[Cite as *State v. Boerio*, 2010-Ohio-6215.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-10-1024

Appellee — Trial Court No. CR0200703434

v.

Dale Boerio — **DECISION AND JUDGMENT**

Appellant — Decided: December 17, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Heather L. Allred, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This is the second time this case is before the court. See *State v. Boerio*, 6th Dist. No. L-08-1182, 2009-Ohio-5181 ("*Boerio I*"). In *Boerio I*, appellant, Dale Boerio, was found guilty on two counts of rape and three counts of gross sexual imposition. Id. at ¶ 2. Appellant subsequently filed two presentence motions. Id. at ¶ 71.

One of these motions asked the court to, pursuant to R.C. 2950.11(F)(2), exclude him from the community notification requirements under R.C. 2950.11, as effective prior to January 1, 2008, imposed on certain sex offenders. Id. at ¶ 72. The trial court denied this motion without holding a hearing. Id. at ¶ 87.

{¶ 2} On appeal, Boerio set forth ten assignments of error. Id. at ¶ 3-12. We found, under appellant's ninth assignment of error, that the lower court erred by failing to hold a hearing prior to determining the necessity of community notification and to set forth "any evidence suggesting that it considered those factors" set forth in R.C. 2950.11(F)(2)(a)-(k). Id. at ¶ 87. Consequently, we affirmed the trial court's judgment in all respects except sentencing and remanded this cause solely for the purpose of "resentencing pursuant to R.C. 2950.11(F)(2)."

{¶ 3} Upon our remand, appellant was examined by a psychologist, Dr. Charlene Cassel, at the Court Diagnostic and Treatment Center. At the hearing on the issue of whether appellant should be exempt from the community notification requirements under R.C. 2950.11, as effective prior to January 1, 2008, the trial court, using the facts in Dr. Cassel's report, discussed the applicable factors in R.C. 2950.11(F)(2)(a)-(k) and found that appellant should not be exempt from those requirements. Appellant appealed this judgment and was appointed counsel.

{¶ 4} Appellant's counsel, however, submitted a motion to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738. Under *Anders*, if counsel, after a conscientious examination of the case, determines it to be wholly frivolous, he or she

must advise the court of the same and request permission to withdraw. Id. at 744. This request must be accompanied by a brief identifying anything in the record that could arguably support the appeal. Id. Counsel must also furnish his or her client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that he chooses. Id. Once these requirements are satisfied, the appellate court is required to conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. Id. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating any constitutional requirements or may proceed to a decision on the merits if state law so requires. Id.

{¶ 5} In the case before us, appointed counsel for appellant satisfied the requirements set forth in *Anders*. Although notified, appellant never raised any matters for our consideration. Accordingly, we shall proceed with an examination of the arguable assignment of error set forth by counsel for appellant, and of the entire record on remand below, in order to determine whether this appeal lacks merit and is, therefore, wholly frivolous. Appellant's sole arguable issue presented for our review reads:

{¶ 6} "Was the trial court's determination that Mr. Boerio would have been subject to community notification under the prior version of R.C. 2950.11 and 2950.09 against the manifest weight of the evidence?"

{¶ 7} Appellant claims the trial court based its finding on "scant evidence," failed to place sufficient weight on the fact that appellant has no prior criminal record or history

of sex offenses, "used the [unreliable] Static 99 test[1] in making its determination," and made only a vague reference to his "developmental character." We disagree.

{¶ 8} R.C. 2950.11(F)(2), effective prior to January 1, 2008, provided:

{¶ 9} "[T]he notification provisions of this section do not apply to a person described in division (F)(1)(a), (b), or (c) of this section if a court finds at a hearing after considering the factors described in this division that the person would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment. In making the determination of whether a person would have been subject to the notification provisions under prior law as described in this division, the court shall consider the following factors:

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

{¶ 11} "(b) The offender's or delinquent child's prior criminal or delinquency 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 or the order of disposition is to be made;

{¶ 13} "(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;

{¶ 14} "(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;

[1]The court never mentions the "Static 99" test in its decision.

{¶ 15} "(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;

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

{¶ 17} "(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;

{¶ 18} "(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;

{¶ 19} "(j) Whether the offender or delinquent child would have been a habitual sex offender or a habitual child victim offender under the definitions of those terms set forth in section 2950.01 of the Revised Code as that section existed prior to the effective date of this amendment;

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

{¶ 21} Based upon Dr. Cassel's findings, the trial judge concluded that appellant was in the moderate to high risk category for reoffending. She noted that due to Boerio's age, which was 21 at the time of the offense, there was a higher risk of recidivism, but the fact that he had no prior record of committing a sex offense reduced his risk of reoffending. Nonetheless, the judge further held that the fact that appellant's victim was a male increased the risk of recidivism.

{¶ 22} The court below also found that the offenses were committed when appellant was babysitting the nine-year-old victim or "when other family members were sleeping." The judge further observed that Boerio placed duct tape and his hand over the child's mouth to keep him from seeking help. She also indicated that appellant engaged in the charged offenses, which involved both anal and oral sex, several times with his victim. In addition, the judge found that appellant threatened the child and his family with harm. She also considered the facts establishing that appellant had no prior criminal record, that he did not use alcohol or drugs to impair his victim, and that he was not "mentally ill or mentally retarded."

{¶ 23} Based upon all of the foregoing, we cannot say that the trial court's decision finding that appellant should not be excluded from the community notification provisions of the prior version of R.C. 2950.11 is against the manifest weight of the evidence. Accordingly, appellant's only arguable assignment of error lacks merit. After engaging in further independent review of the record, we find that there are no other grounds for a meritorious appeal. This appeal is therefore determined to be wholly frivolous.

Appointed counsel's motion to withdraw is found well-taken and is hereby granted. The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE