convicted of rape and felonious sexual penetration on charges involving a three-year-old girl, who testified against appellant when she was five. (Tr. 12). In a separate case, appellant was convicted of seven counts of rape involving his daughter and son, who were both under the age of 13 and who both testified against appellant at trial. (Tr. 12-13). The conduct appellant engaged in with the children consisted of vaginal intercourse, anal intercourse, and fellatio. (Tr. 11, 13). Thompson also testified that appellant's criminal record consisted of convictions for forgery, theft, and passing bad checks. (Tr. 13).

{¶22} Cecelia Marchisio, a therapist for sexually abused adolescents who worked previously as a caseworker for Belmont Count Children Services, testified next. Ms. Marchisio testified that in July of 1991 she was assigned to investigate allegations of sexual abuse at appellant's daycare center. (Tr. 18). She found that the three-year-old girl was sexually abused while at the daycare center. (Tr. 19). Ms. Marchisio stated that she interviewed 16 children regarding alleged abuse at appellant's daycare center and found that appellant sexually assaulted all 16. (Tr. 20). She stated the oldest child was 11 years old while the youngest child was three. (Tr.

22). Ms. Marchisio testified the children reported that appellant had threatened to kill them with a gun if they told their parents what he did. (Tr. 23). She stated that her investigation revealed the abuse had been ongoing in appellant's home for at least two years. (Tr. 23). She also testified that she has been in contact with the victims of the abuse over the past ten years and that many of the children were still suffering as a result of appellant's conduct. (Tr. 23-24). Ms. Marchisio stated that appellant and his wife were custodians for children during the periods of time while the children were in their care. (Tr. 25). Finally, Ms. Marchisio testified that appellant's wife was also charged and she accepted responsibility. (Tr. 26).

{¶23} Appellant testified last. He stated that the Department of Rehabilitation has refused to allow him to participate in a sexual offender program in prison because he is still pursuing appeals. (Tr. 28). However, on cross-examination appellant admitted that he had exhausted all of his appellate rights. (Tr. 31). He also stated that in order to be admitted into the sexual offender program he, as the offender, would have to admit to his offenses. (Tr. 32). When asked if he was now admitting that he committed the rapes, appellant denied doing so. (Tr. 32). Finally, appellant testified that he does not suffer from any mental disease or defect. (Tr. 36).

{¶24} From this evidence it is clear that the trial court based its determination on competent, credible evidence. Additionally, the court commented on the evidence regarding each of the R.C. 2950.09(B)(2) factors in its judgment entry. Based on the foregoing, appellant's first assignment of error is without merit.

{¶25} Appellant's second assignment of error states:

{¶26} "OHIO REVISED CODE 2950.09(B)(1) IS RETROACTIVE LAW WHICH VIOLATES BOTH THE OHIO AND UNITED STATES CONSTITUTIONS BECAUSE THEY APPLY TO CONDUCT COMMITTED BEFORE THE EFFECTIVE DATE OF THE STATUTE."

{¶27} Appellant argues that R.C. 2950.29(B)(1) is unconstitutional. He claims this section violates the prohibition against retroactive laws. In the alternative, appellant argues that R.C. 2950.29(B)(1) violates the constitutional ban against ex post facto laws.

{¶28} The Ohio Supreme Court has determined:

{¶29} "R.C. 2950.09(B)(1), as applied to conduct prior to the effective date of the statute, does not violate the Retroactivity Clause of Section 28, Article II of the Ohio Constitution.

{¶30} "R.C. 2950.09(B)(1), as applied to conduct prior to the effective date of the statute, does not violate the Ex Post Facto Clause of Section 10, Article I of the United States Constitution." *State v. Cook* (1998), 83 Ohio St.3d 404, paragraphs one and two of the syllabus.

{¶31} Accordingly, appellant's second assignment of error is without merit.

{¶32} For the reasons stated above, the decision of the trial court is hereby affirmed.

Judgment affirmed.

Waite and DeGenaro, JJ., concur.