[Cite as *State v. Wyant*, 2004-Ohio-6663.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

MADISON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee	:	CASE NO. CA2003-08-029
	:	O P I N I O N
-vs-		12/13/2004
	:	
JON T. WYANT,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. 97CR-06-038

Stephen J. Pronai, Madison County Prosecuting Attorney, Eamon P. Costello, 23 W. High Street, London, OH 43140, for plaintiff-appellee

J. Michael Murray, 8 E. Main Street, West Jefferson, OH 43162, for defendant-appellant

POWELL, J.

{¶1} Defendant-appellant, Jon T. Wyant, appeals the decision of the Madison County Court of Common Pleas adjudicating him a sexual predator pursuant to R.C. Chapter 2950. We affirm the decision of the trial court.

{¶2} Appellant's wife discovered photographs in her home of her three-year-old daughter engaging in sexual activity. On the

morning of May 29, 1997, she brought those photographs to Sergeant Pickett, a police officer with the London Police Department. During an interview with Sergeant Pickett, appellant gave a written statement indicating that on one occasion he photographed his stepdaughter while she was performing oral sex on him and while she was lying naked on a bed. Appellant also admitted that on another occasion he brought his stepdaughter into a bedroom and masturbated in her presence. Appellant further indicated in his statement that he has known for a long time that he has a problem and that he needs outside professional help to control his urges.

{¶3} On August 7, 1997, appellant pled no contest to the charge of pandering sexually oriented material involving a minor. On September 19, 1997, a sentencing hearing was held, and appellant was sentenced to six years imprisonment. At that hearing, both appellant and the state indicated that they were not prepared to go forward with a sexual predator determination at that time. Consequently, the court sentenced appellant without making a sexual predator determination. The court indicated, however, that a separate hearing would be held at a later date to determine whether appellant was a sexual predator.

{¶4} On April 23, 2003, five and a half years later and approximately two months before appellant was scheduled to be released from incarceration, the state requested a sexual predator hearing. The hearing was set for June 20, but on May 5 the state requested, and was granted, a continuance to July 2. On

June 6, the state asked the court to order appellant to submit to a psychological evaluation, and on June 24, the court granted the state's request. Four days later, however, when it was discovered that an examination could not be completed prior to appellant's scheduled release date, the court rescinded the order.

{¶5} On July 2, 2003, the sexual predator determination hearing was held. At the hearing, appellant requested that the action be dismissed, arguing that the statute governing the determination requires that the hearing be held prior to, or at, the sentencing hearing. The court denied this request. Appellant then requested that an expert be appointed to determine the likelihood that he will re-offend. The court denied this request as well. At the conclusion of the hearing, the trial court found that appellant is a sexual predator.

{¶6} On appeal, appellant raises three assignments of error.

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED IN FAILING TO DISMISS THE ACTION TO DETERMINE WHETHER THE DEFENDANT-APPELLANT SHOULD BE CLASSIFIED AS A SEXUAL PREDATOR."

{¶9} In his first assignment of error, appellant argues that he had a right, pursuant to R.C. 2950.09(B)(2), to have his sexual predator determination hearing held either before or during his sentencing hearing. Because the trial court did not conduct the hearing either before or during the sentencing hear-

ing, appellant argues the court lost the power to make the determination at all. We disagree.

{¶10} R.C. 2950.09(B)(2) provides: "[T]he judge shall conduct the [sexual predator] hearing * * * prior to sentencing and, if the sexually oriented offense is a felony[,] * * * may conduct it as part of the sentencing hearing * * *."

{¶11} Because of the "shall conduct" language, a cursory reading of the statute could lead to the conclusion that its time prescriptions are mandatory. However, as a general rule, "a statute which provides a time for the performance of an official duty will be construed as directory [and not mandatory] so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure." State ex rel. Jones v. Farrar (1946), 146 Ohio St. 467, paragraph three of the syllabus. This rule applies "unless the object or purpose of a statutory provision requiring some act to be performed within a specified period of time is discernible from the language employed." Id.

{¶12} In State v. Bellman, 86 Ohio St.3d 208, 210, 1999-Ohio-95, the Ohio Supreme Court, analyzing R.C. 2950.09(B)(2), applied the general rule articulated in Farrar and held that the statute's time prescriptions are merely for judicial convenience and orderly procedure, and thus, are only directory.

