

[Cite as *State v. Graham*, 2004-Ohio-3102.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO
STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 20113
vs. : T.C. CASE NO. 02CR3423
THOMAS W. GRAHAM : (Criminal Appeal from
Common Pleas Court)
Defendant-Appellant :

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O P I N I O N

Rendered on the 10th day of June, 2004.

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GRADY, J.

{¶1} Defendant, Thomas Graham, appeals from his
conviction for sexual battery and his designation as a
sexual predator.

{¶2} Pursuant to a negotiated plea agreement, Defendant
entered a no contest plea to one count of sexual battery in
violation of R.C. 2907.03(A)(1) which was charged via a bill

of information. In exchange, the State dismissed two charges of rape of a substantially impaired victim in violation of R.C. 2907.02(A)(1)(c), and two charges of rape by force or threat of force in violation of R.C. 2907.02(A)(2). The trial court found Defendant guilty and sentenced him to five years of community control with specific conditions. The court also designated Defendant a sexual predator. The victim of the offense is Defendant's sister who is mentally challenged and has cerebral palsy.

{¶3} Defendant has timely appealed to this court from his conviction. He challenges only his classification as a sexual predator.

ASSIGNMENT OF ERROR

{¶4} "THE EVIDENCE PRESENTED AT APPELLANT'S SEXUAL CLASSIFICATION HEARING WAS NOT SUFFICIENT AS A MATTER OF LAW TO PROVE, BY CLEAR AND CONVINCING EVIDENCE, THAT APPELLANT WAS LIKELY TO ENGAGE IN THE FUTURE IN ONE OR MORE SEXUALLY ORIENTED OFFENSES AND, THEREFORE, APPELLANT SHOULD NOT HAVE BEEN CLASSIFIED AS A SEXUAL PREDATOR."

{¶5} In order to adjudicate Defendant a sexual predator, the court must find by clear and convincing evidence that Defendant has been convicted of or pled guilty to a sexually oriented offense and that "he is likely to engage in the future in one or more sexually oriented offenses." R.C. 2950.01(E); R.C. 2950.09(B)(3); *State v. Eppinger*, 91 Ohio St.3d 158, 2001-Ohio-247.

{¶6} "Clear 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; *State v. Ingram* (1992), 82 Ohio App.3d 341.

{¶7} Defendant's conviction for sexual battery constitutes a sexually oriented offense. R.C. 2950.01 (D)(1)(a). Thus, the only issue is whether Defendant is likely to engage in the future in another sexually oriented offense.

{¶8} In determining the likelihood of recidivism, the trial court is mandated by R.C. 2950.09(B)(2) to consider the factors relating to the offender which are set out at paragraphs (a) through (j) therein. While the statute deems the factors relevant, they are only potentially relevant. *State v. Thompson*, 92 Ohio St.3d 584, 2001-Ohio-1288. Some may not be applicable in a given case, and "the judge has the discretion to determine what weight, if any, he or she will assign to each guideline." *Id.*, at p. 589. Because the "guidelines do not control a judge's discretion," *Id.*, at p. 587, a factor irrelevant to a particular offender is entitled to no weight. Further, the court may consider any other evidence the court deems relevant. *Id.*

{¶9} The statutory guidelines are:

{¶10} "(a) The offender's age;

{¶11} "(b) The offender's prior criminal record regarding all offenses, including, but not limited to, all sexual offenses;

{¶12} "(c) The age of the victim of the sexually oriented offense for which sentence is to be imposed;

{¶13} "(d) Whether the sexually oriented offense for which sentence is to be imposed involved multiple victims;

{¶14} "(e) Whether the offender used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;

{¶15} "(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;

{¶16} "(g) Any mental illness or mental disability of the offender;

{¶17} "(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;

{¶18} "(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;

{¶19} "(j) Any additional behavioral characteristics that contribute to the offender's conduct. R.C. 2950.09(B)(2).

{¶20} The trial court conducted a sexual offender classification hearing as part of the sentencing proceeding in this case. In making its determination the trial court considered the presentence investigation report, which includes the House Bill 180 screening instrument, and the forensic report prepared by Dr. Marciani. The parties stipulated that if called to testify Dr. Marciani would testify consistent with her report. Neither party presented any other evidence or witnesses relative to Defendant's sexual offender status.

