[Cite as *State v. Bunch*, 2021-Ohio-1244.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

CHAZ BUNCH,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0022

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2001 CR 1024

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor*, Atty. Ralph M. Rivera,* Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Stephen Hardwick, Assistant Public Defender, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, for Defendant-Appellant.

Dated: March 22, 2021

Robb, J.

{¶1} In this appeal, Defendant-Appellant Chaz Bunch appeals two decisions rendered by the Mahoning County Common Pleas Court. The trial court granted in part and denied in part his timely petition for postconviction relief. The portion of the petition that was denied was Appellant's claim that mandatory juvenile bindover is unconstitutional and trial counsel was ineffective for failing to offer expert testimony that the victim's identification of Appellant as the perpetrator of the crimes was unreliable. The part that was granted concerned the 89-year sentence Appellant had received. The trial court, following the United States Supreme Court decision in *Graham* and the Ohio Supreme Court decision in *Moore*, held the sentence was a de facto life sentence and was unconstitutional. The trial court ordered Appellant resentenced. Upon resentencing, Appellant received a 49-year sentence and was classified a sexual predator. Appellant appeals the portion of the trial court's decision denying the petition for postconviction relief, the imposition of the 49-year sentence, and the sexual predator classification.

{¶2} For the reasons expressed below, the trial court did not err in denying the portion of the postconviction relief petition and the 49-year sentence was not contrary to law. As to the sexual predator classification, the classification is supported by the record. The decisions of the trial court are affirmed.

Statement of Facts and Case

{¶3} On October 2, 2002, a jury found Appellant guilty of three counts of rape, three counts of complicity to rape, aggravated robbery, kidnapping, and eight firearm specifications. He was also convicted of aggravated menacing, a misdemeanor. *See State v. Bunch,* 7th Dist. No. 02CA196, 2005–Ohio–3309 (reversing a conviction for conspiracy to commit aggravated robbery, affirming remaining convictions, and remanding for resentencing on a maximum of three firearm specifications). Following the initial appeal, Appellant was sentenced to an aggregate sentence of 89 years in prison. *State v. Bunch,* 7th Dist. No. 06MA106, 2007–Ohio–7211. He received consecutive terms of ten years on each of the eight felonies, with the misdemeanor menacing count

running concurrent, plus three years on each of the three firearm specifications. *State v. Bunch,* 7th Dist. No. 06MA106, 2007–Ohio–7211.

{¶4} The events leading to his indictment and convictions were set forth in the initial appeal and are as follows:

> Early in the evening on August 21, 2001, Jason Cosa, Christine Hammond and Jason's grandfather were returning to Jason's home located at 190 Maywood, Youngstown, Ohio. (Tr. 808, 814). After they had entered the driveway, a man wearing a mask (later admitted to being Brandon Moore), approached the car and robbed them at gunpoint. (Tr. 809–811, 826).
>
> Neither Jason nor Christine could identify who the gunman was, but they did notice that he got into an awaiting vehicle that was a dark, older automobile. Both described the car as being dark and very loud. (Tr. 813, 829).
>
> Later that night at approximately 10:20 p.m., M.K., a twenty-two year-old Youngstown State University student, arrived at a group home for mentally handicapped women to report to work for the evening; she worked the night shift. (Tr. 850, 854). The group home she worked at was located at 1322 Detroit Avenue, Youngstown, Ohio. (Tr. 855).
>
> Upon arriving, she exited her vehicle and went to get her belongings out of the trunk of her car. (Tr. 855). On her way to the trunk, M.K. noticed an older, black automobile (referred to as black automobile) coming up the street and stopping a few houses away. (Tr. 862–863). At this point, she also saw a tall man running through the grass. (Tr. 863). The man wearing a mask, later identified as Brandon Moore, pointed a gun at her and instructed her to give him all her money and belongings. (Tr. 864). The porch light of the group home then came on and Moore instructed her to get into the passenger seat of her car. (Tr. 864). Moore climbed over M.K., positioned himself into the driver's seat, and drove away with her in the car. (Tr. 864).

Upon leaving the driveway, Moore, driving M.K.'s car, began following the black automobile. Shortly thereafter, Moore stopped the car and a second gunman exited the black automobile in front of them and entered the victim's car through the rear passenger's side door. (Tr. 870). The second gunman, later identified as Bunch, put a gun to her head and demanded her money and belongings. (Tr. 873). She now had two guns pointed at her, one from Moore and one from Bunch, (Tr. 874). After Bunch had entered the vehicle, Moore began to drive and continued to follow the black automobile.

As all of this was occurring, Moore began to compliment M.K. on her beauty. Moore then, while driving, inserted his fingers into her vagina. (Tr. 876–877). Moore was so infatuated with her that he nearly hit the black automobile in front of them. (Tr. 877). It was at this point that M.K. was able to see the license plate of the black automobile. She memorized the license plate number as "CTJ6243." (Tr. 872). While all this was occurring, Bunch still had the gun pointed at her head.

At some point while Moore was driving, the black automobile stopped leading and began to follow Moore. Eventually, Moore drove down a dead-end street near Pyatt Street in Youngstown, Ohio, and both automobiles pulled into a gravel lot. (Tr. 879, 881, 1038–1039). Bunch ordered M.K. out of the car. (Tr. 884). Moore and Bunch then took turns orally raping her; one of them would have his penis in her mouth, while the other would force her head down. (Tr. 887–888). Guns were pointed at her while this was occurring. (Tr. 888).

After Moore and Bunch were finished orally raping her, they forced her at gunpoint to the trunk of the car. (Tr. 889). At the trunk of the car, she was anally raped. (Tr. 893). While this was occurring one of the individuals from the black automobile, who was later identified as Jamar Callier, went through her belongings in the trunk and took some of the items. (Tr. 890). The other individual in the black automobile stayed in the car the whole time and watched; he was later identified as Andre Bundy.

After the anal rape occurred, Bunch threw M.K. to the ground and then Moore and Bunch vaginally and orally raped her. (Tr. 895). While one of them vaginally raped her, the other would orally rape her, and then they would switch places. (Tr. 895–896). Both were armed as this occurred. (Tr. 895).

At some point while this was occurring, Bundy told Callier to stop what was going on. As a result, Callier pushed Bunch off M.K., helped her to her feet, and put her in her car. (Tr. 897, 1265–1266). This caused an altercation between Bunch and Callier. (Tr. 899). Bunch wanted to kill M.K., however, Callier told Bunch that he could not kill a pregnant woman. (Tr. 899). During the rapes, M.K. was pleading for her life and as part of that plea she claimed to be pregnant. (Tr. 893). Prior to her leaving, Moore and Bunch told her that they knew who she was and threatened to harm her and her family if she ever told what happened. (Tr. 900).

