

[Cite as *State v. Johns*, 2004-Ohio-5124.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 03 MA 61
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
EARL E. JOHNS)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Mahoning County, Ohio
Case No. 92 CR 822

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Jason M. Katz
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant: Atty. James E. Lanzo
4126 Youngstown-Poland Road
Youngstown, Ohio 44514

JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: September 20, 2004

WAITE, P.J.

{¶1} This is an appeal of Appellant Earl E. Johns' classification as a sexual predator. Appellant argues that he should not have been adjudicated as a sexual predator because two objective tests found him to be a low risk for committing future sexual offenses, and a clinical evaluation rated him as only a moderate risk for reoffending. The record reflects that the trial court considered the appropriate factors in making its sexual predator determination, as found in R.C. §2950.09(B)(3). There exists clear and convincing evidence that Appellant is a sexual predator, including the clinical evaluation, the fact that he repeatedly raped his two daughters and possibly his son over a ten-year period, that the attacks became more frequent over time, that he is a pedophile, and that he is in denial about the crimes. Therefore, based on the following reasons, the judgment of the Mahoning County Court of Common Pleas is affirmed.

{¶2} On September 11, 1992, Appellant pleaded guilty to two counts of first degree felony rape in violation of R.C. §2907.02(A)(2). The victims were Appellant's two minor daughters. The crimes occurred over a ten-year period when the children were between five and fifteen years old. Appellant was sentenced to a term of 7 to 25 years in prison on each count, to be served concurrently.

{¶3} On December 11, 2002, the Mahoning County Court of Common Pleas held a hearing to determine if Appellant was a sexual predator, pursuant to R.C. §2950.09(C). The evidence that was admitted during the hearing consisted of two

victim impact statements and the report of John Fabian, Psy.D., the clinical psychologist who examined Appellant in preparation for the sexual predator hearing.

{¶4} The report noted that Appellant received a score of 0 on the STATIC-99 recidivism test, indicating a low risk of recidivism. Only 5 percent of offenders who scored 0 re-offended after 5 years of release from prison, 11 percent after 10 years, and 13 percent after 15 years. Appellant also scored a 0 on the RRASOR test, which is short for "Rapid Risk Assessment for Sexual Offense Recidivism". This is also a low risk score, because only 4.4 percent of offenders with a score of 0 re-offend within 5 years, and 6.5 percent after 10 years. Even though Appellant had low risk scores on these tests, Dr. Fabian concluded that a variety of other factors established that Appellant was a moderate risk for committing future sexually oriented crimes.

{¶5} On March 14, 2003, the trial court entered judgment that Appellant was to be classified as a sexual predator. On April 7, 2003, Appellant filed this timely appeal.

{¶6} Appellant's sole assignment of error states:

{¶7} "The evidence presented at the sexual predator determination hearing was insufficient to prove by clear and convincing evidence that the Defendant-Appellant is a sexual predator."

{¶8} A sexual predator is defined as a person who has been convicted of or has pled guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses. R.C. §2950.01(E). Sexual predator classification proceedings under R.C. §2950.09 are civil in nature and require the

prosecution to prove by clear and convincing evidence that an offender is a sexual predator. R.C. §2950.09(B)(4); *State v. Cook* (1998), 83 Ohio St.3d 404, 408, 700 N.E.2d 570. An appellate court will not reverse a trial court's determination that an offender is a sexual predator if some competent, credible evidence supports the trial court's determination. *State v. Hardie* (2001), 141 Ohio App.3d 1, 4, 749 N.E.2d 792. "This deferential standard of review applies even though the state must prove that the offender is a sexual predator by clear and convincing evidence." *Id.* The trial court makes its determination after considering the factors listed in R.C. §2950.09(B)(3), using the factors as guidelines on a case by case basis. *State v. Grahek*, 8th Dist. No. 81443, 2003-Ohio-2650, at ¶73.

{¶9} A trial court's determination regarding whether a defendant is a sexual predator may be appealed, as a matter of right, by either the offender or the prosecutor. R.C. §2950.09(B)(4).

{¶10} Appellant contends that he should not be designated a sexual predator because he was found to have a low risk of recidivism on two objective tests, the STATIC-99 test and the RRASOR. (12/11/02 Tr., Joint Exh. 1, p. 5.) Although Appellant acknowledges that he was found to be an overall moderate risk for recidivism, he contends that the STATIC-99 and RRASOR tests should have outweighed any other factors.

{¶11} Appellant cites one case, *State v. Youlten*, 151 Ohio App.3d 518, 2003-Ohio-430, 784 N.E.2d 768, in support of his argument. It should first be noted that *Youlten*, an Eighth District Court of Appeals case, has no majority opinion.

