

[Cite as *State v. Bieck*, 2004-Ohio-3562.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 2003-CA-66

vs. : T.C. CASE NO. 02CR337

VICTOR W. BIECK: (Criminal Appeal from
Common Pleas Court)
Defendant-Appellant :

.

O P I N I O N

Rendered on the 2nd day of July, 2004.

.

William F. Schenck, Pros. Attorney; Jeffrey D. Hunter, Chief
Trial Counsel, 61 Greene Street, Xenia, Ohio 45385, Atty.
Reg. No. 0061364

Attorney for Plaintiff-Appellee

Andrew T. Davenport, 87 S. Progress Drive, Xenia, Ohio
45385, Atty. Reg. No. 0074203

Attorney for Defendant-Appellant

.

GRADY, J.

{¶1} Defendant, Victor Bieck, appeals from his
conviction and sentence for attempted unlawful sexual
conduct with a minor, importuning, and his designation as a
sexual predator.

{¶2} Between March 3, 2002, and May 18, 2002, Defendant

used the internet to engage in conversations and solicit sex from a person whom he believed was a fourteen year old female but in fact was a Xenia police officer. Those conversations resulted in Defendant traveling to Xenia to a rendezvous point for the purpose of having sexual intercourse with the fourteen year old female. Upon arriving in Xenia, Defendant was arrested by police.

{¶3} Defendant was indicted on one count of attempted unlawful sexual conduct with a minor, R.C. 2923.02(A) and 2907.04(A), and one count of importuning, R.C. 2907.07(E)(2). Defendant subsequently entered pleas of guilty to both offenses. The trial court sentenced Defendant to a definite term of eleven months on each offense and ordered the sentences to be served consecutively, for a total of twenty-two months. The court also designated Defendant a sexual predator.

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

FIRST ASSIGNMENT OF ERROR

{¶5} "THE TRIAL COURT ERRED BECAUSE THERE WAS NOT CLEAR AND CONVINCING EVIDENCE THAT APPELLANT SHOULD BE CLASSIFIED AS A SEXUAL PREDATOR."

{¶6} 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.

{¶7} "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 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.

{¶8} Defendant's conviction for importuning 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.

{¶9} 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.*

{¶10} The statutory guidelines are:

{¶11} "(a) The offender's age;

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

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

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

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

{¶16} "(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;

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

{¶18} "(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;

{¶19} "(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;

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

{¶21} The trial court conducted a sexual offender classification hearing as part of the sentencing proceeding in this case. In making its determination concerning Defendant's sexual offender status, the trial court considered the presentence investigation report, forensic reports submitted by Dr. Bobbie Hopes and Dr. Frederick Peterson, and the testimony of those two expert witnesses. At the conclusion of the hearing the trial court designated Defendant a sexual predator. In making that determination the trial court discussed the risk 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. *Eppinger, supra*.

{¶22} Relying on Dr. Hopes' testimony, the trial court found that there were several risk factors which increase Defendant's risk for recidivism. For instance Defendant's age, twenty-five, R.C. 2950.09(B)(2)(a), Defendant's extensive criminal record of convictions both as a juvenile and an adult, R.C. 2950.09(B)(2)(b), Defendant's anti-social personality disorder, R.C. 2950.09(B)(2)(j), and his history

6

of violent behavior throughout his lifetime, R.C. 2950.09(B)(2)(j).

{¶23} While the court gave no weight to the age of the victim, because in reality there was no victim, R.C. 2950.09(B)(2)(c), the court nevertheless gave some weight to the fact that Defendant believed that the person he was going to meet for sex was a fourteen years old girl. R.C. 2950.09(B)(2)(j). Similarly, while the court gave no weight to multiple victims because there were none, R.C. 2950.09(B)(2)(d), the court nevertheless chose to give some weight to Defendant's expressed desire to be sexually involved with more than the one girl he believed he was communicating with. R.C. 2950.09(B)(2)(j). Finally, while the court gave no weight to pattern of abuse because there was none, the court nevertheless gave some weight to the fact that Defendant's conduct demonstrates extensive interaction of a sexual nature with a child over a long period of time. R.C. 2950.09(B)(2)(j). Additionally, the trial court found very disturbing the fact that Defendant was on probation at the time of this offense, and that Defendant has a family including children, yet engaged in conduct of this kind. R.C. 2950.09(B)(2)(j).