Once in her car, M.K. locked her doors and drove straight to her boyfriend's parents' house. While she was driving she kept repeating the license plate number of the car. (Tr. 902). Upon arriving at the house, the victim was hysterical, but she was able to scream out the license plate number, which someone wrote down. Her boyfriend's parents then immediately took her to the hospital. (Tr. 902). She arrived at the hospital at approximately 11:12 p.m. (Tr. 1029–1030).

At the hospital, her boyfriend's father immediately told Officer Lynch from the Youngstown Police Department that M.K. had been raped by individuals in an older black automobile with the license plate number “CTJ6423.” (Tr. 1028). Officer Lynch was at the hospital for an unrelated matter, but when this information was given to her, she began broadcasting the plate number and the car's description over the police radio; this occurred at approximately 11:13 p.m. (Tr. 910, 1027, 1029–1030). Officer Lynch then began obtaining further information from the victim, including a detailed

description of the assailants and the crimes. Officer Lynch broadcasted the description of the assailants over the police radio.

While this investigation was occurring, a sexual assault nurse at the hospital examined M.K. and completed a rape kit. The rape kit included swabs of the victim's mouth, vagina, and rectum. (Tr. 1588–189). Once completed, the rape kit was sealed and taken into police custody. (Tr. 1045–1050).

At approximately 11:30 p.m. Youngstown Police Officer Anthony Vitullo, who was on patrol and had heard Officer Lynch's broadcast, pulled his cruiser into the Dairy Mart at the intersection of Mahoning Avenue and Bella Vista. He noticed a black car at pump seven. (Tr. 1061). As the car was pulling out he noticed that the license plate number on the car as "CTJ6243." (Tr. 1061). The plate number was not the exact number that had been broadcasted over the radio, however, the numbers were very close. The number broadcasted over the radio was "CTJ6423." Given that the car matched the description and that the license plate number was very similar to the one broadcasted, Officer Vitullo began following the car.

The black automobile pulled onto Mahoning Avenue and headed east toward downtown. (Tr. 1062). It then merged onto I–680 southbound and exited at the first exit, Glenwood Avenue. (Tr. 1063). The black automobile then ran the stop sign, turned southbound on Edwards Street, and pulled into the first driveway on the west side of the street. (Tr. 1063, 1065).

Officer Vitullo followed the car the whole time; however, he did not activate his overhead lights. Upon arriving at the Edwards Street address, Officer Vitullo remained at his car waiting for backup before approaching the car. (Tr. 1065–1067). Moments later backup arrived, including Officer Schiffhauer from the YPD K–9 unit. The officers proceeded to the car. Upon reaching the car, the officers noticed that the driver of the vehicle had fled on foot. However, the passengers, Moore, Bundy, and Callier, remained in

the vehicle and were subsequently arrested and detained. The passengers informed the police that the driver's name was “Shorty Mack.”

At that point, the K–9 unit began trying to track the driver of the vehicle. Officer Schiffhauer was unable to track and find the driver, but he was able to determine that the driver headed west. (Tr. 1111).

At 11:50 p.m., Youngstown Police Officer Ronnie Jones heard the broadcast that the driver from the suspected automobile had fled on foot. (Tr. 1152–1155). He then set up a perimeter and positioned his cruiser on Glenwood Avenue near Bernard Street in Volney Rogers parking lot. (Tr. 1155). Approximately five minutes later Officer Jones noticed Bunch “trotting” by on Glenwood Avenue. (Tr. 1157–1158). Officer Jones placed the spotlight on Bunch and Bunch slowed to a walk. (Tr. 1157–1158). Bunch proceeded to the side door of 349 Glenwood Avenue and began knocking. (Tr. 1158–1159).

Lamont Hollingshead lived at 349 Glenwood Avenue. He opened the door when Bunch knocked, but Hollingshead would not let Bunch in because he did not know who Bunch was. Hollingshead testified that Bunch claimed to being chased by the police for a curfew violation. (Tr. 1184–1185). Bunch asked Hollingshead to tell the police he was Bunch's uncle. (Tr. 1184). Believing that the police were after Bunch for a curfew violation, Hollingshead complied with Bunch's request. (Tr. 1184).

Officer Jones questioned both Hollingshead and Bunch. Bunch informed the officer that he was sixteen years old, that his name was Chaz Bunch, and that he was on his way from his uncle's house to his cousin's house. (Tr. 1159–1161). Given the explanation and the fact that Bunch did not match the description of the driver that was broadcasted over the police radio, Officer Jones let Bunch go. The description broadcasted over the radio was that the driver was wearing gray sweats and went by the name of “Shorty Mack.” (Tr. 1161–1162, 1167–1169). Bunch was wearing navy blue

pants, a navy blue top with a white T-shirt underneath it. (Tr. 1164). Moore was wearing gray sweatpants, thus, the wrong description was broadcasted over the radio. (Tr. 1162).

After Officer Jones left, Bunch paid Hollingshead to make a telephone call from his house. Bunch called Brandy Miller; Brandy Miller's testimony and telephone records confirmed this. (Tr. 1195–1198, 1572–1573).

Three days later, while at roll call, Officer Jones was informed that the subject that fled the automobile on the night of the rape was suspected to be Bunch. Officer Jones informed his superiors that on the night of the rape he had seen an individual who identified himself as Chaz Bunch. Officer Jones was shown a photo array with Bunch in it; he identified Bunch as the individual he saw on the night of the rape. Bunch was subsequently arrested.

During the investigation of the rape, the police inventoried the black automobile. In inventorying the car, the police found the victim's belongings. (Tr. 1071–1073, 1097, 1206–1208, 1211–1212). The police also found a vehicle registration and credit union card belonging to Jason Cosa. (Tr. 1213, 1251, 1406–1407). Also in the car was a .38 caliber handgun and one blue and one black wave cap. (Tr. 1073–1074, 1097, 1208–1209).

Additionally, in further investigating the crimes, the police interviewed M.K. On August 22, 2001, M.K. was shown a series of photographic line-ups. (Tr. 910–911, 1425, 1433). She positively identified Bundy as the driver of the dark older automobile that watched the entire time. (Tr. 913, 14488). She also identified Callier as the person who went through her trunk and as the person who stopped the rape. (Tr. 913–914, 1451–1452). She identified Moore as the first gunman who abducted, robbed and raped her. (Tr. 919–920, 1446). She signed each individual photograph indicating the identifications. (Tr. 913, 920, 1446, 1448, 1451).

As to Bunch's identification, she was drawn to the photograph of him as being the second gunman, but she informed the detectives that she wanted to see a full body picture before signing the photograph. The police were unable to put together a full body array because they were unable to find juveniles of that build. (Tr. 1450). However, on September 7, 2001, the victim saw a local newspaper which showed a picture of Bunch from mid-chest up. Upon seeing this picture, the victim immediately knew that Bunch was the second gunman and called her victim-witness advocate to inform her of this information.