{¶13} Appellant argues on appeal that the rule articulated in Bellman should not apply in this case because, unlike appellant, the defendant in Bellman expressly waived the right to

have his sexual predator hearing either before or at the sentencing hearing. In Bellman the defendant's attorney stated explicitly at the sentencing hearing: "I want the record to be perfectly clear I am waiving any defect" as a result of the delay. According to appellant, because he did not expressly waive the time requirements using similar language, the rule set forth in Bellman does not apply.

{¶14} Appellant's position is directly on point with an argument raised in State v. Echols (May 5, 2000), Greene App. No. 99CA60. In Echols, the defendant was convicted of a sexually oriented offense. At his sentencing hearing, the state requested that a sexual predator hearing be conducted at a later date. Echols' attorney did not object to the delay at that time. At the sexual predator hearing, however, Echols' attorney did object to the delay.

{¶15} Like appellant in this case, Echols attempted to argue that the rule in Bellman did not apply because he did not expressly waive any defect resulting from a delay in conducting the hearing. The Second Appellate District held, however, that the Court's holding in Bellman was not dependent upon an express waiver. See Echols, Green App. No. 99CA60. We agree with the Second District that the holding in Bellman applies even when an offender does not expressly waive time prescriptions.

{¶16} At the sentencing hearing in this case, the court, the prosecutor, and appellant held a discussion on the record concerning a sexual predator determination hearing. Both the

prosecutor and appellant indicated to the court that they were not sure about how to proceed with such a hearing. The court then indicated that the burden was on the state to request a hearing at a later date. At no time during the sentencing hearing did appellant object to delaying the determination hearing. In fact, appellant's attorney stated: "I'm a little bit befuddled as to what exactly has to happen and therefore I don't think we're prepared at this point."

{¶17} Six years later, when the sexual predator hearing finally took place, appellant argued to the trial court that although he might have indicated at the sentencing hearing that he was not prepared to proceed, he did not expressly waive the right to have the hearing at or before sentencing. Therefore, the trial court no longer had the power to hold a sexual predator hearing. The trial court rejected this argument, and so do we.

{¶18} Appellant could have raised an objection to the delay at the sentencing hearing, but chose not to do so. Furthermore, the record does not reveal any indication that appellant was prejudiced by the delay. For these and all of the foregoing reasons, appellant's first assignment of error is overruled.

{¶19} Assignment of Error No. 2:

{¶20} "THE COURT ERRED IN FAILING TO APPOINT AN EXPERT TO EVALUATE THE DEFENDANT-APPELLANT TO DETERMINE HIS LIKELIHOOD OF RE-OFFENDING."

{¶21} On the day of the sexual predator hearing, appellant requested that an expert be appointed at state expense to evaluate the likelihood that he would re-offend. The court denied this request, and appellant argues in his second assignment of error that the trial court erred when it did so. We disagree.

{¶22} At a sexual predator hearing, the offender must be given an opportunity to testify, present evidence, call and examine witnesses and expert witnesses, and cross-examine witnesses and expert witnesses. R.C. 2950.09(B)(2). In addition, "[a]n expert witness shall be provided to an indigent defendant * * * if the court determines, within its sound discretion, that such services are reasonably necessary to determine whether the offender is likely to engage in the future in one or more sexually oriented offenses * * *." State v. Eppinger, 91 Ohio St.3d 158, 159, 2001-Ohio-247, paragraph one of the syllabus.

{¶23} "The term discretion * * * involves the idea of a choice, of an exercise of the will, of a determination made between competing considerations." State v. Jenkins (1984), 15 Ohio St.3d 164, 222. Merely disagreeing with the trial court's choice to deny appellant an expert evaluation at state expense, therefore, would not be adequate grounds for this court to reverse the trial court. In order to reverse a decision within the sound discretion of the trial court, we must determine that the choice was unreasonable, arbitrary, or unconscionable. State v. LaMar, 95 Ohio St.3d 181, 191, 2002-Ohio-2128, ¶40.

{¶24} When appellant's request for a court appointed expert was denied, the trial court had before it, among other information, a Sexual Offender Assessment ("Assessment") from the Madison Correctional Institution, a Presentence Investigation Report ("PSI") from the Probation Department, and the written statement appellant gave to Sergeant Pickett during the investigation. We find that these sources of information, taken together, were sufficient to justify the trial court in concluding that an expert was not necessary in this case.

{¶25} Appellant's written statement to Sergeant Pickett reveals that he acted upon his pedophile impulses with his three-year-old stepdaughter on at least two separate occasions. The statement also indicates appellant has known for a long time that he has a problem and that he is incapable of controlling his urges without help.

