[Cite as *State v. Lyons*, 2004-Ohio-2827.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

vs.

ERIC S. LYONS

Defendant-Appellant

JUDGES:
: Hon. William B. Hoffman, P.J.
: Hon. Sheila G. Farmer, J.
: Hon. John F. Boggins, J.
:
: Case Nos. 03CAA11068
: 04CAA01001
:
: OPINION

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 02CRI08376
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 1, 2004

APPEARANCES:

For Plaintiff-Appellee

WILLIAM J. OWEN
140 North Sandusky Street
Delaware, OH 43015

For Defendant-Appellant

CHAD A. HEALD
125 North Sandusky Street
Delaware, OH 43015

Farmer, J.

{¶1} On May 6, 2003, the Delaware County Grand Jury indicted appellant, Eric S. Lyons, on one count of unlawful sexual conduct with a minor in violation of R.C. 2907.04 and one count of rape in violation of R.C.2907.02.

{¶2} On August 19, 2003, pursuant to a plea agreement, appellant pled guilty to one count of attempted sexual battery in violation of R.C. 2923.02. By judgment entry filed October 24, 2003, the trial court sentenced appellant to eighteen months in prison.

{¶3} On November 25, 2003, a hearing was held to determine appellant's status pursuant to the Sex Offender Registration Act, R.C. Chapter 2950. By judgment entry filed December 5, 2003, the trial court classified appellant as a "habitual sex offender."

{¶4} Appellant filed appeals on the October 24, and December 5, 2003 judgment entries and this matter is now before this court for consideration. In combining the two appellate briefs, we have renumbered the assignments for the sake of clarity. The assignments of error are as follows:

I

{¶5} "THE TRIAL COURT ERRED BY SENTENCING THE APPELLANT TO THE MAXIMUM PRISON TERM."

II

{¶6} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO COMPLY WITH THE REQUIREMENTS OF R.C. 2950.09 IN CLASSIFYING THE DEFENDANT AS A HABITUAL SEXUAL OFFENDER."

III

{¶7} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO MAKE FINDINGS IN SUPPORT OF ITS ADJUDICATION THAT MR. LYONS WAS A HABITUAL SEXUAL OFFENDER."

I

{¶8} Appellant claims the trial court erred in sentencing him to the maximum prison term. We disagree.

{¶9} R.C. 2953.08 governs an appeal of sentence for felony. Subsection (G)(2) states as follows:

{¶10} "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 court's 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:

{¶11} "(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

{¶12} "(b) That the sentence is otherwise contrary to law."

{¶13} Clear and convincing evidence is that evidence "which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶14} Appellant pled guilty to attempted sexual battery in the fourth degree. Pursuant to R.C. 2929.14(A)(4), felonies in the fourth degree are punishable by six to eighteen months. By judgment entry filed October 24, 2003, the trial court sentenced appellant to eighteen months in prison.

{¶15} Appellant argues the trial court erred in sentencing him to the maximum sentence. We note appellant was informed of the possible sentences in his plea of guilty to a lesser included offense. See, Written Plea of Guilty filed August 20, 2003. Appellant acknowledged understanding that while "statutory guidance exists in favor of the Trial Judge imposing upon me any Community Control Sanction," the trial court may impose a sentence anywhere from six to eighteen months. Id. Appellant acknowledged "[n]o promises, threats or inducements have been made to me by anyone to secure my plea" and "my plea of Guilty is freely, voluntarily, and intelligently made with my full and complete understanding of the nature of the charge and the consequences, including the maximum penalties." Id. During the plea hearing, the trial court explained to appellant "the Court still retained the right to exercise its discretion and thereby proceed

with Judgment and Imposition of Sentence, in a fashion deemed appropriate by the Court." See, Judgment Entry on Guilty Plea filed September 4, 2003. In addition, the trial court "inquired of the Defendant in order to determine if the Defendant understood the full range of prison terms applicable to a Felony of the Fourth Degree." Id. The trial court ascertained appellant understood the possible sentences. Id.