Furthermore, evidence that was obtained during the investigation was sent away for fingerprint and DNA testing. The rape kit was tested at BCI. The semen sample from the vaginal swab, rectal swab and the victim's shorts were not consistent with Bunch's DNA. However, it was determined that Moore could not be excluded; the chance of finding another individual with the same DNA as Moore was one in 94,000,000,000,000,000,000. (Tr. 1670). No fingerprints were found on the .38 caliber gun.

The police also obtained the video surveillance from Dairy Mart. Still pictures were made from the video surveillance. The pictures showed Callier and Bunch purchasing food and gas for pump seven.

Also, the police conducted interviews with the suspects. On August 22, 2001, Andre Bundy was interviewed by the police. Bundy admitted to being the driver of the black automobile. (Tr. 1419). Bundy also stated that he had Callier stop the rape. (Tr. 1421).

Moore was interviewed on August 23, 2001. He informed the detective that he was the individual who robbed Cosa and Hammond. He stated that he was the individual who first approached M.K. and forced her into her car at gunpoint. He then admitted to raping her. (Tr. 1431). However, he claimed that he committed the crimes because an individual known as “Shorty Mack”

> made him do it. (Tr. 1464). He also claimed that the gun he used that night was a fake. (Tr. 1472).
>
> Callier was then interviewed by the police and also testified at trial. (Tr. 1276–1400). He testified that both Bunch and Moore raped M.K. (Tr. 1264). He stated that Bunch was the driver of the black automobile when it left the Dairy Mart. He then stated that once Bunch pulled the car into the house on Edwards Street, Bunch told them to tell the police that he was "Shorty Mack." (Tr. 1274). Callier also saw the pictures from Dairy Mart and indicated that he and Bunch were in the pictures. (Tr. 1276).

State v. Bunch, 7th Dist. Mahoning No. 02 CA 196, 2005-Ohio-3309, ¶ 2-3.

{¶5} Appellant filed a pro se post-conviction petition on June 12, 2003, which was not ruled on initially.

{¶6} In April 2013, Appellant filed a Delayed Application for Reconsideration contending his sentence was unconstitutional pursuant to *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010). Co-defendant Brandon Moore also filed a delayed application for reconsideration. We denied both applications. Those decisions were appealed to the Ohio Supreme Court.

{¶7} While those decisions were pending in the Ohio Supreme Court, Appellant filed an application for DNA testing, which the trial court denied and we affirmed the denial. *State v. Bunch*, 7th Dist. Mahoning No. 14 MA 168, 2015-Ohio-4151.

{¶8} Thereafter in 2016, the Ohio Supreme Court reversed our decision denying the delayed application for reconsideration of Brandon Moore's sentence. *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127. The court concluded Moore's sentence was unconstitutional because "*Graham's* categorical prohibition of sentences of life without the possibility of parole for juveniles who commit nonhomicide crimes applies to juvenile nonhomicide offenders who are sentenced to term-of-years sentences that exceed their life expectancies." *Id*. at ¶ 100.

{¶9} The Ohio Supreme Court, however, declined to review Appellant's denial of the application for reconsideration.

{¶10} Approximately two months after the Ohio Supreme Court decision in *Moore*, Appellant filed his first amended postconviction petition. 2/22/17 First Amended Postconviction Petition. Three claims were raised in this petition. The first claim was based on the *Moore* decision. 2/22/17 First Amended Postconviction Petition. The second claim was based on the Ohio Supreme Court's decision in *Aalim I*, which held that the mandatory transfer of juveniles to the general division of a common pleas court violates the juveniles' right to due process as guaranteed by the Ohio Constitution. *See State v. Aalim*, 150 Ohio St.3d 463, 2016-Ohio-8278, 83 N.E.3d 862, ¶ 31 (*Aalim I*), *reconsideration granted, decision vacated,* 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 31 (*Aalim II*). While Appellant acknowledged that *Aalim II* vacated the *Aalim I* decision and held that there was no constitutional violation for mandatory transfers of juveniles, Appellant argued the issue to preserve it for appeal. 1/18/18 Defendant Response to State's Motion for Judgment on the Pleadings. The third claim was that appellate counsel was ineffective for failing to hire an expert witness regarding the unreliability of eyewitness identification. 2/22/17 First Amended Postconviction Petition. Appellant admitted counsel attacked the credibility of the identification on cross-examination, but argued an expert was needed to support that attack. 1/18/18 Defendant Response to State's Motion for Judgment on the Pleadings.

{¶11} In response to the petition, the state filed a motion for judgment on the pleadings. 11/22/17 Motion. The state conceded that the first claim had merit and Appellant was entitled to resentencing. It argued the second claim failed based on *Aalim II.* As to the third claim, it contended counsel was not ineffective for failing to call an expert. Counsel relied heavily on cross-examination to demonstrate the victim's identification of Appellant as the fourth assailant was reliable.

{¶12} The trial court granted the judgment in part and denied the judgment in part. 1/29/18 J.E. The trial court found merit with the first claim and ordered resentencing. 1/29/18 J.E. However, as to the second and third claims, the trial court denied them for the reasons asserted by the state. 1/29/18 J.E.

{¶13} Appellant timely appealed the decision. After the briefs were submitted, the parties jointly asked for the appeal to be held in abeyance until a new sentence was imposed. 6/15/18 Motion. We granted the request and indicated that following the

resentencing, Appellant could determine whether he needed to amend his notice of appeal.

{¶14} Sentencing memorandum was filed by both parties, and a resentencing hearing occurred on September 6, 2019. The trial court sentenced Appellant to an aggregate sentence of 49 years. He received 3 years on each of the three firearm specifications for a total of 9 years. He received 10 years for aggravated robbery, 10 years for each of the three rapes to run consecutive to each other and consecutive to the aggravated robbery sentence. He received 10 years for each of the three complicity to rape convictions and 10 years for the kidnapping conviction. Those sentences were ordered to run concurrent to each other and concurrent with the other sentences. He also received 6 months for aggravated menacing, which was ordered to run concurrent to the other sentences.

{¶15} A sexual classification hearing was then held. Since the crimes occurred prior to the tier system, Appellant was subject to the old classification system under Megan's Law. The trial court classified him a sexual predator.

{¶16} Appellant amended his notice of appeal to include the sentence and sexual predator classification. This appeal can be divided into three parts. The appeal of the postconviction relief petition, the appeal of the sentence, and the appeal of the sexual offender classification.

1. PostConviction Relief Petition

{¶17} The first two assignments of error address the trial court's partial denial of the postconviction relief petition.

{¶18} Pursuant to R.C. 2953.21, a petition for postconviction relief is a petition brought by "[a]ny person who has been convicted of a criminal offense * * * and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States[.]" Appellant argues his conviction is void because the mandatory bindover to the common pleas court violated his due process rights (*Aalim I*) and trial counsel was ineffective for failing to hire an expert on the unreliability of the witness identification.

{¶19} "[A] postconviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment." *State v. Calhoun*, 86 Ohio St.3d 279,

281, 714 N.E.2d 905 (1999). "Therefore, a petitioner receives no more rights than those granted by the statute." *Id.* Appellate courts review a trial court's ruling on a petition for postconviction relief for abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. Abuse of discretion implies that the court acted in an unreasonable, arbitrary, or unconscionable manner. *State ex rel. Sartini v. Yost*, 96 Ohio St. 3d 37, 2002-Ohio-3317, 770 N.E.2d 584, ¶ 21.

First Assignment of Error

"The trial court erred by dismissing Chaz Bunch's petition without an evidentiary hearing even though the petition was supported by the affidavit of an eye witness identification expert demonstrating that the identification in this case was unreliable."

{¶20} This assignment of error is based on the victim's identification of Appellant. During the photographic lineup, the victim was able to positively identify Bundy, Moore, and Callier. However, she did not positively identify Appellant. She indicated she was drawn to the photograph of him being the second gunman, but she wanted to see a full body picture before signing the photograph. The police were unable to put together a full body array because they were unable to find juveniles of that build. However, within two weeks of seeing the line-up, she saw a local newspaper, which showed a picture of Appellant from mid-chest up. Upon seeing this picture, she immediately knew Appellant was the second gunman and called her victim-witness advocate to inform her of this information.

{¶21} At trial, during cross-examination of the victim, the reliability of her identification was brought into question. However, trial counsel did not present an expert concerning the reliability of the victim's identification of Appellant.

{¶22} In his postconviction relief petition, Appellant argued trial counsel's failure to call an expert on the reliability of the victim's identification constituted ineffective assistance of counsel. Attached to the petition for postconviction relief was an expert opinion on witness identification reliability and this report called into question the reliability of the identification.

{¶23} To prevail on a claim of ineffective assistance of counsel, a postconviction petitioner must demonstrate that counsel's (1) performance fell below an objective standard of reasonableness, and (2) deficient performance prejudiced him. *See*

Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). When reviewing counsel's performance, this court "must indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Strickland* at 689. To establish resulting prejudice, a defendant must show that the outcome of the proceedings would have been different but for counsel's deficient performance. *Id.*

{¶24} Here, trial counsel choose to use cross-examination to question the reliability of the victim's identification of Appellant. The decision between relying on an expert and cross-examination is trial strategy. *State v. Foust*, 105 Ohio St.3d 137, 2004–Ohio–7006, 823 N.E.2d 836, ¶ 97–99 (trial counsel's failure to request funds for a DNA expert, an alcohol and substance-abuse expert, a fingerprint expert, and an arson expert did not amount to ineffective assistance of counsel because appellant's need for experts was "highly speculative" and counsel's choice "to rely on cross-examination" of prosecution's expert was a "legitimate tactical decision"). Debatable trial tactics do not establish ineffective assistance of counsel. *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 45. Furthermore, the failure to call an expert and instead rely on cross-examination has been found by the Ohio Supreme Court to not constitute ineffective assistance of counsel. *State v. Nicholas*, 66 Ohio St.3d 431, 436, 613 N.E.2d 225 (1993). *See also State v. Thompson*, 33 Ohio St.3d 1, 9, 514 N.E.2d 407 (1987) (trial counsel's failure to obtain a forensic pathologist to "rebut" the issue of rape was not ineffective assistance of counsel); *Foust*, 105 Ohio St.3d 137 at ¶ 97–99. *See also State v. Yarger*, 6th Dist. No. H–97–014, 1998 WL 230648 (May 1, 1998) (trial counsel's failure to hire an expert medical doctor to rebut state's expert witness was not ineffective assistance of trial counsel); *State v. Rutter*, 4th Dist. No. 02CA17, 2003–Ohio–373, ¶ 19, 28 (trial counsel's failure to hire an accident reconstructionist did not amount to ineffective assistance of counsel).

{¶25} Furthermore, Callier testified Appellant and Moore raped the victim; he identified Appellant as the fourth assailant. Therefore, the victim's identification of Appellant was not the only identification.

{¶26} Consequently, for those reasons the trial court did not abuse its discretion in finding the claim that trial counsel was ineffective for failing to call an expert witness on unreliable identifications was meritless. This assignment of error lacks merits.

Second Assignment of Error

"The trial court erred by transferring Chaz Bunch to adult court without an amenability hearing."

{¶27} The offenses were committed in August 2001 and Appellant was transferred to Common Pleas court in October 2001. The juvenile transfer statute in effect at that time required mandatory transfer given the offenses. R.C. 2151.26 (version in effect until 1-1-02). *See also* R.C. 2152.10 and R.C. 2152.12 (both effective 1-1-02).

{¶28} In 2016, the Ohio Supreme Court held that "the mandatory transfer of juveniles to the general division of a common pleas court violates juveniles' right to due process as guaranteed by Article I, Section 16 of the Ohio Constitution." *State v. Aalim*, 150 Ohio St.3d 463, 2016-Ohio-8278, 83 N.E.3d 862 (*Aalim I*), *reconsideration granted, decision vacated,* 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883 (*Aalim II*). In *Aalim I*, the Court stated Ohio's procedure for discretionary transfer of juveniles 14 and older is constitutional and that process, which includes an amenability hearing, is required for all 14 and older juvenile transfers to the common pleas court. *Aalim I* at ¶ 27-31. Thus, under *Aalim I*, for an offender like Appellant, who was 16 years old at the time of the offense, an amenability hearing would be required before he could be transferred to the common pleas court.

{¶29} The Ohio Supreme Court, however, reconsidered *Aalim I* in early 2017 and vacated its prior decision. *Aalim II*, 150 Ohio St.3d 463. In *Aalim II*, the Court held that the mandatory bind provisions concerning juveniles who commit qualifying offenses when they are 16 or 17 years of age (R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b)) complies with due process and equal protection as guaranteed by the Ohio and United States Constitutions. *Id*. at ¶ 38.

{¶30} Consequently, the mandatory transfer without an amenability hearing did not violate Appellant's rights. Based on *Aalim II*, the trial court did not abuse its discretion in denying the second claim in the petition for postconviction relief. It is acknowledged Appellant is only raising this claim to preserve it for appeal to the Ohio Supreme Court.

{¶31} The second assignment of error lacks merit.

{¶32} In conclusion, as to the partial denial of the postconviction relief petition, both assignments of error lack merit. The denial of the postconviction relief petition is affirmed.

2. Forty-Nine Year Sentence

{¶33} The next four assignments of error address the sentence imposed. An appellate court is permitted to review a felony sentence to determine if it is contrary to law; the standard of review is dictated by R.C. 2953.08(G). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1. That statute provides:

> The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court. The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate courts' standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

R.C. 2953.08(G)(2).

