

[Cite as *State v. Wilkinson*, 2002-Ohio-1032.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-010229
	:	TRIAL NO. B-0007678
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
RIYON WILKINSON,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: March 8, 2002

Michael K. Allen, Prosecuting Attorney, and *Judith Anton Lapp*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Stephen J. Wenke, for Defendant-Appellant.

Please Note: We have *sua sponte* removed this case from the accelerated calendar.

DOAN, Judge.

{¶1} Defendant-appellant Riyon Wilkinson, pursuant to a plea bargain, pleaded guilty to rape of a minor without force. An agreed sentence of three years' incarceration was imposed. A sexual-offender-classification hearing was held immediately following the plea and sentencing. At the hearing, the state submitted a document that contained evidence favorable to Wilkinson. The document stated that the victim had initially alleged that Wilkinson had forced her into his car, but later admitted that she had entered his car voluntarily. The state also submitted a copy of Wilkinson's juvenile record. Wilkinson had no significant adult record, with the prosecutor indicating that Wilkinson had only two minor-misdemeanor moving violations.

{¶2} The prosecutor presented the facts of the offense as follows:

{¶3} Your Honor, this offense occurred at an undetermined time during the morning hours of September the 10th in the year 2000. It happened at an apartment located at 757 Ridgeway Avenue, Apartment Number 202, which is located in District 4 of Cincinnati, Hamilton County, Ohio. On that date, time and location, this defendant, who at the time was 20 years of age, engaged in sexual intercourse with a 12-year-old female whose initials are TW, her date of birth was 12/2/87, so she was twelve and a half at the time, almost 13 at the time this occurred.

{¶4} Specifically, Judge, this young lady reported to the police at some point - - she initially reported that the defendant actually forced her into his vehicle and had taken her to this apartment where he forced her to engage in sexual intercourse with him. During the course of the investigation, however, she did admit, and I did disclose this to [defense counsel], that she went voluntarily with the defendant to this location; they did have sexual intercourse or vaginal intercourse, and she also reported that she engaged in fellatio with the defendant; and at some point thereafter she called it to the attention of the police.

{¶5} She didn't know the defendant's name, but she was able to identify him through a photo array lineup. The police went and contacted him. He denied that he had any contact with her whatsoever. During the course of the rape examination, however, DNA type evidence was recovered. There was semen in

her vagina, which was consistent with her having vaginal intercourse. Although the DNA results aren't back, it's the State's belief that the semen does belong to the defendant. We did put in motion the DNA test, and the lab is in the process of finalizing the results of that test. (T.p. 13-14.)

{¶6} In arguing that Wilkinson should be found to be a sexual predator, the prosecutor cited the age of the victim. Further, the prosecutor stated,

{¶7} This is a situation where he came forward to the police and said, hey, I thought she was older, I didn't mean to do this. It was a situation, at first, where he denied any contact with her. Whether that means he's a sexual predator, we don't know, but I would say at least a sexually-oriented offender.

{¶8} The trial court found Wilkinson to be a sexual predator based upon the age of the victim and "Mr. Wilkinson's inability to recognize a child when he sees a child." The court found that "when there is a rape of a child of tender years, and a twelve-year-old is a child of tender years * * * it is an indication of probative recidivism [*sic*]." (T.p. 24.)

{¶9} Wilkinson has appealed his sexual-predator classification, raising two assignments of error for our review. Wilkinson's first assignment of error, which alleges that R.C. 2950.09, Ohio's sexual-predator-classification statute, is unconstitutionally vague, is overruled on the authority of *State v. Williams* (2000), 88 Ohio St.3d 513, 728 N.E.2d 342.

{¶10} Wilkinson's second assignment of error alleges that the trial court's determination that he is a sexual predator was based upon insufficient evidence.

{¶11} A sexual predator is "a person who has been convicted of or pleaded guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses." R.C. 2950.01(E). The prosecution must prove by clear and convincing evidence that an offender is a sexual predator. See R.C.

2950.09(B)(3); *State v. Cook* (1998), 83 Ohio St.3d 404, 700 N.E.2d 570; *State v. Lee* (1998), 128 Ohio App.3d 710, 716 N.E.2d 751. Clear and convincing evidence is that measure of proof that produces a firm belief as to the allegations sought to be established. See *State v. Eppinger* (2001), 91 Ohio St.3d 158, 743 N.E.2d 881; *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E.2d 118, syllabus; *State v. Hunter* (2001), 144 Ohio App.3d 116, 759 N.E.2d 809. It is an intermediate standard, more than a preponderance but not to the extent of the certainty required by the beyond-a-reasonable-doubt standard. *Id.* Clear and convincing evidence does not mean clear and unequivocal. *Id.*

{¶12} The declaration of an offender's status as a sexual predator cannot be automatic. See *State v. Hicks* (1998), 128 Ohio App.3d 647, 716 N.E.2d 279; *State v. Lee, supra*; *State v. Hunter, supra*. The legislature did not contemplate that sexually-oriented offenders would be found to be sexual predators solely because they had been convicted of or pleaded guilty to a sexually-oriented offense. *Id.* The trial court must avoid indulging in the presumption that anyone with a prior sexually-oriented offense is a sexual predator. *Id.*

{¶13} Wilkinson committed rape, which is a sexually-oriented offense. The issue for the trial court to determine was whether Wilkinson was likely to commit another sexually-oriented offense in the future.

{¶14} R.C. 2950.09(B)(2) provides the following:

{¶15} In making a determination under divisions (B)(1) and (3) of this section as to whether an offender is a sexual predator, the judge shall consider all relevant factors, including, but not limited to, all of the following:

{¶16} The offender's age;

{¶17} The offender's prior criminal record regarding all offenses, including, but not limited to, all sexual offenses;

{¶18} The age of the victim of the sexually-oriented offense for which sentence is to be imposed;

{¶19} Whether the sexually-oriented offense for which sentence is to be imposed involved multiple victims;

{¶20} Whether the offender used drugs or alcohol to impair the victim of the sexually-oriented offense or to prevent the victim from resisting;

{¶21} If the offender previously has been convicted of or pleaded guilty to any criminal offense, whether the offender completed any sentence imposed for the prior offense, and, if the prior offense was a sex offense or a sexually-oriented offense, whether the offender participated in available programs for sexual offenders;

{¶22} Any mental illness or disability of the offender;

{¶23} The nature of the offender's sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually-oriented offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;

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

{¶25} Any additional behavioral characteristics that contribute to the offender's conduct.

{¶26} An offender may be found to be a sexual predator "even if only one or two statutory factors are present, so long as the totality of the relevant circumstances provides clear and convincing evidence that the offender is likely to commit a future sexually-oriented offense." See *State v. Randall* (2000), 141 Ohio App.3d 160, 750 N.E.2d 615, citing *State v. Clutter* (Jan. 28, 2000), Washington App. No. 99CA19, unreported.

{¶27} In *State v. Hunter, supra*, Hunter was convicted of rape and gross sexual imposition. Hunter, who was the father of his victim's brother, massaged his nine-year-old victim's legs, anally raped her, rubbed his penis on her vagina and ejaculated on her

when the children spent the night in his condominium. Hunter had prior convictions, but he had not previously been convicted of a sexually-oriented offense. The trial court found Hunter to be a sexual predator based upon the age of the victim and the “type of rape.” We held that the trial court’s classification of Hunter as a sexual predator was against the manifest weight of the evidence because the weight of the evidence did not support a finding that Hunter was likely to recidivate. We stated,

{¶28} [A]lthough the victim was nine years old when the underlying offenses were committed, we are unconvinced that the record demonstrates that Hunter is likely to commit another sexually-oriented offense. *State v. Hunter, supra*, at 124, 759 N.E.2d at 814-815.