{¶12} In *Youlten*, the defendant was determined to be a sexual predator despite low risk scores on a number of tests, including the STATIC-99 test, and despite a low-to-medium risk designation by the psychologist who examined the defendant. More importantly, in *Youlten* the trial court relied almost entirely on facts established prior to the time of the defendant's conviction in 1989, rather than on more current information that indicated a very low likelihood that the defendant would commit future sexually oriented crimes. *Id.* at ¶22, 31. The trial judge also concluded that the defendant's pedophilia had not diminished and would escalate in the presence of children, even though these conclusions were not supported by the court-appointed psychologist or by the record. *Id.* at ¶22-23. The Eighth District Court of Appeals concluded that there was no clear and convincing evidence that the defendant was a sexual predator, and it reversed the trial court judgment. *Id.* at ¶24.

{¶13} Appellant's reliance on *Youlten* is misplaced for a number of reasons. First, the sexual predator statute, R.C. §2950.09(B)(3), does not direct the trial court to give greater or exclusive weight to the STATIC-99 test, or any other psychological test, when the court makes a sexual predator determination. Instead, R.C. §2950.09(B)(3) lists a variety of factors that a court must consider in making a sexual predator determination:

{¶14} "(3) 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:

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

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

{¶17} "(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;

{¶18} "(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;

{¶19} "(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;

{¶20} "(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;

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

{¶22} "(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;

{¶23} "(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;

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

{¶25} Although the catch-all factor found in R.C. §2950.09(B)(3)(j) may be interpreted to include such things as the test results from the STATIC-99 test, the statute does not place primary or exclusive emphasis on those test results. The weight, if any, to be given to each factor is left to the discretion of the trial court. *State v. Crooks*, 152 Ohio App.3d 294, 2003-Ohio-1546, 787 N.E.2d 678, ¶14.

{¶26} Second, *Youlten* is of doubtful precedential value even in the Eighth District Court of Appeals. As stated earlier, there is no majority opinion in *Youlten*. A more recent case from the Eighth District indicates that the results of the STATIC-99 test are not treated as the definitive factor in reviewing a sexual predator determination. In *State v. Nash*, 8th Dist. No. 82685, 2004-Ohio-158, the trial court found that the defendant was not a sexual predator, based at least in part on a low score on the STATIC-99 test. *Id.* at ¶5. The Eighth District reversed the trial court ruling and held that the defendant was a sexual predator based on the totality of the evidence. *Id.* at ¶19. Based on the holding in *Nash*, it would appear that not even the Eighth District espouses the position taken by Appellant in the instant appeal.

{¶27} A number of courts have specifically held that a low-risk score on the STATIC-99 test is merely one factor within the totality of evidence that a court must

consider in determining whether a defendant is a sexual predator. *State v. Morales*, 153 Ohio App.3d 635, 2003-Ohio-4200, 795 N.E.2d 145, ¶10 [First District]; *State v. Robertson*, 147 Ohio App.3d 94, 2002-Ohio-494, 768 N.E.2d 1207, ¶39 [Third District]; *State v. Kunsman*, 11th Dist. No. 2001-L-073, 2002-Ohio-4700, ¶14.

{¶28} Although the STATIC-99 test is an important factor in determining whether an offender is a sexual predator, it is certainly not the only important factor. Dr. Fabian, the psychologist who examined Appellant, himself explained that a 0 score on the STATIC-99 test still indicated a 5 percent risk of recidivism within 5 years of release from prison, and a 13 percent risk within 15 years. The STATIC-99 test does not purport to be a perfect indicator of recidivism. Based on all the facts presented in Dr. Fabian's report, there is clear and convincing evidence that Appellant satisfied a number of high risk factors supporting his designation as a sexual predator. Dr. Fabian found that Appellant was a pedophile (attraction to prepubescent children) and a hebephile (attraction to post-pubertal adolescents). He found that the offenses were with multiple victims over a long period of time and with increasing frequency, that there was possibly a male victim, and that there were threats of violence. Appellant denied and minimized the seriousness of the offenses, and also condoned his crimes. There was evidence that Appellant had marriage and employment problems, which are also high risk factors. Although Dr. Fabian did not state the risk level that Appellant scored on the Sexual Violence Risk-20 test, it is apparent that many of the higher risk factors were present.

{¶29} Dr. Fabian also examined each section of R.C. §2950.09(B)(3) and found the following high risk factors present: the victims were between ages 5 and 15; there were multiple victims; there was possibly a male victim (Appellant's son); Appellant is a pedophile and a hebephile; there was a long pattern of abuse over 10 years; and Appellant made threats of violence during the abuse. Although there are a variety of factors indicating a possible low risk of recidivism, Dr. Fabian and the trial court placed more emphasis on the high risk factors. This is not a case where the trial court simply ignored the evidence and disregarded the opinion of the examining psychologist. The trial court examined Dr. Fabian's report and apparently placed greater weight on the factors indicating a high risk of recidivism, which is the essence of the sexual predator designation. The record contains clear and convincing evidence supporting the trial court's conclusion that Appellant is a sexual predator, and the judgment of the Mahoning County Court of Common Pleas is affirmed.

Vukovich, J., concurs.

DeGenaro, J., concurs.