{¶34} Pursuant to *Marcum*, "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id.* 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. *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. It is that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases. *Marcum* at ¶ 22, quoting *Cross* at paragraph three of the syllabus.

Third Assignment of Error

"The trial court erred when it sentenced Chaz Bunch to 49 years in prison because it failed to consider youth as a mitigating factor as required by *Graham v. Florida*, 560 U.S. 48 (2010) and *State v. Long*, 138 Ohio St.3d 478 (2014)."

{¶35} Appellant argues that the trial court did not consider his youth at the time the offense was committed as a mitigating factor. He asserts the trial court did not make statements during sentencing that youth was a mitigating factor. The state counters arguing there is no requirement that the trial court must state on the record that youth is a mitigating factor prior to sentencing the offender.

{¶36} The Ohio Supreme Court in *State v. Long* stated that an offender's youth and the attendant circumstances of youth may be considered pursuant to the United States Supreme Court decision in *Miller* before the sentencing court imposes a sentence on a juvenile. *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 18. "R.C. 2929.11 and 2929.12 do not prevent a court from considering youth as a factor that makes an offense less serious or makes an offender less likely to commit future offenses." *Id*. The *Long* court then further explained:

> Nevertheless, for clarification, we expressly hold that youth is a mitigating factor for a court to consider when sentencing a juvenile. But this does not mean that a juvenile may be sentenced only to the minimum term. The offender's youth at the time of the offense must still be weighed against any statutory consideration that might make an offense more serious or an offender more likely to recidivate. Yet because a life-without-parole sentence implies that rehabilitation is impossible, when the court selects this most serious sanction, its reasoning for the choice ought to be clear on the record.

Id. at ¶ 19.

{¶37} The statements in *Long* make it clear that youth is a mitigating factor and it is to be used as a mitigating factor when weighing the serious and recidivism factors in R.C. 2929.12. The language in R.C. 2929.12 permits the consideration of any additional factor and youth as a mitigating factor could clearly be considered in that analysis. See R.C. 2929.12(A) ("In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) * * * relating to the seriousness of the conduct, the factors provided in divisions (D) and (E) * * * relating to the likelihood of the offender's recidivism * * * and in addition to any other factors relevant to achieving the purposes and principles of sentencing."). *Long* also clearly indicated that when life without the possibility of parole is a sentencing option the reasoning for the choice must be clear on the record. *Id*.

{¶38} Typically, R.C. 2929.12 does not require the trial court to "use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors." *State v. Johnson,* 7th Dist. Mahoning No. 19 MA 0030, 2020-Ohio-3640, ¶ 27. However, the Ohio Supreme Court has recently explained that not only is the trial court required to separately consider the youth of a juvenile offender as a mitigating factor before imposing a life sentence with or without the possibility of parole, but consideration of that mitigating factor must be articulated on the record. *State v. Patrick*, ___ Ohio St.3d ___, 2020-Ohio-6803, ___ N.E.3d ____, ¶ 27, 38, 42, 48 (with possibility of parole) *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 1, 20-28 (without possibility of parole).

{¶39} Those statements are taken to mean youth as a mitigating factor must be expressly articulated and considered when imposing a life sentence with or without the possibility of parole. In the case at hand, life with or without the possibility of parole was not a sentencing option. Thus, the more stringent requirement of expressly articulating youth as a mitigating standard may not be required. That said, we do acknowledge that in *Moore*, the Supreme Court indicated that the sentence imposed was was a de facto life sentence and violated the Constitution. Therefore, there is a valid and persuasive argument that when sentencing a juvenile to a lengthy sentence for committing multiple crimes, youth should be considered as a mitigating factor.

{¶40} Regardless, the record here is clear the trial court did consider youth when determining and imposing the sentence. At sentencing, the trial court expressly articulates it considered youth as a mitigating factor:

> Let the record reflect the defendant was present this date in court for a resentencing hearing. Defendant was represented by Attorney Emoff. The state was represented by Attorney Rivera. The defendant was afforded all his rights pursuant to Criminal Rule 32.
> The court has considered the record, the oral statements made, the victim's impact statement, as well as the principles and purposes of sentencing under Ohio Revised Code 2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code 2929.12.
> The court has also taken into consideration the fact that the defendant was a minor at the time of the offense, and considers his capacity for change, and that a minor has a diminished sentence [sic] of culpability.

9/6/19 Resentencing Tr. 75-76.

{¶41} In the sentencing judgment entry, the trial court stated that it considered all statements of counsel and Appellant, the sentencing memorandums, and all reports and records submitted to it. 9/17/19 J.E. The state recognized youth as a mitigating factor in its sentencing arguments; it acknowledged that the law recognizes that juvenile offenders are different from adults because they are less mature and more impulsive. 9/6/19 Resentencing Tr. 7; 7/29/19 State's Sentencing Memorandum. Appellant's sentencing memorandum, his own statements, and arguments by counsel also indicated that youth is a mitigating factor. 9/6/19 Resentencing Tr. 30-31, 37-41, 62, 71-73; 6/28/19 Sentencing Memorandum.

{¶42} Consequently, all statements by the trial court indicated it did consider Appellant's youth when determining the appropriate sentence. Moreover, it expressly articulated it considered Appellant's youth. This assignment of error is meritless.

Fourth Assignment of Error

"The trial court erred by imposing a sentence that does not provide Chaz Bunch with a meaningful opportunity for release."

{¶43} Appellant argues his 49-year prison term denies him a meaningful opportunity for release. Appellant would be eligible for judicial release after serving 44 years, when he is 60 years old. His 49-year sentence would be completed when he is 65 years old. The state disagrees and argues that being eligible for release at age 60 does provide Appellant with a meaningful opportunity for release.

{¶44} A similar argument was recently presented to this court by Appellant's co-defendant Brandon Moore. In finding no merit with the argument that Moore's 50-year sentence did not provide him with a meaningful opportunity for release we examined cases from other states:

> For instance, in *People v. Contreras*, 4 Cal.5th 349, 411 P.3d 445, 229 Cal.Rptr.3d 249 (2018), the California Supreme Court found that the sentences of two nonhomicide juvenile offenders of 50 years to life and 58 years to life violated the Eighth Amendment under the standard set out in *Graham*. The Court reasoned that even if the offenders' parole eligibility dates were within their expected lifespans, the chance for their release would come near the end of their lives and they would have spent the vast majority of adulthood in prison. *Id.* at 368, 229 Cal.Rptr.3d 249, 411 P.3d 445. The Court opined that the sentences reflected a judgment that the offenders were "irretrievably incorrigible" and the sentences did not give them "the realistic chance for release contemplated by *Graham*." *Id.*
>
> And in *Casiano v. Commr. of Correction*, 317 Conn. 52, 115 A.3d 1031 (2015), which was a homicide case, the Connecticut Supreme Court held that the juvenile offender's sentence of 50 years without the possibility of parole violated the Eighth Amendment pursuant to *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407. In so doing, the Court also applied *Graham's* reasoning. It observed that *Graham* and *Miller* viewed the concept of life "more broadly than biological survival;" instead they "implicitly endorsed the notion that an individual is effectively incarcerated for 'life' if he will have no opportunity to truly reenter society or have any meaningful life outside of prison." *Id.* at 78, 115 A.3d 1031. The Connecticut Supreme

Court concluded that the procedure set out in *Miller* (requiring that a trial court must engage in an individualized sentencing process that accounts for the mitigating circumstances of youth and its attendant characteristics before sentencing a juvenile homicide offender to life in prison), must be applied before sentencing a juvenile homicide offender to 50 years in prison. *Id.* at 79, 115 A.3d 1031.

