

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
UNION COUNTY**

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NUMBER 14-2000-21

v.

KEVIN DEWITT

OPINION

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment reversed and cause remanded.

DATE OF JUDGMENT ENTRY: November 15, 2000

ATTORNEYS:

**KERRY M. DONAHUE
Attorney at Law
6065 Frantz Road, Suite 106
Dublin, OH 43017
For Appellant.**

**R. LARRY SCHNEIDER
Prosecuting Attorney
Rick Rodger
233 West Sixth Street
Marysville, OH 43040
For Appellee.**

WALTERS, J. Defendant-Appellant, Kevin Ray Dewitt, brings this appeal from a judgment issued by the Common Pleas Court of Union County finding him to be a sexual predator. For the reasons set forth in the following opinion, we reverse the trial court's judgment.

In January 1987, the Union County Grand Jury returned an indictment against Appellant for one count of rape, a violation of R.C. 2907.02, and one count of felonious sexual penetration, a violation of R.C. 2907.12, for sexual acts allegedly committed with a five-year-old male child. Appellant entered an initial plea of not guilty to both counts contained in the indictment, and the matter was set for a jury trial. Prior to trial, however, Appellant entered into a negotiated plea agreement whereby the prosecutor agreed to dismiss the charge of felonious sexual penetration in exchange for a plea of guilty to the charge of rape. The court accepted the agreement and proceeded to sentence Appellant to an indefinite prison term of five to twenty-five years. The entry on conviction and sentence was journalized on September 28, 1987.

In March 2000, while Appellant was serving his sentence, the Department of Corrections and Rehabilitation recommended that the court adjudicate Appellant a sexual predator pursuant to the provisions set forth in R.C. Chapter 2950. A hearing on the matter took place the following month. After considering

the evidence presented at the hearing, the court found Appellant to be a sexual predator in an entry dated June 2, 2000. This appeal followed.

Appellant presents the following as his sole assignment of error on appeal:

**The lower court's finding that Defendant is a sexual predator * *
* was not supported by clear and convincing evidence.**

The Ohio Revised Code defines a "sexual predator" as "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 crimes." R.C. 2950.01(E). The crime of rape is included in the definition of "sexually oriented offense". R.C. 2950.01(D)(1). In making its determination as to whether an offender should be adjudicated a sexual predator, the trial court must consider all pertinent factors, including, but not limited to, those enumerated in R.C.

2950.09(B)(2):

- (a) The offender's age;**
- (b) The offender's prior criminal record regarding all offenses, including, but not limited to, all sexual offenses;**
- (c) The age of the victim of the sexually oriented offense for which sentence is to be imposed;**
- (d) Whether the sexually oriented offense for which sentence is to be imposed involved multiple victims;**
- (e) Whether the offender used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;**

(f) 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;

(g) Any mental illness or mental disability of the offender;

(h) 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;

(i) 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;

(j) Any additional behavioral characteristics that contribute to the offender's conduct.

The standard for determining an offender's status as a sexual predator is by clear and convincing evidence. R.C. 2950.09(B)(3). Clear and convincing evidence is a higher level of proof than a preponderance of the evidence, but lower than that which is required for proof beyond a reasonable doubt. See *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus. It is evidence that will "produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, quoting *Cross, supra*, at paragraph three of the syllabus.

The record herein reveals that the trial court did not review a pre-sentence or post-sentence investigation report. Nor was there a psychiatric evaluation available for the court's consideration. The only evidence before the court was the Department of Corrections Screening Instrument, indicating only one of the R.C. 2950.09(B)(2) factors, and the testimony of the prosecutor, concerning the facts of the underlying conviction from nearly thirteen years ago. On appeal, Appellant argues that the trial court erred in finding him to be a sexual predator, and specifically in finding that he is likely to commit future sexually oriented offenses on this evidence alone. The State of Ohio, on the other hand, argues that the facts of this case provide enough support for the court's decision.

We begin our analysis by reiterating the holding recently announced in *State v. Dennis* (Sept. 7, 2000), Logan App. No. 8-2000-08, unreported, wherein this Court refused to adopt the proposition that a single crime, regardless of the seriousness or violent nature of the offense, cannot, as a matter of law, form the basis for the finding that an offender is a sexual predator. Instead, we found that the review of these matters must be on a case-by-case basis. *Id.*

With this in mind, we must review the evidence presented at the hearing. As we stated previously, the majority of the evidence presented by the state came from the prosecuting attorney who testified under oath as to the facts of the underlying offense. The prosecutor stated that Appellant, who was in his early

twenties at the time, was apparently entrusted to baby-sit the five-year-old victim when he performed various acts of molestation on the child, such as fellatio and inserting his finger in the boy's anus.

The record indicates that Appellant did not use drugs or alcohol to impair the victim nor did he engage in a pattern of abusing the child. There was no allegation of cruelty or threats of cruelty. Prior to this offense, Appellant had no criminal record, and he has not committed a similar crime while incarcerated. Moreover, contrary to the state's contention, the record shows that while serving his sentence, Appellant has completed the Monticello Core Program, a year-long counseling program designed to educate offenders about anger and how that emotion can cause a person to act out sexually. Appellant also participated in a six-month aftercare program, and was scheduled to begin another year-long sex offender treatment program in July 2000. Indeed, the record indicates an apparent desire on Appellant's part to begin counseling shortly after his sentence commenced. This is evidenced by the fact that in 1988, Appellant filed various motions for "shock probation", pleading for early release because, at that time, the correctional facility did not offer sex offender treatment programs that could be obtained by the general public.

Considering the totality of evidence in the record at the conclusion of the hearing, we do not believe that the state's reliance on the particular facts of this

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case provides sufficient inferential proof that Appellant is, clearly and convincingly, *likely* to commit a sexually oriented offense in the future. For these reasons, Appellant's assignment of error is sustained.

Having found error prejudicial to the Appellant herein, in the particulars assigned and argued, the judgment of the trial court is hereby reversed and the cause is remanded for entry of judgment in accordance with this opinion.

Judgment reversed and remanded.

HADLEY, P.J., and SHAW, J., concur.

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