{¶29} The Ohio Supreme Court, in *State v. Eppinger, supra*, at 162, 743 N.E.2d at 885, observed,

{¶30} One sexually-oriented offense is not a clear predictor of whether that person is likely to engage in the future in one or more sexually-oriented offenses, particularly if the offender is not a pedophile. Thus, we recognize that one sexually-oriented conviction, without more, may not predict future behavior.

{¶31} In the case *sub judice*, the evidence adduced by the state showed that Wilkinson had engaged in sexual intercourse and fellatio with a girl who was nearly thirteen years old. There was no evidence of coercion. The prosecution did not dispute the fact that Wilkinson thought the girl was older. Outside of two minor-misdemeanor moving violations, Wilkinson had no adult criminal record. The prosecutor stated that he “didn’t know” if Wilkinson was a sexual predator, but that Wilkinson was “at least a sexually-oriented offender.” There was no evidence submitted by the prosecution, and no finding made by the trial court, that Wilkinson was a pedophile.

{¶32} We hold, examining the totality of the circumstances, that the prosecution failed to prove by clear and convincing evidence that Wilkinson was likely to engage in the future in a sexually-oriented offense. The second assignment of error is sustained.

{¶33} We point out that this case is distinguishable from *State v. Thompson* (2001), 92 Ohio St.3d 584, 752 N.E.2d 276, because *Thompson* dealt with what evidence the trial court may consider in determining whether an offender is likely to commit a sexually-oriented offense in the future, and the weight the trial court may accord each R.C. 2950.09(B)(2) factor in making that determination. In the instant case, the prosecution failed to submit sufficient evidence from which the trial court could have determined that Wilkinson is a sexual predator. See *State v. Hinton* (Dec. 14, 2001), Hamilton App. No. C-010046, unreported.

{¶34} Because the evidence was insufficient, we must reverse Wilkinson's sexual-predator adjudication and remand this case to the trial court to specify in Wilkinson's sentence and judgment of conviction that he is not a sexual predator, pursuant to R.C. 2950.09(B)(3), and for further proceedings consistent with law and this Decision.

Judgment reversed and cause remanded.

SUNDERMANN, J., concurs.

GORMAN, P.J., dissents in part.

GORMAN, P.J., dissenting in part.

{¶35} I agree that the state failed to establish by clear and convincing evidence that Wilkinson is likely to engage in the future in one or more sexually-oriented offenses. Under the *Eppinger* model, Wilkinson's one sexually-oriented offense committed upon a twelve-year-old "is not a clear predictor of whether that person is likely to engage in the

future in one or more sexually oriented offenses.” *State v. Eppinger*, 91 Ohio St.3d at 162, 743 N.E.2d at 886. I believe, however, that the majority has employed the wrong basis—an assignment of error aimed at the sufficiency of the evidence—to justify its decision and to compel the remedy it has ordered. Because, in my view, the test for the sufficiency and the manifest weight of the evidence in a civil case is essentially the same, I believe that the judgment should be reversed and that the case should be remanded to the trial court for a rehearing.

{¶36} The trial court’s finding that “Wilkinson’s inability to recognize a child when he sees a child” did not justify its conclusion that Wilkinson is a sexual predator. This statement was nothing more than hyperbole and was no more persuasive than the statement in *State v. Eppinger*, 91 Ohio St.3d at 159, 743 N.E.2d at 883, that “neither expert is competent to predict the future conduct of the individual and [I] will take the testimony of a gypsy over those people in attempting to predict the future conduct of an individual.”

{¶37} A sexual-offender-classification hearing under R.C. 2950.09(B) is a civil proceeding. See *State v. Cook*, 83 Ohio St.3d at 423, 700 N.E.2d at 585; see, also, *State v. Gowdy* (2000), 88 Ohio St.3d 387, 398, 727 N.E.2d 579, 589. As a civil proceeding, the standard of appellate review for a sexual-offender-classification hearing was determined to be manifest weight of the evidence in *State v. Cook*, 83 Ohio St.3d at 426, 700 N.E.2d at 587-588. Under the manifest-weight-of-the-evidence standard in a civil case, the reviewing court must determine from the record if the judgment is supported by some “competent, credible evidence going to all essential elements of the case.” *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus.