{¶16} Upon review, we find appellant was aware of the possible sentences under the negotiated plea, including an eighteen month term. The trial court did not err in sentencing appellant pursuant to the plea agreement.

{¶17} Assignment of Error I is denied.

II, III

{¶18} Appellant claims the trial court erred in classifying him a habitual sex offender. Specifically, appellant claims the trial court failed to follow R.C. 2950.09 and hold the classification hearing prior to sentencing, and failed to make findings in support of the classification. We disagree.

{¶19} R.C. 2950.09(B)(2) states the following in pertinent part:

{¶20} "Regarding an offender, the judge shall conduct the hearing required by division (B)(1)(a) of this section prior to sentencing and, if the sexually oriented offense is a felony and if the hearing is being conducted under division (B)(1)(a) of this section, the judge may conduct it as part of the sentencing hearing required by section 2929.19 of the Revised Code."

{¶21} At the conclusion of the sentencing hearing, the trial court and counsel discussed the classification issue. October 24, 2003 T. at 34. Pursuant to the discussion, the trial court recessed the matter until a later date for the following reasons:

{¶22} "I will explain that it is my understanding and apparently the prosecutor and the defendant agreed and that's what we discussed at the side, if I determine the defendant is a sexually oriented offender, we do not have to have a hearing. If we have to determine that the defendant is a habitual sexual offender or predator, we have to have a hearing, so we're not sure if we will have a hearing. I think the prosecutor wants to review the matter before he makes any recommendation and I respect that and the defense counsel may want to review that before he makes any opinion. We're going to recess for that purpose." Id. at 36.

{¶23} R.C. 2950.09(B)(2) clearly states the trial court may conduct the classification hearing "as part of the sentencing hearing." The sentencing hearing was continued to allow counsel the opportunity to consider the classification issue. Appellant did not object to this procedure. An error not raised in the trial court must be plain error for an appellate court to reverse. *State v. Long* (1978), 53 Ohio St.2d 91; Crim.R. 52(B). There has been no demonstration of plain error.

{¶24} As for appellant's argument that the trial court failed to make findings in support of the habitual sex offender classification, we note defense counsel conceded the classification during the hearing:

{¶25} "Your Honor, I believe 2950.01(B) clearly states that if a person has been convicted of a previous offense, that he shall be labeled a habitual sex offender; therefore, I have no objection to this – that he – that he clearly is within the legal definition of a habitual sex offender." November 25, 2003 T. at 8-9.

{¶26} Defense counsel made this statement following the state's presentation of State's Exhibit A, an April 24, 1998 judgment entry evidencing appellant's previous

conviction for attempted sexual battery for which he was required to register, Case No. 97CRI10417. Id. at 7-8.

{¶27} Assignments of Error II and III are denied.

{¶28} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

Farmer, J.

Hoffman, P.J. and

Boggins, J. concur.

Hoffman, P.J., concurring.

{¶28} I concur in the majority's analysis and disposition of appellant's second and third assignments of error.

{¶29} I further concur in the majority's disposition of appellant's first assignment of error. However, unlike the majority, I do not find the fact appellant was aware of the possible sentences under the negotiated plea is relevant to or provides clear and convincing evidence to support the trial court's imposition of the maximum sentence. Although the charge to which appellant pled may have been the result of a plea bargain, the sentence was not negotiated.

{¶30} Nevertheless, I find the record contains sufficient evidence concerning appellant's past criminal history to support the trial court's conclusion appellant presents the greatest likelihood to reoffend. Accordingly, I join the majority's decision to overrule the first assignment of error.

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JUDGE WILLIAM B. HOFFMAN

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IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	JUDGMENT ENTRY
-vs-	:	
	:	
ERIC S. LYONS	:	
	:	CASE NOS. 03CAA11068
Defendant-Appellant	:	04CAA01001

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Delaware County, Ohio is affirmed.

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JUDGES