

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
PUTNAM COUNTY**

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NO. 12-04-13

v.

CHAD MARTIN

OPINION

DEFENDANT-APPELLANT

**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas
Court**

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: June 27, 2005

ATTORNEYS:

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SHAW, J.

{¶1} The defendant-appellant, Chad M. Martin, appeals the judgment and sentence of the Putnam County Court of Common Pleas classifying him as a sexual predator and sentencing him to consecutive sentences.

{¶2} On November 18, 2003, Martin was indicted for unlawful sexual conduct with a minor in violation of R.C. 2907.04(A), a felony in the fourth degree. Similarly, on February 20, 2004, Martin was indicted for two counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A). All charges stemmed from sexual relations with a girl that was thirteen years old at the time of the incidents. Martin pled guilty to all charges alleged in the indictment, and the trial court sentenced him to eighteen months incarceration for each of the three counts of unlawful sexual conduct with a minor to be served consecutively and classified Martin as a child-victim oriented offender.

{¶3} On May 24, 2004, a Putnam County Grand Jury again indicted Martin with twelve counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A). All charges in this indictment arose out of alleged sexual conduct with another girl that was fifteen years old at the time of the incidents. As part of a guilty plea, Martin pled guilty to six counts of unlawful sexual conduct.

{¶4} A sentencing and sexual classification hearing was held on November 15, 2004. At the hearing, the trial court concluded that Martin was a

sexual predator. Furthermore, the trial court sentenced Martin to eighteen months for each of the six counts to be served consecutively and consecutive to the three previous unlawful sexual conduct with a minor convictions. Martin appeals alleging two assignments of error.

Assignments of Error

THE TRIAL COURT COMMITTED AN ERROR OF LAW WHEN IT IMPOSED THE SEXUAL PREDATOR CLASSIFICATION ON APPELLANT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE [sic].

THE TRIAL COURT COMMITTED AN ERROR OF LAW WHEN IT IMPOSED CONSECUTIVE SENTENCES FOR THE OFFENSES OF APPELLANT.

{¶5} Preliminarily, we note that the plaintiff-appellee, the State of Ohio, failed to file a brief in this appeal. Consequently, App.R. 18(C) (emphasis added) states:

If an appellee fails to file the appellee's brief within the time provided by this rule...the appellee will not be heard at oral argument except by permission of the court upon a showing of good cause submitted in writing prior to argument; and in determining the appeal, *the court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action.*

{¶6} We frankly find no excuse for the State's failure to file a brief in a case of this seriousness and, accordingly, admonish the prosecutor in the strictest terms to file such briefs in any future cases arising from criminal prosecutions in

Putnam County. Nevertheless, in the interest of justice, the court will review the issues in the appellant's brief and the record in order to adjudicate the present appeal.

Sexual Predator Classification

{¶7} A “sexual predator” is defined by the Ohio Revised Code as the “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. 2905.01(E)(1). In making sexual predator determination, R.C. 2950.09(B)(3) states:

the judge shall consider all relevant factors, including, but not limited to, all of the following:

- (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...;**
- (f) If the offender...has been convicted of...a criminal offense, whether the offender...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...participated in available programs for sexual offenders;**
- (g) Any mental illness or mental disability of the offender...;**
- (h) The nature of the offender's...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 patten of abuse;

(i) Whether the offender...,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;

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

R.C. 2950.09(B)(3)(a)-(j).

{¶8} Additionally, “[r]igid rules generally have no place in this determination, as courts should apply the enumerated factors and consider the relevance, application, and persuasiveness of individual circumstances on a case-by-case basis.” *State v. Robertson*, 2002-Ohio-494, ¶20, 147 Ohio App.3d 94, 768 N.E.2d 1207. After reviewing all the testimony and evidence presented at the sexual offender classification hearing, a trial court shall determine by clear and convincing evidence whether the offender is a sexual predator. R.C. 2950.09(B)(4). The Supreme Court of Ohio has held that

[c]lear 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. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.”

Cross v. Ledford (1954), 161 Ohio St. 469, 477, 120 N.E.2d 118 (emphasis in original), citing *Merrick v. Ditzler* (1915), 91 Ohio St. 256, 110 N.E. 493. Finally, a reviewing appellate court must examine the entire record to determine whether

the manifest weight of the evidence standard satisfies the clear and convincing standard. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54.

{¶9} In the instant case, the trial court made the following determinations when classifying Martin as a sexual predator:

The Court: The Court is taking into account those factors under 2950.09 and making a determination of whether or not the defendant is a sexual predator. Those factors include the offender and the child's ages, the offender currently being 23; is that correct, Mr. Martin?

