[Cite as *State v. Hurst*, 2005-Ohio-128.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. Case No. 20435

vs. : T.C. Case No. 03-CR-4019

DANIEL LEE HURST : (Criminal Appeal from Common
: Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 14th day of January , 2005.

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MATHIAS H. HECK, JR., Prosecuting Attorney, By: JOHNNA M. SHIA, Assistant Prosecuting Attorney, Atty. Reg. #0067685, Appellate Division, P.O. Box 972, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorneys for Plaintiff-Appellee

BRENT E. RAMBO, Atty. Reg. #0076969, 318 W. Fourth Street, Dayton, Ohio 45402
Attorney for Defendant-Appellant

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BROGAN, P.J.

{¶ 1} Daniel Lee Hurst appeals from his conviction and sentence following a guilty plea to one count of unlawful sexual conduct with a minor and his designation as a sexual predator.

{¶ 2} Hurst advances two assignments of error on appeal. First, he contends the trial court erred in failing to comply with the notice-and-hearing requirements of R.C. 2950.09(B) before designating him a sexual predator. Second, he claims the trial court erred in failing to comply with its statutory obligation to make a determination as to his habitual-sexual-offender status.

{¶ 3} The record reflects that Hurst entered his guilty plea on January 2, 2004. The trial court then ordered a pre-sentence investigation report and a psychological evaluation for purposes of assisting it in determining whether to classify him as a sexual predator. Thereafter, on March 10, 2004, the trial court conducted a combined sentencing and sexual-offender classification

hearing. At the outset of the proceeding, defense counsel stated: "There are two things we have to do today. One is sentencing and one is to make a determination of [Hurst's] status as a sexual offender." The trial court then heard sentencing arguments from counsel, listened to a statement from the victim, and offered Hurst an opportunity to speak on the issue of sentencing. Immediately thereafter, the trial court imposed a four-year prison sentence and expressed its rationale for doing so. The trial court then turned to the matter of determining a proper sexual-offender classification. It first took evidence in the form of a stipulated expert's psychological report. After the State rested on the contents of the report, the trial court afforded Hurst's attorney an opportunity to put anything he wished on the record. In response, defense counsel presented no evidence but did make an argument on Hurst's behalf and dispute certain information in the expert's report. After giving Hurst an opportunity to speak on the issue of his sexual-offender classification, the trial court designated him a sexual predator and explained its rationale for doing so.

{¶ 4} In light of the foregoing facts, we find no merit in Hurst's first assignment of error. There he contends the trial court failed to give him notice of a sexual-offender classification hearing or to conduct such a hearing, as required by R.C. 2950.09(B). We disagree. The Ohio Supreme Court has recognized that the giving of such notice is essential and mandatory. State v. Gowdy, 88 Ohio St.3d 387, 2000-Ohio-355. In the present case, however, defense counsel's remarks at the outset of the March 10, 2004, proceeding show that he knew it was a combined sentencing and sexual-offender classification hearing. Thus, defense counsel plainly had notice of the hearing. We note too that R.C. 2950.09(B)(2) expressly authorized the trial court to conduct a sexual-offender classification hearing as part of a sentencing hearing. Moreover, we reject Hurst's argument that the proceeding on March 10, 2004, lacked the hallmarks of a true "hearing." The trial court took evidence in the form of a stipulated expert's report and afforded respective counsel an opportunity to present anything else they wished. The trial court also heard argument from counsel and gave Hurst an opportunity to speak. Consequently, we believe the proceeding qualified as a hearing.

{¶ 5} Hurst next argues that even if the March 10, 2004, proceeding was a "hearing," the trial court violated R.C. 2950.09(B)(2) by conducting the sexual-offender classification part of the hearing after sentencing him. Hurst reads the statute as requiring a sexual-offender classification hearing to take place prior to actual sentencing. Because the trial court imposed his sentence before proceeding to the sexual-offender classification issue, Hurst contends it

violated the statute. In relevant part, R.C. 2950.09(B)(2) provides: "[T]he judge shall conduct the [sexual-offender] hearing * * * prior to sentencing and * * * the judge may conduct it as part of the sentencing hearing[.]" Hurst's interpretation of the statute comports with the Ohio Supreme Court's recognition that a sexual-predator hearing is to precede sentencing. State v. Bellman, 86 Ohio St.3d 208, 210-211, 1999-Ohio-95.

{¶ 6} We note, however, that defense counsel failed to object to the trial court's imposition of sentence before conducting the sexual-offender classification portion of the hearing. As a result, Hurst has waived all but plain error. Id. at 211. In the present case, we fail to see how he could have been prejudiced by the trial court sentencing him before declaring him a sexual predator. If anything, a prior finding that an offender is a sexual predator would tend to increase, not lessen, the sentence that he receives. Consequently, we find no plain error. Hurst's first assignment of error is overruled.

{¶ 7} In his second assignment of error, Hurst contends the trial court erred in failing to fulfill its obligation under R.C. 2950.09(E) to make a determination as to his status as a habitual-sexual-offender. For its part, the State concedes error on the issue and requests a remand for the trial court to make the necessary determination. Upon review, we agree that the trial court erred in failing to determine whether Hurst qualifies as a habitual sexual offender.

{¶ 8} "When an individual has been convicted of or pled guilty to a sexually oriented offense, the statute specifically requires the trial court to make a finding regarding an offender's status as a habitual sex offender." State v. Gopp, 154 Ohio App.3d 385, 389, 2003-Ohio-4908; see also State v. Otheberg, Cuyahoga App. No. 83342, 2004-Ohio-6103, at 20 (footnotes omitted) ("[U]nder R.C. 2950.09(E), when an individual has been convicted of or pleaded guilty to a sexually oriented offense, the judge must make a finding regarding the offender's status as a habitual sex offender. This finding must be expressly made regardless of whether the offender was already adjudicated as a sexual predator, and, although the habitual sex offender finding will have no impact on the registration requirements after a sexual predator determination, the statute, nonetheless, mandates such a finding."); State v. Rhodes, Belmont App. No. 99 BA 62, 2002-Ohio-1572, at 41 (recognizing that a habitual-sexual-offender determination "must be made regardless of whether the offender was already adjudicated as a sexual predator for the commission of the sexually oriented offense" because an offender may be declared a sexual predator and a

habitual offender for the same offense). In Otheberg, supra, the Eighth District held that a trial court's failure to make a determination as to whether a defendant is a habitual sexual offender constitutes plain error. Given that the trial court failed to address the issue, and in light of the State's concession of error and request for a remand on the issue, we sustain Hurst's second assignment of error.

{¶ 9} Based on the reasoning set forth above, we hereby affirm in part and reverse in part the judgment of the Montgomery County Common Pleas Court and remand the cause for the limited purpose of allowing the trial court to make a determination as to whether the appellant is a habitual sexual offender.

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GRADY, J., and YOUNG, J., concur.

Copies mailed to:
Johnna M. Shia
Brent E. Rambo
Hon. Barbara P. Gorman