But in numerous cases, other states have found sentences of approximately 50 years not to violate *Graham*.

In *Ira v. Janecka*, 2018-NMSC-027, 419 P.3d 161, ¶ 4, the New Mexico Supreme Court first determined that *Graham* applies to multiple term-of-years sentences that will likely keep a juvenile offender in prison for his entire life because the juvenile is deprived of a meaningful opportunity to demonstrate his maturity and rehabilitation in order to obtain release. In that case, the juvenile offender was convicted of ten counts of criminal sexual penetration and several other crimes. The juvenile offender was sentenced to 91½ years in prison with parole eligibility after 46 years. At the time he would be eligible for parole, he would be 62. The New Mexico Supreme Court determined that this sentence provided the offender with a meaningful opportunity for release pursuant to *Graham*. *Id.* at ¶ 34. The Court did note, however, that serving almost 46 years before being given an opportunity to obtain release "is the outer limit of what is constitutionally acceptable." *Id.* at ¶ 38.

In *State v. Smith*, 295 Neb. 957, 892 N.W.2d 52 (2017), cert. denied, ––– U.S. ––––, 138 S.Ct. 315, 199 L.Ed.2d 208 (2017), a juvenile burglary and kidnapping offender was sentenced to 90 years to life in prison. His sentence made him eligible for parole at the age of 62, after serving approximately 46 years. In upholding the sentence as not violating the Eighth Amendment, the Nebraska Supreme Court noted that "a number of courts have held that sentences that allow the juvenile offender to be released in his or her late sixties or early seventies satisfy the 'meaningful

> opportunity' requirement." *Id.* at 977, 892 N.W.2d 52. It further reasoned that parole eligibility at age 62 did not equate to "geriatric release" since many people in today's society work well into their seventies and have a meaningful life well beyond age 62 or even at age 77. *Id.* at 978, 892 N.W.2d 52.
>
> And in *Williams v. State*, 197 So.3d 569, 572 (Fla. App. 2016), a Florida appellate court upheld a juvenile nonhomicide offender's 50-year sentence reasoning, "[e]ven if Williams is required to serve every day of his fifty-year sentence, he would be released from prison at age sixty-eight."
> Moreover, in *People v. Lehmkuhl*, 2013 COA 98, 369 P.3d 635, ¶ 13 (Colo. App.), a Colorado appellate court upheld a sentence of 76 years to life for a juvenile nonhomicide offender where the offender would become eligible for parole at age 67.

State v. Moore, 7th Dist. Mahoning No. 18 MA 0055, 2020-Ohio-4715, ¶ 21-27.

{¶45} We then considered whether Moore's 50-year sentence, with eligibility for judicial release after 47 years when he is 62 years old violated the Eighth Amendment. *Id*. at ¶ 28. We concluded that the United States Supreme Court's *Graham* decision and the Ohio Supreme Court decision in *Moore*, "only require that juvenile nonhomicide offenders be given a meaningful opportunity to demonstrate rehabilitation so that they may spend *part* of their lives outside of prison." *Id*. at ¶ 30. Eligibility for judicial release at 62 years old provided Moore with that possibility; "there does not exist a national consensus against a 50-year sentence with an opportunity for judicial release after 47 years at which time the offender will be 62 years old." *Id*. at ¶ 31-32. "Numerous states have upheld similar sentences as constitutional and not in violation of *Graham*." *Id*. at ¶ 32.

{¶46} Based on the above analysis, Appellant's 49-year sentence with eligibility for judicial release after 44 years provides Appellant with a meaningful opportunity for release.

{¶47} A few days prior to oral arguments, Governor DeWine signed R.C. 2967.132 into law. Appellant thereafter filed a notice of additional authority. R.C. 2967.132(C)

provides for special parole for offenders who are serving a prison sentence for an offense other than an aggravated homicide offense and who were under eighteen years of age at the time of the offense, or who are serving consecutive prison sentences for multiple offenses none of which is an aggravated homicide offense and who were under eighteen years of age at the time of the offenses. This section indicates when these offenders are eligible for parole. Section (C)(1) indicates Appellant would be eligible after serving 18 years. The statute also provides that in considering release on parole, the board must consider, among other factors, the prisoner's age at the time of the offense and "that age's hallmark features, including intellectual capacity, immaturity, impetuosity, and a failure to appreciate risks and consequences." R.C. 2967.132(E)(2)(a). Appellant contends given this statute he will be eligible for parole upon its effective date. The effect of this new statute further lends support for the position that Appellant does have a meaningful opportunity for release.

{¶48} For those reasons, this assignment of error lacks merit.

Fifth Assignment of Error

"The trial court erred when it sentenced Chaz Bunch because the findings supporting consecutive sentences are clearly and convincingly not supported by the record and the sentence is contrary to law."

{¶49} This assignment of error specifically addresses the imposition of consecutive sentences. In applying the above standard of review, a sentence can be deemed contrary to law if the trial court did not make the required findings in R.C. 2929.14(C)(4) prior to imposing consecutive sentences. That statute provides:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4).

{¶50} In order to impose consecutive sentences, "a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry * * *." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, syllabus. Yet, it is not required "to explain its findings before imposing consecutive sentences." *State v. Brundage*, 9th Dist. Summit No. 29477, 2020-Ohio-653, ¶ 17, citing *Bonnell* at syllabus. "[A]s long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Bonnell* at ¶ 29.

{¶51} Here, it is undisputed that the trial court made the requisite findings. Appellant's argument is that there is no evidence to show that he is at high risk for reoffending and therefore, the findings that consecutive sentences are "necessary to protect the public from future crime" and that consecutive sentences are not disproportionate to "the danger the offender poses to the public" are not supported by the record. The state disagrees asserting the record supports the trial court's imposition of consecutive sentences.