A. No, sir, I'm 22 years old, Your Honor.

The Court: And that the most recent victim of the defendant was age 15 at the time of the offenses. The Court is taking into account the prior record of criminal convictions and delinquencies, those being recited in the pre-sentence report, and as indicated, include the prior findings of sexual offenses. The record begins in 1995 with a theft, in 1995 a grand theft, possession of alcohol. Breaking and entering in 1999. Passing bad checks in 2000. Disorderly conduct in 2000. Passing bad checks in 2001. Another passing bad check charge in 2002, community control violations also during that year. A theft and obstruction of official business in the year 2003, an additional community control violation, an assault in 2003, an additional community control violation, unlawful sexual conduct with a minor in November of 2003. Two counts of unlawful sexual conduct in February of 2004 that involve what was then a 13 year old, and the charges in the present case. The age of the victim has already been indicated by the Court. The Court is making a determination at this point that there have been multiple victims of the defendant. The Court is making a determination that at some point drugs were used to either lure or impair the victim or victims. The Court is making a finding there was a previous adjudication of a sexual offender status. The Court is making a finding that the offense, being the current offenses, were admitted while on bond and/or awaiting sentencing with the Court. The Court is making a finding that

the offender, being the defendant, has pleaded guilty to a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses. There has been a prior adjudication as an adult, and the Court finds that the offender is likely to engage again in one or more sexually oriented offenses.***

Sexual Predator Classification Hearing, Nov. 15, 2004 at pp 5-6.

{¶10} After reviewing the trial court’s findings and conclusions, we conclude that Martin’s classification as a sexual predator is not against the weight of the evidence. Primarily, we note that Martin had two victims under the age of sixteen. Second, according to the timeline as alleged in his brief, Martin had sexual intercourse with his second victim while on bail for charges relating to his first victim. Third, we note that Martin’s criminal history, which, at the time he was classified as a sexual predator, did contain two previous convictions for sex crimes. Fourth, we highlight that Martin was previously classified as a sexually oriented offender. Fifth, we point out the use of drugs and alcohol to impair the victims’ senses. Finally, we note Martin’s age, 21 and 22, versus those of his victims, 13 and 15. Accordingly, the first assignment of error is overruled.

Consecutive Sentences

{¶11} In this assignment of error, Martin alleges that the trial court made erroneous findings and failed to give a sufficient basis for imposing consecutive sentences. Specifically, Marin asserts that “the trial court’s finding to support the

consecutive sentence is a mere recitation of the statutory factors....” Appellant’s Brief at p. 9.

{¶12} When a defendant pleads guilty to multiple offenses, the sentencing court is to impose concurrent sentences unless it finds that consecutive sentences are permissible pursuant to R.C. 2929.14(E)(4). *State v. Mendez*, 3rd Dist No. 12-02-99, 2003-Ohio-717, at ¶12. In making a consecutive sentence recommendation, the court must comply with the relevant sentencing statutes by making all necessary findings on the record at the sentencing hearing. *Martin*, 136 Ohio App.3d at 361-62, 736 N.E.2d 907.

{¶13} Ohio Revised Code section 2929.19(B)(2) states that “a court shall impose a sentence and shall make a finding that gives its reasons for selecting the sentence imposed in any of the following circumstances:...[i]f it imposes consecutive sentences under section 2929.14 of the Revised Code, its reasons for imposing the consecutive sentences.” Additionally, R.C. 2929.14(E)(4) states, in relevant part:

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:... (c) The offender's history of criminal conduct demonstrates that

consecutive sentences are necessary to protect the public from future crime by the offender.

{¶14} In the instant case, when imposing Martin's sentence, the trial court stated:

At this time, the Court is making a series of findings. First of all, the Court is finding under R.C. 2929.13(B)(1) that the present cases are sex offenses, that there has been previously served a prison term [sic], which is a present term, that the offenses were committed while the offender was under a restriction of the Court, that being a bond of the Court. The Court is making a finding that in weighing the seriousness and recidivism factors, that prison is consistent with the purposes and principals of the Revised Code. That the offender is not amenable for the available community control sanction, that being for the reasons as already recited by the Court. The Court is making a finding that a minimum term would demean the seriousness of the offense and clearly would not adequately protect the public. The Court is making a finding that the offender poses the greatest likelihood of committing future crimes.

The Court is making a finding that the offender's criminal history shows that consecutive terms are needed to protect the public. Again, for reasons as recited by the Court and the discussion had here today, indicating that having pled to prior cases, that the offender was out on bond and simply continued a course of felonious conduct involving drugs, young victims, and victims of sexual offenses, and sought out new victims of or a new victim of a sexual offense.

I want the record to be clear as to the reasons for imposing the longest term and consecutive sentences, that being the repeat nature of the offenses and the fact that these were occurring while on sanction by this Court. As indicated, Mr. Martin, the Court finds it inconceivable, that given these circumstances that you were in this Court before, that you would go out and commit what are a series of additional offenses here.

Sentencing Hearing Tr., Nov. 15, 2004 at p. 15-16.

{¶15} Again, after reviewing the record and the conclusions and findings the trial court made before imposing consecutive sentences, we conclude that imposing consecutive sentences is supported by the record. Particularly, we highlight the protection of the public given Martin's long and extensive criminal history. Furthermore, we note the seriousness of the crimes, in light of Martin's criminal history. Accordingly, taken all of this together—i.e. the seriousness of Martin's current charges, his extensive criminal history, and the interest to protect the public from future harm—we conclude that the imposition of consecutive sentences were not disproportionate to the seriousness of the conduct and to the danger that Martin poses to the public. Thus, the second assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment Affirmed.

BRYANT and ROGERS, J.J., concur.

/jlr