{¶26} The PSI states that "[a]lthough the defendant has no prior record, and recidivism factors indicate it is not likely he will commit future crimes, based on the fact that he admitted

that he has had pedophilic urges for the past 12 years, and expressed to his wife his fear of being alone with the minor children, this department finds that recidivism is likely."

{¶27} The Assessment conducted by the Madison Correctional Institution states that appellant "admitted he has been sexually attracted to pre-pubescent females since he was a teen-ager." The report also notes appellant admitted "fantasiz[ing] about his young niece for many years but did nothing inappropriate with her because he was biologically related to her."

{¶28} The Assessment concludes that although appellant's "primary sexual orientation is toward children and his pedophilic interests emerged by adolescence," he is a low risk for re-offending. The psychologist who conducted the assessment states that appellant is considered to be low risk because "he has no other felony convictions, he lived with the victim, and the offense involved non-familial child abuse."

{¶29} We find the foregoing to be a sufficient and reasonable basis for denying appellant's request for a court-appointed expert to determine the likelihood that he would re-offend.

{¶30} Appellant argues on appeal that because he was convicted of only one offense and had no prior history of sexually oriented offenses, the trial court was required, pursuant to Eppinger, to appoint an expert.

{¶31} In Eppinger, a defendant who had no prior history of sexually oriented offenses was convicted of raping a nineteen-year-old female to whom he was not related. The Court held

under the facts of that case that the defendant was entitled to an expert to determine the likelihood that he would re-offend. 91 Ohio St.3d at 167. In reaching its decision, the Court noted that because of the profound impact such a classification can have on the offender, experts are necessary in many cases. Id. at 162. One sexually oriented conviction, without more, might not be enough to predict future behavior, and absent a history of similar offenses or other indicators, an expert is necessary. Id. (Emphasis added.)

{¶32} The Eppinger Court did not hold, however, that an expert is necessary in every case in which the defendant is a first-time offender. See id. at 166; see, also, State v. Messer, Defiance App. No. 4-02-26, 2003-Ohio-3722, (a Third District case noting that Eppinger does not stand for the proposition that every first-time offender is entitled to an expert evaluation at state expense). The Eppinger Court recognized that there are instances in which the rate of recidivism is so high that an expert is unnecessary. Id. at 162.

{¶33} As an example of such a case, the Eppinger Court pointed to offenders who prey upon children. For those types of offenders, there might be sufficient evidence in transcripts, victim impact statements, presentence investigation reports, prior history of arrests and convictions, age, etc., to make the appointment of an expert unnecessary. Id.

{¶34} We find this case to be one of those instances. Appellant was convicted of an offense involving a three-year-old

child, and sufficient evidence exists in the record to make appointment of an expert unnecessary. Accordingly, appellant's reliance on Eppinger to support his contention that an expert should have been appointed is misplaced.

{¶35} Appellant also cites to State v. Dobies, 147 Ohio App.3d 568, 2001-Ohio-8823, for the proposition that the trial court abused its discretion in denying his request for an expert. Dobies, however, is distinguishable from the case at bar. In Dobies, the only evaluation available to the trial court when it adjudicated the defendant a sexual predator was a six-year-old drug and alcohol assessment. In this case, however, a sexual offender assessment was conducted. A psychologist at the Madison Correctional Institution evaluated appellant shortly after he began serving his prison term.

{¶36} The decision to appoint an expert to determine the likelihood of re-offending is within the sound discretion of the trial court, and after a careful review of the record, we cannot say the trial court's decision to deny appellant an expert at state expense was unreasonable, arbitrary, or unconscionable. Appellant's second assignment of error is therefore overruled.

{¶37} Assignment of Error No. 3:

{¶38} "THE TRIAL COURT ABUSED ITS DISCRETION IN CLASSIFYING THE APPELLANT AS A SEXUAL PREDATOR."

{¶39} R.C. 2950.01(E) defines a sexual predator as a person who has been convicted of, or pled guilty to, committing a sexually oriented offense, and who is likely to engage in one or

more sexually oriented offenses in the future. Therefore, when making a sexual predator determination, a trial court must determine (1) whether a sexually oriented offense has been committed, and (2) whether the offender is likely to engage in a sexually oriented offense in the future.