{¶52} Consecutive sentences were imposed for the aggravated robbery and three rape convictions. The facts involving this case speak for themselves and do not engender

sympathy. *See State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, ¶ 2 ("The facts of this case do not engender a sense of sympathy for appellant, Brandon Moore. Moore embarked on a criminal rampage of escalating depravity on the evening of August 21, 2001, in Youngstown."). Appellant robbed the victim at gunpoint and then vaginally, anally, and orally raped her. The facts establish she was brutally gang raped by Appellant and Moore. The record supports the findings.

{¶53} This assignment of error is meritless.

Sixth Assignment of Error

"The trial court erred by failing to consider whether Chaz's sentence was consistent with sentences for similar offenses committed under the same law."

{¶54} This assignment of error raises arguments concerning R.C. 2929.11. Under that statute, a sentence must be "consistent with sentences imposed for similar crimes committed by similar offenders." R.C. 2929.11(B).

{¶55} Appellant contends his sentence is contrary to law because the trial court did not consider the average sentence for a rape case that occurs in Mahoning County, which he contends is 11.5 years. 9/6/19 Resentencing Tr. 29. The state counters arguing the sentence is consistent with similar offenses; the sentence is similar to the 50-year sentence his co-defendant Brandon Moore received.

{¶56} R.C. 2929.11 states:

> (B) A sentence imposed for a felony shall be reasonably calculated to achieve the three overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

R.C. 2929.11(B).

{¶57} Appellant did ask the court to consider similar crimes by similar offenders in imposing a sentence. Counsel indicated on the record that the average sentence for a rape case in Mahoning County is 11.5 years. Counsel filed an Evid.R. 201 request where he listed the rape cases for the past 20 years and the sentences imposed. Descriptions

of each of those case were not provided, so it is unclear whether those cases had similar offenders and similar facts to the case at hand. At sentencing, specifically as to the Evid.R. 201 motion and the argument concerning the average sentence for a rape case in Mahoning County, the trial court stated, "Regarding the Defendant's Evidence 201 request, [the] court finds that even though the defendant argues that the average sentence should be 11.5 years on the rape conviction, the court also finds that each case must be decided on its own merits, and therefore this sentence is appropriate." 9/6/19 Resentencing Tr. 80.

{¶58} The trial court's statement is not an indication it would not consider similar crimes by similar offenders. Rather, it is an indication that this case is not the average case. As stated above, the facts in this case speak for themselves; it was a brutal gang rape and robbery. There is nothing in the record before this court to demonstrate that any of the rape cases listed, other than co-defendant Brandon Moore's case, had similar facts and a similar offender. Furthermore, as the state correctly points out, Appellant's sentence was consistent with a similar offender, his co-defendant.

{¶59} For those reasons, this assignment of error lacks merit.

{¶60} In conclusion, all four assignments of error relating to the 49-year sentence lack merit. The imposition of the 49-year sentence is affirmed; the sentence was not contrary to law.

3. Sexual Predator Classification

Seventh Assignment of Error

"The sexual predator hearing the trial court held was beyond the scope of this Court's remand."

{¶61} Appellant contends when this court held the appeal of the partial denial of the postconviction relief petition in abeyance and granted a limited remand for resentencing, that remand did not include authority to conduct a sexual offender classification hearing. He asserts if the state wanted the ability to conduct that hearing, it should have asked this court to broaden our limited remand.

{¶62} In addressing this assignment of error, the state does not address our limited remand order. Rather, it states that when the trial court granted the postconviction relief petition in part, it vacated the entire sentence and stated he was entitled to a new

sentencing hearing. This effectively placed Appellant in the same place as if no sentence had been in place and thus, the trial court could properly hold a sexual offender classification hearing as part of the resentencing. It also asserts that Appellant did not object to the classification hearing and he had never previously been classified under Megan's Law.

{¶63} Starting with our remand orders, when the appeal was initially filed, the state filed a motion to dismiss. In that entry, we correctly noted that although the appeal was pending, a trial court retains continuing jurisdiction to correct a void sentence. 4/23/18 J.E. Thereafter, the parties requested this court to hold the appeal in abeyance and remand the case for resentencing. We granted the request for 60 days and in doing so we stated, "we remand the case to the trial court for the limited purpose of resentencing Appellant pursuant to its January 29, 2018 judgment entry." 7/11/18 J.E. Thereafter in many of the judgment entries continuing the remand we explained, "This appeal has been on limited remand to the trial court in order for the trial court to resentence Appellant or otherwise resolve any pending matters related to its order of January 29, 2018." 5/28/19 J.E.; 1/9/19 J.E.

{¶64} As can be seen, our remand did not limit the trial court's resentencing; rather, we indicated to follow its January 29, 2018 order where it granted the petition for postconviction relief in part. This assignment of error is based on the faulty premise that our order limited the trial court's ability to conduct a sexual predator hearing. That is not the case. Our order merely granted the trial court the authority to follow its January 29, 2018 order and do whatever that order permitted.

{¶65} For those reasons, to the extent that Appellant argues the trial court acted outside the authority of our remand and the state should have asked this court to widen the scope of the remand order if it wanted to conduct a sexual predator hearing, the assignment of error fails.

{¶66} Possibly, in the four-paragraph argument Appellant is trying to argue that the trial court's January 29, 2018 order granting the petition for postconviction relief in part did not give the trial court the authority to hold a sexual offender classification hearing. If that is the case, then the argument fails for the reasons the state provided in its brief. The trial court in the January 29, 2018 order vacated the 89-year sentence and indicated

Appellant was entitled to a new sentencing hearing. As the state acknowledged, vacating a sentence places the party in the same place as if no sentence was imposed. Appellant was never classified under Megan's Law. It naturally flows from resentencing for a classification to occur, especially given that there had never been a classification.

{¶67} For the reasons expressed above, this assignment of error lacks merit.

Eighth Assignment of Error

"The evidence was insufficient to support the trial court's finding that Chaz is a sexual predator."

{¶68} Appellant contends the sexual predator classification under Megan's Law is not supported by the record. He offered the expert opinion that juveniles with only one sexual offense are at low risk of recidivism and the best-matched classification is sexually oriented offender. He admits the facts as described by the victim demonstrate cruelty, which is one of the factors to be considered in determining whether to classify him as a sexual predator. He maintains that none of the other listed factors are applicable.

{¶69} The state disagrees and contends there was competent credible evidence to label him a sexual predator.

{¶70} The Third Appellate District has explained that because sex offender classification proceedings under R.C. Chapter 2950 are civil in nature under Megan's Law, "[o]n appeal, this Court reviews a trial court's sexual-predator designation 'under the civil manifest-weight-of-the-evidence standard and [the trial court's determination] may not be disturbed when the judge's findings are supported by some competent, credible evidence.'" *State v. Johnson*, 3d Dist. Wyandot Nos. 16-13-07 and 16-13-08, 2013-Ohio-4113, ¶ 9, quoting *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, syllabus.