{¶24} Some factors the court found inapplicable and it gave them no weight, such as the use of drugs or alcohol to impair the victim, R.C. 2950.09(B)(2)(e), whether Defendant completed his sentence for prior offenses, R.C. 2950.09(B)(2)(f), and whether Defendant displayed cruelty

during this offense, R.C. 2950.09(B)(2)(i).

{¶25} We further note that Dr. Hope's use of the Sex Offender Risk Appraisal Guide (SORAG) to evaluate Defendant placed him in category seven, which has an eighty percent probability of reoffending within the next ten years. Dr. Hopes opined that Defendant has a high likelihood of reoffending.

{¶26} Dr. Peterson, on the other hand, opined that Defendant poses a low risk for reoffending if he is in treatment. Dr. Peterson's use of the Abel Assessment For Sexual Interest demonstrates that Defendant is a typical adult heterosexual male who is interested in adult females and has some interest in adolescent females. Dr. Peterson stressed that because Defendant did not actually meet with any fourteen year old girl in this case and have sexual contact with her, he is neither a child molester nor a pedophile and therefore is much more amenable to treatment. Dr. Peterson agreed, however, that at least three of the risk factors set out in R.C. 2950.09(B)(2) are present in this case, and he conceded that his assessment of Defendant would be different had he actually met a fourteen year old girl and had sex with her.

{¶27} A review of this record reveals several risk factors probative of the increased risk for sexual reoffending that Defendant poses. The trial court gave varying degrees of weight to those factors, as it was entitled to do. *Thompson, supra*. After considering and

weighing all of the factors and evidence, 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. In our view there is ample evidence in this record to support that finding.

{¶28} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶29} "PRIOR HOLDINGS IN *EPPINGER*, *COOK AND THOMPSON* VIOLATE THE SEPARATION OF POWERS BY ALLOWING THE TRIAL COURT TOO MUCH DISCRETION IN DECIDING SEXUAL PREDATOR STATUS WITH RESPECT TO R.C. 2950.09(B)(2)."

{¶30} In determining whether an offender is a sexual predator, R.C. 2950.09(B)(2) requires the trial court to consider all relevant factors including, but not limited to, the factors set forth in R.C. 2950.09(B)(2)(a)-(j). In *State v. Thompson*, 92 Ohio St.3d 584, 2001-Ohio-1288, the Ohio Supreme Court held:

{¶31} "1. A judge must consider the guidelines set out in R.C. 2950.09(B)(2), but the judge has discretion to determine what weight, if any, he or she will assign to each guideline. Pursuant to R.C. 2950.09(B)(2), a judge may also consider any other evidence that he or she deems relevant to determining the likelihood of recidivism.

{¶32} "2. Because R.C. 2950.09(B)(2) does not encroach upon the trial court's factfinding authority, it does not

violate the separation-of-powers doctrine." (Syllabus)

{¶33} Defendant argues in this assignment of error that the Supreme Court's holding in *Thompson*, allowing trial courts to decide what weight, if any, to give to each particular factor in R.C. 2950.09(B)(2), allows too much opportunity for judicial abuse of discretion in that the trial court can effectively refuse to consider certain factors by simply refusing to give them any weight. That thwarts the General Assembly's directive to consider all of the factors set out in R.C. 2950.09(B)(2), and thereby violates the separation of powers doctrine.

{¶34} At the outset we note that Defendant failed to raise this constitutional issue in the trial court below. Accordingly, we decline to consider this argument for the first time on appeal. *State v. Awan* (1986), 22 Ohio St.3d 120; *State v. Petrusch* (Nov. 15, 1995), Montgomery App. No 14983.

{¶35} In any event, the trial court's failure to give a particular factor in R.C. 2950.09(B)(2) any weight is not equivalent to refusing to consider that factor. To the contrary, some of the factors may not be relevant in a given case, and as to those factors it would not be appropriate to give them any weight. Under R.C. 2950.09(B)(2), a trial court retains its fact finding powers in assessing the relevance of each factor. *Thompson, supra*. We decline Defendant's invitation for this intermediate level appellate court to overrule the Ohio Supreme Court's pronouncement in

Thompson that the trial judge has discretion to determine what weight, if any, to assign to each factor in R.C. 2950.09(B)(2).

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

BROGAN, J. and YOUNG, J. concur.

Copies mailed to:

Jeffrey D. Hunter, Esq.
Andrew T. Davenport, Esq.
Hon. Stephen A. Wolaver