{¶40} Appellant was found guilty of pandering sexually oriented material involving a minor in violation of R.C. 2907.322(A)(1). Pandering sexually oriented material is included in the definition of a sexually oriented offense. R.C. 2950.01. Thus, the issue for the trial court to determine at the sexual predator hearing was whether appellant was likely to engage in one or more sexually oriented offenses in the future.

{¶41} The criteria established by the Ohio General Assembly to guide trial courts in determining whether an offender is a sexual predator are set forth in R.C. 2950.09(B)(3). When making a determination as to whether an offender is a sexual predator, the judge shall consider all relevant factors, including, but not limited to: the ages of the offender and victim, whether multiple victims or patterns of abuse were involved, prior offenses and any mental illnesses of the offender, whether the act was cruel or involved drugs or alcohol to impair the victim, and any other behavioral characteristics that contributed to the conduct. See R.C. 2950.09(B)(3)(a)-(j).

{¶42} After reviewing the statutory factors, and all testimony and evidence, the court must then "determine by clear and convincing evidence whether the offender is a sexual predator."

R.C. 2950.09(B)(2). Clear and convincing evidence is the measure or degree of proof that is more than a mere preponderance of the evidence, but less than the certainty required for beyond a reasonable doubt in criminal cases. State v. Schiebel (1990), 55 Ohio St.3d 71. It will "produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." Id.

{¶43} On review of a decision based upon the clear and convincing standard, this court "must examine the record to determine whether sufficient evidence exists to satisfy the requisite degree of proof." State v. Cook, 149 Ohio App.3d 422, 431, 2002-Ohio-4812.

{¶44} Turning to the facts of this case, the record on appeal clearly reveals the trial court fulfilled its obligation to consider all the required statutory factors. The court found appellant's age at the time of the offense was 26 and the victim was 3. The court determined the offense did not involve multiple victims and that no drugs or alcohol were used. After considering the facts and circumstances of the case, the court also made the determination that the act itself was an act of cruelty.

{¶45} The court reviewed appellant's prior criminal record and whether he had ever participated in a sex offender program. The court indicated that it reviewed the PSI, which concludes that although appellant admitted he was treated for depression at age 14, no record of any mental illness or disability exists.

Finally, appellant's statement to Sergeant Pickett indicates that on two occasions, separated by almost two months, he engaged in sexual misconduct with his victim. With this statement before it, the court concluded that the offense was part of a demonstrated pattern of abuse.

{¶46} Based upon the foregoing, the trial court determined there was clear and convincing evidence that appellant is a sexual predator. We agree with the conclusion of the trial court.

{¶47} Appellant seems to raise other issues under this assignment of error, but the exact thrust of his argument is not entirely clear. He seems to say both that the court was required to appoint an expert, but not permitted to rely on the expert's conclusion. He also seems to claim that the only evidence before the court was that there was a low risk of reoffending, and that it was therefore contrary to the requirements of R.C. Chapter 2950 for the trial court to conclude that he was a sexual predator.

{¶48} In an attempt to respond to these claims, we note that although a judge must consider all the statutory factors, he or she has discretion to determine what weight, if any, will be assigned to each. State v. Thompson, 92 Ohio St.3d 584, 2001-Ohio-1288, paragraph one of the syllabus. The trial court is also not required to find the evidence supports a majority of the factors. State v. Boshko (2000), 139 Ohio App.3d 827, 840. Even when only one or two factors indicate that recidivism is

likely, a trial court may reasonably conclude that an offender is a sexual predator. See State v. Randall (Jan. 22, 2001), Lake App. No. 99-L-040 (finding one or two factors sufficient for concluding that recidivism is likely).

{¶49} A trial court is also not required to accept the conclusions of a psychiatric evaluation. State v. Robertson, 147 Ohio App.3d 94, 95, 2002-Ohio-494. Therefore, although the psychologist at the Madison Correctional Institution concluded appellant was not likely to re-offend, the trial court was not required to accept this conclusion.

{¶50} Finally, we note that "recidivism is at best an imperfect science." Thompson, 92 Ohio St.3d at 588. The trial court is not required to determine with exactitude that an offender will or will not re-offend. Accordingly, although there is evidence in the record to support a finding that appellant will not re-offend, there is also ample evidence in the record to support the trial court's conclusion that appellant is likely to re-offend.

{¶51} After a careful review of the record, we find there is clear and convincing evidence to support the trial court's determination that appellant is a sexual predator. Appellant's third assignment of error is therefore overruled.

{¶52} Judgment affirmed.

YOUNG, P.J., and WALSH, J., concur.

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