{¶38} A review for sufficiency of the evidence is reserved for a criminal trial and is linked to the state’s burden to prove guilt beyond a reasonable doubt. It is a test of adequacy that is constitutionally mandated by the Due Process Clause. See *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 546. To reverse a criminal conviction for insufficient evidence, the reviewing court must conclude, after viewing the evidence in the light most favorable to the prosecution, that no rational trier of fact could have found that all the essential elements of the crime had been proved beyond a reasonable doubt. See *id.*

{¶39} The concepts of sufficiency and manifest weight of the evidence are qualitatively and quantitatively different in a criminal trial. Although the supreme court did address “sufficiency” in *Eppinger*, its discussion was only in the context of the sufficiency of the procedures for the classification hearing rather than the sufficiency of the evidence. See *State v. Eppinger*, 91 Ohio St.3d at 163-164, 743 N.E.2d at 886-887. The due-process requirements in a civil trial are not subject to the heightened constitutional considerations attending a conviction in a criminal trial. Therefore, in the appeal of a civil case, the test for sufficiency and manifest weight is essentially the same. See *State v. Hunter*, 144 Ohio App.3d at 121, 759 N.E.2d at 812; see, also, *Lichentenberg Constr. & Dev., Inc. v. Paul W. Wilson, Inc.* (Sept. 28, 2001), Hamilton App. No. C-000811, unreported; *Lakeshore Properties, Universal AM-CAM, Ltd.* (Feb. 16, 2001), Hamilton App. No. C-000321, unreported; *Duvall v. Time Warner Entertainment Co.* (June 25, 1999), Hamilton App. No. C-980515, unreported. The effect of the majority’s decision is to reverse these precedents.

{¶40} Granted, under the weight analysis, the remedy ordered by the majority could be imposed. Pursuant to App.R. 12(C), where a trial court’s judgment in a bench trial has been determined to be against the manifest weight of the evidence, the appellate court has the option to reverse and “render the judgment or final order that the trial court should have rendered on that evidence” or to remand the case to the trial court for further proceedings. But because a sexual-offender-classification hearing is a civil and remedial statutory proceeding, designed to “provid[e] adequate notice and information about sexual predators” to the public, and not subject to the Double Jeopardy Clause, “the safety and general welfare” of the public ought to be the overriding concern in our review. R.C. 2950.02; see *State v. Cook*, 83 Ohio St.3d at 417, N.E.2d at 581.

{¶41} When the state’s evidence establishes the existence of one or more of the factors found in R.C. 2950.09(B)(2), there is some competent, credible evidence supporting the trial court’s adjudication of the defendant as a sexual predator, although it may not satisfy the threshold for clear and convincing evidence. The statutory guidelines do not direct what weight, if any, the trial court must assign to each factor in determining the likelihood of recidivism. See *State v. Thompson* (2001), 92 Ohio St.3d 585, 587-588, 752 N.E.2d 276, 280. Here, the only factors supported by the record are Wilkinson’s age of twenty years and that of the twelve-year-old victim.

{¶42} Despite the age factors under R.C. 2950.09(B)(2)(a) and (c), the trial court’s stated reason for its determination that Wilkinson is a sexual predator simply has no evidentiary support in the record. To satisfy the intent of the legislature, I would remand this case to the trial court for a rehearing with instructions to determine if expert evidence is indicated and to reassess the evidence of record and any new evidence offered

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by the parties under the appropriate factors in R.C. 2950.09(B)(2). The court should then determine whether, by clear and convincing evidence, Wilkinson is likely to engage in the future in one or more sexually-oriented offenses. See R.C. 2950.01(E); see, also, *State v. Eppinger*, 91 Ohio St.3d at 162, 743 N.E.2d at 885.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Decision.