{¶21} At the conclusion of the hearing the trial court designated Defendant a sexual predator. In making that determination the trial court discussed on the record the factors in R.C. 2950.09(B)(2) upon which it relied, the evidence relating to those factors, and the weight assigned by the court to those factors. See: *Eppinger, supra*.

{¶22} The trial court found that some factors, such as Defendant's age (33), and whether Defendant displayed cruelty during the offense, do not increase his risk for recidivism. Other factors, such as the age of the victim (26), whether Defendant used drugs or alcohol to impair the victim and prevent resistance, and whether multiple victims were involved in the offense, either have no proven

correlation to the risk for recidivism or are simply not applicable in this particular case.

{¶23} The court observed that one factor, that Defendant failed to complete previous sexual offender treatment, does increase the risk for recidivism. In that regard, the trial court stated that Dr. Marciani's report indicates that as an adolescent Defendant failed to complete a sexual offender treatment program. Defendant immediately challenged the accuracy of that information, asserting that Dr. Marciani misunderstood what he had told her, and that he did in fact complete that program at Paint Creek Youth Center when he was seventeen. From the record it appears that the trial court accepted Defendants' explanation and did not conclude that this particular factor increased Defendant's risk for recidivism.

{¶24} However, the trial court did find a number of factors present in this case that do increase Defendant's risk for recidivism: in particular, Defendant's prior criminal record. The court noted that as a juvenile Defendant has previous convictions for two sexual offenses: a gross sexual imposition in 1986 and two counts of rape in 1987. Although Defendant contested whether these offenses were all part of one case and whether the rape charges had been dismissed, when asked by the trial court Defendant admitted that he had been convicted of rape as an adolescent. In any event, it is clear that Defendant has one or more convictions for sexual offenses as a juvenile,

for which Defendant spent five years in the custody of D.Y.S.

{¶25} The trial court also noted that as an adult Defendant has misdemeanor convictions for unauthorized use of a motor vehicle in Miamisburg, Ohio in 1992, theft (shoplifting) in Florida in 1998, and making/filing a false report in Colorado in 1998. Defendant has felony convictions for theft of a firearm in Utah in 1995, and the present sexual battery offense. The trial court indicated that Defendant's extensive criminal history, which includes previous sexual offenses, increases his risk for recidivism and is a compelling factor in finding that Defendant is likely to engage in additional sex offenses in the future.

{¶26} Another compelling factor in the court's determination that Defendant is likely to commit future sex offenses is evidence in Defendant's mental health records which suggest that Defendant suffers from antisocial personality disorder, which is characterized by a failure to conform to societal norms. Yet another compelling factor that increases Defendant's risk for recidivism is his chronic pattern of abuse as reflected by his history of previous sexual offenses as a juvenile and the current sexual offense at issue in this case. Defendant's history of sexual offenses includes both male and female victims. Moreover, Defendant admitted to police having sexual contact with his sister when they were both children.

{¶27} Finally, the court found that several additional

behavioral characteristics were also compelling factors in determining that Defendant is likely to commit additional sex offenses in the future. These include Defendant's history of alcohol abuse and his unstable nomadic lifestyle, his sporadic employment, and the fact that Defendant moves about the country constantly and does not live in one place for long.

{¶28} On this record there is at least one risk factor, Defendant's age, that actually decreases Defendant's risk for recidivism. Several others are neutral in that they neither increase nor decrease Defendant's risk for recidivism, largely because they have no proven correlation to the risk or they are inapplicable to this particular case. Many others, however, are clearly probative of the increased risk for sexual reoffending that Defendant poses. The trial court gave considerable weight to those factors, finding them to be compelling, as it was entitled to do. *Thompson, supra*. After considering and weighing all of the factors, the trial court concluded that there is clear and convincing evidence that Defendant is likely to engage in the future in additional sex offenses, and the court designated him a sexual predator.

{¶29} In our view there is ample evidence in this record to support that conclusion. A review of Dr. Marciani's report supports the notion that there are even more risk factors present in this case that increase Defendant's risk for recidivism than those on which the trial court relied in

making its determination. Clearly, the record is sufficient to support the trial court's sexual predator classification.

{¶30} The assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. and YOUNG, J., concur.

Copies mailed to:

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