{¶71} Former R.C. 2950.01(E) defined a "sexual predator" as a person who had been convicted of, or had pleaded guilty to, committing a sexually oriented offense and was likely to engage in the future in one or more sexually oriented offenses. *State v. Eppinger*, 91 Ohio St.3d 158, 163, 743 N.E.2d 881 (2001). To classify an offender as a sexual predator, the trial court must hold an adjudicatory hearing and provide the offender an opportunity to present evidence and cross-examine witnesses. Former R.C. 2950.09(B); *State v. Williams*, 88 Ohio St.3d 513, 519, 728 N.E.2d 342 (2000). The standard of proof for classifying an offender as a sexual predator is clear and convincing

evidence. Former R.C. 2950.09(B)(4); *State v. Cook*, 83 Ohio St.3d 404, 408, 700 N.E.2d 570 (1998). Clear and convincing evidence is evidence that "will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross*, 161 Ohio St. 469 at paragraph three of the syllabus.

{¶72} Former R.C. 2950.09(B) provided several nonexclusive factors for the trial court to consider when determining whether to classify an offender as a sexual predator. These factors included (1) the offender's age, (2) the offender's criminal record, (3) the victim's age, (4) whether multiple victims were involved, (5) whether drugs and alcohol were used to impair the victim, (6) the offender's participation in sexual offender treatment pursuant to a previous sex offense conviction, (7) whether the offender has a mental illness or mental disability, (8) the nature of the offender's sexual contact with the victim and whether it was part of a pattern of abuse, (9) whether the offender displayed cruelty or made threats of cruelty, and (10) any additional behavioral characteristics that contribute to the offender's conduct. *State v. Black*, 12th Dist. Butler No. CA2002-04-082, 2003-Ohio-2115, ¶ 11. In considering these factors, the trial court "has discretion to determine what weight, if any, it will assign to each factor." *Wilson*, 113 Ohio St. 3d 382 at ¶ 19; *State v. Thompson*, 92 Ohio St.3d 584, 587-588, 752 N.E.2d 276 (2001). These factors serve as a guideline for the trial court but do not control the decision-making process. *Thompson* at 587. The Twelfth Appellate District has stated that the trial court may rely upon one factor more than another, depending upon the circumstances of the case, and is not required to find that the evidence supports a majority of the factors. *State v. McGlosson*, 12th Dist. Butler No. CA2013-05-082, 2014-Ohio-1321, ¶ 29.

{¶73} At the classification hearing, the state highlighted the factors. It explained Appellant has an extensive juvenile record, but he was never convicted of an offense of violence prior to this incident. 9/6/19 Resentencing Tr. 82. The state asserted the two most important factors in favor of a sexual predator classification were the nature of the offense and the cruelty and threats made toward the victim. 9/6/19 Resentencing Tr. 83. The state explained:

> I'm not going to belabor these points. The record is abundantly clear. The victim's impact statement highlighted all of those factors, the brutality of the offenses. The aspect of – this case is extremely different from I would say

> every other rape case that has come through these courts. You have two individuals that repeatedly raped her on multiple occasions and continued over the course of the evening. It's impossible to compare this case to any other case that has come before this court or any other court in Mahoning County. Just as the victim stated, Mr. Bunch threatened her multiple times throughout the night, threatened to kill her while holding a gun to her during this encounter.

9/6/19 Resentencing Tr. 83-84.

{¶74} Appellant at the hearing argued the only evidence before the court was the letter from Dr. McConnell who offered the opinion that there was a low rate of recidivism and that the best classification for Appellant was sexually oriented offender.

{¶75} In determining the appropriate classification, the trial court noted that it considered the factors listed in former R.C. 2950.09(B). It then stated it finds by clear and convincing evidence that Appellant should be classified as a sexual predator.

{¶76} Given the facts of this case, even considering the letter from Appellant's expert, there is clear and convincing evidence to support the sexual predator classification. *See State v. Ingels*, 1st Dist. Hamilton No. C-180469, 2020-Ohio-4367, ¶ 21 (upholding a sexual predator classification where the clinical evaluation indicated recidivism was low to moderate, but the facts of the case where there were multiple victims, drugs to impair the victims, and the offender was on probation for sexual battery when many of the offenses were committed). This assignment of error lacks merit.

Ninth Assignment of Error

"The trial court erred by failing to specify whether its predator determination was made pursuant to R.C. 2950.09(B)(2)."

{¶77} Appellant argues that when the trial court classified him as a sexual predator it did not state that it made this finding pursuant to division (B) of former R.C. 2950.09. He asserts that division requires the court to make that finding because the statute states the court "shall specify that the determination was pursuant to division (B) of this section." He cites Eighth and Ninth Appellate Court decisions for the position that the failure to make this finding is reversible error. The state counters arguing any error was harmless because of the overwhelming evidence establishing he is a sexual predator.

{¶78} The trial court stated in its judgment entry, "The court has considered the factors listed in ORC 2950.09(B). Upon consideration of the foregoing and the applicable law, the court finds by clear and convincing evidence that the defendant should be classified as a "Sexual Predator." 9/17/19 J.E.

{¶79} The Ninth Appellate District in *Hardy* found language similar to that was not sufficient to comply with R.C. 2950.09(B)(4). *State v. Hardy*, 9th Dist. Summit No. 21788, 2004-Ohio-2242, ¶ 5. The language in R.C. 2950.09(B)(4) provided:

> If the court determines by clear and convincing evidence that the subject offender or delinquent child is a sexual predator, the court shall specify in the offender's sentence and the judgment of conviction that contains the sentence or in the delinquent child's dispositional order, as appropriate, that the court has determined that the offender or delinquent child is a sexual predator and shall specify that the determination was pursuant to division (B) of this section.

Former R.C. 2950.09(B)(4).

{¶80} The Eighth Appellate District decision in *Edwards* cited by Appellant did rely on *Hardy* to vacate the sexual predator classification, but it did so for other reasons. *State v. Edwards*, 8th Dist. Cuyahoga No. 84660, 2005-Ohio-2441, ¶ 2, citing *Hardy* at ¶ 6. (discussing habitual sex offender classification).

{¶81} Considering the language of the statute, the language used by the trial court, the fact that *Hardy* is not binding on this court, and given that there was competent, credible evidence supporting the sexual predator classification, any possible error by the trial court in not specifically stating in the same sentence that "the determination was made pursuant to division (B)" of R.C. 2950.09 was harmless. *See* Civ.R. 61 (Error that does not affect a substantial right is harmless) and Crim.R. 52(A) (same).

{¶82} In conclusion, the sexual predator classification assignments of error lack merit and the classification is affirmed.

Conclusion

{¶83} The trial court's decisions denying the postconviction relief petition in part, imposing an aggregate 49-year sentence, and classifying Appellant as a sexual predator are affirmed. All assignments of error lack merit.

Waite, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.