

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

**STATE OF OHIO,**

**CASE NUMBER 2-07-01**

**PLAINTIFF-APPELLEE,**

**v.**

**O P I N I O N**

**DANIEL L. STREET,**

**DEFENDANT-APPELLANT.**

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

**JUDGMENT: Judgment affirmed.**

**DATE OF JUDGMENT ENTRY: November 26, 2007**

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**ATTORNEYS:**

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**Shaw, J.**

{¶1} Defendant-Appellant Daniel Street (“Street”) appeals from the December 5, 2006 Journal Entry of the Court of Common Pleas, Auglaize County, Ohio, finding and designating Street to be a sexual predator and sentencing him to 18 months in prison for his conviction of unlawful sexual conduct with a minor, a fourth degree felony in violation of Ohio Revised Code section 2907.04(A), to be served consecutively to his sentence imposed in Case No. 2006-CR-116 for a total prison sentence of 59 months.

{¶2} On July 19, 2006 an Auglaize County Grand Jury indicted Street on two felony counts of unlawful sexual conduct with a minor, both felonies of the fourth degree in violation of R.C. 2907.04(A). At a bond hearing on July 21, 2006 the trial court appointed a public defender to represent Street and released Street on bond with the condition that he have no contact with minors or students and have no contact with the victim or her family. However, while awaiting arraignment on these two charges (as contained in Case No. 2006-CR-108), Street was arrested on charges of felony drug trafficking after selling marijuana to a confidential informant. The trial court revoked Street’s bond in Case No. 2006-CR-108 due to the drug trafficking arrest and he was placed into custody. Street

Case No. 2-07-01

was subsequently indicted by an Auglaize County Grand Jury on six felony charges related to trafficking in marijuana.<sup>1</sup> (Case No. 2006-CR-116).

{¶3} On July 31, 2006 Street appeared for his arraignment in Case No. 2006-CR-108 and entered pleas of not guilty to the two charges of unlawful sexual conduct with a minor as contained in the indictment. Street was released on bond, but was ordered to personally check in with the St. Mary's Police Department daily.

{¶4} On October 12, 2006 Street appeared for a change of plea hearing in Case No. 2006-CR-108 and Case No. 2006-CR-116. In Case No. 2006-CR-116 Street withdrew his previously entered plea of not guilty as to all charges contained in the indictment and entered into a negotiated plea agreement wherein he agreed to plead guilty to counts one, two and four of the indictment and the State agreed to dismiss counts three, five and six of the indictment. In Case No. 2006-CR-108 Street entered a plea of guilty to unlawful sexual conduct with a minor, as set forth in count one of the indictment, a felony of the fourth degree in violation of R.C. 2907.04(A). The trial court ordered that count two be dismissed upon the completion of sentencing. After accepting Street's guilty plea as to count

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<sup>1</sup> The charges contained in the indictment were as follows: Count One, Trafficking in Marijuana, a felony of the fifth degree in violation of R.C. 2925.03(A)(1)(C)(3)(a); Count Two, Trafficking in Marijuana, a felony of the fifth degree in violation of R.C. 2925.03(A)(1)(C)(3)(a); Count Three, Trafficking in Marijuana, a felony of the fifth degree in violation of R.C. 2925.03(A)(1)(C)(3)(a); Count Four, Trafficking in Marijuana (committed in the vicinity of a juvenile), a felony of the fourth degree in violation of R.C. 2925.03(A)(1)(C)(3)(b); Count Five, Furnishing Marijuana to a Juvenile, a felony of the fourth degree in

Case No. 2-07-01

one, the trial court found Street guilty of unlawful sexual conduct with a minor. The court ordered that the Adult Parole Authority conduct a pre-sentence investigation, that the Auglaize County Victim Advocate prepare a victim impact statement, and that Street undergo a psychological evaluation.

{¶5} On December 5, 2006 the trial court conducted a sexual predator classification hearing and sentencing hearing. The court found that Street had been convicted of committing a sexually oriented offense that was not a registration-exempt sexually oriented offense. Additionally, the court determined that Street was likely to engage in the future in one or more sexually oriented offenses, and therefore found Street to be a sexual predator.

{¶6} The court immediately proceeded to sentencing in Case No. 2006-CR-108 and Case No. 2006-CR-116. In Case No. 2006-CR-108, the court ordered Street to serve 18 months in prison for his conviction of unlawful sexual conduct with a minor with this sentence to run consecutively to the sentence imposed in Case No. 2006-CR-116 for a total prison sentence of 59 months. The court also notified Street of his duty to register as a sexual predator pursuant to R.C. 2950.04 upon his release from prison. Street was granted credit for 133 days served.

{¶7} Street now appeals, asserting one assignment of error.

### **ASSIGNMENT OF ERROR**

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violation of R.C. 2905.02(A)(4)(a)(C)(3); and Count Six, Furnishing Marijuana to a Juvenile, a felony of the fourth degree in violation of R.C. 2905.02(A)(4)(a)(C)(3).

**THE EVIDENCE ADDUCED AT HEARING ON SEXUAL PREDATOR CLASSIFICATION BY THE STATE OF OHIO FAILED TO PROVE, BY CLEAR AND CONVINCING EVIDENCE, THAT THE APPELLANT IS LIKELY TO ENGAGE IN THE FUTURE IN ONE OR MORE SEXUALLY ORIENTED OFFENSES THUS RENDERING THE COURT'S DECISION AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.**

{¶8} In his sole assignment of error, Street contends that the trial court erred in classifying him as sexual predator when the evidence relied upon by the court did not show that Street was likely to engage in future sexually oriented conduct.

{¶9} 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. 2950.01(E)(1).<sup>2</sup> (Emphasis added).

{¶10} In making a determination as to whether an offender is a sexual predator, R.C. 2950.09(B)(3) states that 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;**

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<sup>2</sup> We note that R.C. 2950.01 has been amended by 2007 Ohio Laws File 10 (Am. Sub. S.B. 10), effective June 30, 2007.

- (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...a criminal offense, whether the offender...completed any sentence...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...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.**

R.C. 2950.09(B)(3)(a)-(j).<sup>3</sup>

{¶11} Additionally, we note that “[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), 147 Ohio App.3d 94, 98, 768 N.E.2d 1207. The enumerated criteria set forth in R.C. 2950.09(B) are simply guidelines for a court to consider, and there is no requisite number of factors that must be applicable before a defendant can be considered a sexual predator. *State v. Smith*,

Case No. 2-07-01

3<sup>rd</sup> Dist. No. 17-99-1, 1999-Ohio-846 citing *State v. Gropp* (Apr. 8, 1998), 9<sup>th</sup> Dist. No. 97CA006744, unreported. Simply because certain factors may not apply to a particular defendant does not mean he or she cannot be found to be a sexual predator. *Id.*

{¶12} In classifying an offender as a sexual predator, the Revised Code requires the trial court to make this finding only when the evidence is clear and convincing that the offender is a sexual predator. *State v. Naugle*, 3<sup>rd</sup> Dist. No. 2-03-32, 2004-Ohio-1944 citing R.C. 2950.09(B)(4). The Supreme Court of Ohio has held as follows:

**“[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. Further, when the “degree of proof required to sustain an issue must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof.” *Cross*, supra. Thus, we are required to determine whether the evidence

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<sup>3</sup> We note that R.C. 2950.09 has been repealed by 2007 Ohio Laws File 10 (Am. Sub. S.B. 10), effective June 30, 2007.

presented was sufficient for the trial court to classify Street as a sexual predator by a clear and convincing degree of proof. 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. Martin*, 3<sup>rd</sup> Dist. No. 12-04-13, 2005-Ohio-3237 citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54.

{¶13} At the sexual offender classification hearing in the instant case, the parties stipulated to the admission of Street's psycho-sexual evaluation which contained an analysis of the factors contained in R.C. 2950.09. Additionally, the parties stipulated to the court's consideration of the pre-sentence investigation report as it related to the court's determination of Street's sexual offender status and stipulated that Street would have to be classified as a sexually oriented offender. Neither party put forth additional evidence or testimony and instead simply proceeded to closing arguments based upon the evidence presented to the court.

{¶14} The record reveals that the trial court reviewed the pre-sentence investigation report, Street's prior criminal record and the psycho-sexual evaluation prepared by the Forensic Psychiatry Center for Western Ohio before finding that Street was likely to engage in the future in one or more sexually oriented offenses and therefore finding him to be a sexual predator. (See



Transcript of December 5, 2006 sexual offender classification hearing and sentencing, (“Tr.”) pp. 10-12). Specifically, the trial court noted that it considered Street’s age and the age of his victim (14), and the fact that Street was involved in drug activity and drug addiction. Further, the trial court noted Street’s mental illness and with that, the potential for increased risk for sexual recidivism, the nature of Street’s sexual conduct being intercourse on more than one occasion, the nature of Street’s sexual conduct showing a limited pattern of abuse with this particular victim, and Street’s behavioral characteristics that contributed to his conduct including his narcissistic approach to life. (Tr. p. 12).

{¶15} Upon our review of the record we note that in the pre-sentence investigation report, Street admitted that although he thought his victim was 15, he knew he should not have had sex with a 15 year old. Additionally, Street’s psycho-sexual evaluation includes the results of clinical scales testing which reveals that Street is an individual who is “impulsive, insightful, resentful, and rebellious, that he has difficulty accepting rules and regulations as well as authority, that the likelihood of legal problems is high, and that sexuality and intimacy are problem areas for individuals such as Street.” The evaluation also includes a personality assessment which reveals Street’s antisocial tendencies and antisocial behavior and an alcohol use profile which reveals a high degree of alcohol abuse and high attitudes and behavior associated with problem drinking.

{¶16} Furthermore, we note that Street's psycho-sexual evaluation addresses the risk factors outlined in R.C. 2950.09 and how they apply to Street's particular case. Specifically, the evaluation indicates that Street's age and prior offenses increases his risk for recidivism, that his apparent personality disorder with antisocial traits can increase his risk for sexual recidivism, and that Street has a significant drug and alcohol history and current abuse problem which contributes to his conduct.

{¶17} Based on the foregoing, we are convinced that the trial court considered the criteria set forth in R.C. 2950.09(B)(3)(a)-(j) before finding Street to be a sexual predator pursuant to R.C. 2950.01(E)(1) and that Street was properly classified as a sexual predator by clear and convincing evidence. Accordingly, the trial court's classification is not against the weight of the evidence.

{¶18} Therefore, Street's sole assignment of error is overruled and the December 5, 2006 Journal Entry of the Auglaize County Court of Common Pleas finding and designating Street to be a sexual predator and sentencing him to 18 months in prison for his conviction of unlawful sexual conduct with a minor is affirmed.

*Judgment affirmed.*

**PRESTON, J., concurs.**

**ROGERS, P.J., dissents.**

**Rogers, P.J. dissenting.**

{¶19} I respectfully dissent from the majority opinion. I begin by noticing that the trial court heard no evidence whatsoever from any victim or investigator in this case. The sole basis for the court's finding is a presentence investigation and a report from the Forensic Psychiatry Center for Western Ohio. These two documents were stipulated into the record by the prosecutor and defense counsel, but were not discussed or debated. While I have no doubt that the trial court judge read both documents, I would find them inadequate evidence to provide the basis for a finding by clear and convincing evidence that the defendant was likely to commit future sexually oriented offenses.

{¶20} The Ohio Supreme Court has emphasized the gravity of sexual offender classifications and stressed the need for adequate classification hearings:

**R.C. Chapter 2950 defines three classifications of sex offenders: sexual predators, habitual sexual offenders, and sexually oriented offenders. R.C. 2950.09; *Cook*, 83 Ohio St. 3d at 407, 700 N.E.2d at 574. To earn the most severe designation of sexual predator, the defendant must have been convicted of or pled guilty to committing a sexually oriented offense and must be "likely to engage in the future in one or more sexually oriented offenses." R.C. 2950.01(E).**

**Once a person is designated a sexual predator, R.C. Chapter 2950 places certain obligations on the offender. Sexual predators must register with their county sheriff and provide a current home address, the name and address of the offender's employer, a photograph, and any other information required by the**

**Bureau of Criminal Identification and Investigation. R.C. 2950.04(C). In addition, sexual predators must provide the license plate number of each motor vehicle owned by the offender or registered in the offender's name. R.C. 2950.04(C)(2). Sexual predators must verify their current home address every ninety days for life. R.C. 2950.06(B)(1). Moreover, the sheriff with whom the offender has most recently registered must notify particular community members of the offender's status as a sexual predator and of his current address, if the trial court imposes that requirement. R.C. 2950.10 and 2950.11.**

**This court has already recognized that these requirements have grave consequences. "At a sexual offender classification hearing, decisions are made regarding classification, registration, and notification that will have a profound impact on a defendant's life." *State v. Gowdy* (2000), 88 Ohio St. 3d 387, 398, 727 N.E.2d 579, 589.**

**We noted in *Gowdy* the danger of making the sexual offender classification hearing perfunctory in nature, which would deny defendant the rights guaranteed him under the statute. *Id.* at 398, 727 N.E.2d at 589.**

*State v. Eppinger*, 91 Ohio St. 3d 158, 161-62.

{¶21} In my opinion, the sexual offender classification hearing in this case was clearly perfunctory in nature. While the trial court stated the various criteria it was required to consider, the conclusion it reached did not reflect its stated observations. As the trial court acknowledged, the defendant was convicted of once having sexual intercourse with a consenting juvenile and there was no allegation that the defendant in any way coerced the victim, nor used any alcohol or drugs to secure her cooperation. Indeed, the incident was reported only because the victim had contracted a sexually transmitted disease (Chlamydia) and sought treatment. It is even reported that she further stated that she did not want to get

anyone in trouble. The age difference between the defendant and the victim was only four years, the defendant being just eighteen. This was not a case of an elder imposing some perceived authority over a much younger, fearful individual. There was no demonstrated pattern of abuse, no threats of cruelty, no mental illness<sup>4</sup> or disability of either party, and there were not multiple victims. Also, this is the defendant's first conviction for a sexually oriented offense.

**Although certainly even one sexually oriented offense is reprehensible and does great damage to the life of the victim, R.C. Chapter 2950 is not meant to punish a defendant, but instead, "to protect the safety and general welfare of the people of this state." R.C. 2950.02(B). Thus, if we were to adjudicate all sexual offenders as sexual predators, we run the risk of "being flooded with a number of persons who may or may not deserve to be classified as high-risk individuals, with the consequence of diluting both the purpose behind and the credibility of the law. This result could be tragic for many." [State v. Thompson (1999), 140 Ohio App. 3d 638, 748 N.E.2d 1144]. Moreover, the legislature would never have provided for a hearing if it intended for one conviction to be sufficient for an offender to be labeled a "sexual predator."**

*Eppinger*, 91 Ohio St. 3d at 165.

{¶22} After considering the relevant statutory factors, the limited evidence before the trial court, and the stated observations of the trial court, I would find the determination that the defendant is a sexual predator was not supported by clear

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<sup>4</sup> "Mental illness" means a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life." R.C. 5120.17(A)(1).

Case No. 2-07-01

and convincing evidence, would sustain the assignment of error, and reverse the holding of the trial court.

**r**