[Cite as *State v. Brown*, 2016-Ohio-553.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 14CA3629
vs.	:	
TOMMY LEE BROWN,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio Public Defender, and Stephen P. Hardwick, Ohio Assistant Public Defender, Columbus, Ohio, for appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:1-25-16
ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. Tommy Lee Brown, defendant below and appellant herein, previously pled guilty to (1) rape in violation of R.C. 2907.02(A)(1)(b), (2) complicity to rape in violation of R.C. 2923.03(A)(1)/2923.03(A)(4)/2907.02(A)(1) (b), and (3) corrupting a minor with drugs in violation of R.C. 2925.02(A)(4)(a)/(C)(3)(a).

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY FAILING TO ISSUE A FINAL ORDER BECAUSE THE NOLLE PROSEQUI WAS NOT ISSUED IN OPEN COURT."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY FAILING TO ISSUE A FINAL ORDER BECAUSE THE NOLLE PROSEQUI WAS ENTERED AFTER THE FINAL ORDER."

THIRD ASSIGNMENT OF ERROR:
"THE TRIAL COURT ERRED BY FINDING MR. BROWN A SEXUAL PREDATOR WITHOUT PROVIDING ADVANCE NOTICE."

FOURTH ASSIGNMENT OF ERROR:
"THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING MR. BROWN A SEXUAL PREDATOR WITHOUT CONSIDERING HIS PRISON RECORD."

{¶ 3} On April 29, 1997, the Scioto County Grand Jury returned an indictment that charged appellant with twenty-one counts of rape, seventy-seven counts of sexual battery, one count of complicity to rape and seven counts of corrupting another with drugs. Appellant initially pled not guilty to all charges, but later entered a guilty plea to the aforementioned charges.[1] The trial court accepted appellant's pleas and found him guilty of those offenses. The court sentenced appellant to serve an indefinite term of nine to twenty-five years incarceration on both the rape and complicity to rape charges, and one and a half years on the charge of corrupting another with drugs. The court further ordered all their sentences be served

[1] Those charges encompass counts one, ninety-five and one- hundred-six of the indictment. The record contains no statement of any terms as to the plea agreement regarding the other charges but we presumed they were to be dismissed.

consecutively to one another and further adjudicated appellant to be a sexual predator. No appeal was taken from that judgment.

{¶ 4} On September 13, 2012, appellant filed a petition for postconviction relief. The trial court denied his motion and he appealed that ruling. While on appeal, we noticed that the remaining counts of the indictment had not been resolved. Thus, no final, appealable order existed to permit us to assume jurisdiction. See *State v. Frye*, 4th Dist. Scioto No. 13CA3572, 2013-Ohio-5872, at ¶ 7; *State v. Carver*, 4th Dist. Scioto No. 10CA3377, 2012-Ohio-3479, at ¶ 6. Consequently, we dismissed the appeal.

{¶ 5} On May 13, 2014, the State of Ohio filed a notice of dismissal of counts two through ninety-four, ninety-six through one-hundred-five and one-hundred-seven through one-hundred-eight. The trial court granted the dismissals and this appeal followed.

I

{¶ 6} We jointly consider appellant's first and second assignments of error wherein he asserts that we should dismiss his appeal because the State's dismissal of the remaining counts of the indictment did not result in a final, appealable order.

{¶ 7} Crim.R. 48(A) provides that the "state may by leave of court and in open court file an entry of dismissal of an indictment, information, or complaint and the prosecution shall thereupon terminate." The dismissal of an indictment is not generally a final appealable order because it does not affect a substantial right for purposes of R.C. 2505.02. See *State v. Williams*, 9th Dist. Summit No. 25384, 2011-Ohio-6412, at ¶ 11; *State v. McWilliams*, 8th Dist. Cuyahoga No. 68571, 1995 WL 386981 (Jun. 29, 1995). The effect of a dismissal is to return a defendant to the "same position [he] occupied prior to initiation of the charges." *McWilliams*, supra; also

see *State v. Woolridge*, 9th Dist. Summit No. 21255, 2003-Ohio-1481, at ¶ 7. Here, the dismissal put appellant in the position that he would have been had the only charges brought against him been the charges for which he ultimately pled guilty. In short, the 2014 dismissal is not a final, appealable order in and of itself, but the dismissal of dangling, unresolved counts did render the 1997 sentencing entry final and appealable.

{¶ 8} Appellant also contends that the dismissal is invalid because it did not occur in "open court." However, if appellant's goal is to have us review the merits of his sexual predator classification, which is the only substantive issue he raises in this appeal, to either dismiss the appeal or remand the matter will delay action as on the appeal. Moreover, our review of the record indicates that the parties resolved this matter through a plea agreement in which appellant agreed to and expected the remaining one hundred plus (100+) counts to be dismissed. It is puzzling that if appellant agreed to the dismissal of these counts, why he would challenge the means by which the dismissal was achieved?

{¶ 9} Crim.R. 52(A) provides that "[any] error, defect, irregularity or variance which does not affect a substantial rights shall be disregarded." Appellant does not claim that any of these matters affected a substantial right. To the contrary, appellant not only benefitted from the terms of the plea agreement, but also benefits from us proceeding to the merits of his appeal rather than remanding this case on procedural grounds. In short, appellant demonstrates no prejudice and we will not reverse on any error without a demonstrable showing of prejudice.

{¶ 10} In *State v. Pendleton*, 5th Dist. Licking Nos. 10CA81 & 10CA82, 2011-Ohio-2024, at ¶41, our Fifth District colleagues held that no prejudice could be demonstrated for an alleged Crim.R. 48(A) violation when the remaining criminal charges are dismissed pursuant to a plea

agreement. The facts and circumstances in *Pendleton* are almost identical to those here, and we adopt that reasoning. Appellant did not demonstrate any prejudice from the failure to dismiss in open court the remaining counts of the indictment. Indeed, the dismissals accrued to appellant's benefit.

{¶ 11} For this reason, we find no merit to the first and second assignments of error and they are accordingly overruled.

II

{¶ 12} In his third assignment of error, appellant asserts that the trial court erred by adjudicating him a "sexual predator" because it failed to follow the statutory procedures that existed under R.C. 2950.09(B)(1).[2] That portion of the statute stated in pertinent part:

> "(B)(1) Regardless of when the sexually oriented offense was committed, if a person is to be sentenced on or after the effective date of this section . . . for a sexually oriented offense that is not a sexually violent offense, or if a person is to be sentenced on or after the effective date of this section for a sexually oriented offense that is a sexually violent offense and a sexually violent predator specification was not included in the indictment, count in the indictment, or information charging the sexually violent offense, the judge who is to impose sentence upon the offender shall conduct a hearing to determine whether the offender is a sexual predator. The judge shall conduct the hearing prior to sentencing and, if the sexually oriented offense is a felony, may conduct it as part of the sentencing hearing required by section 2929.19 of the Revised Code. The court shall give the offender and the prosecutor who prosecuted the offender for the sexually oriented offense notice of the date, time, and location of the hearing. At the hearing, the offender and the prosecutor shall have an opportunity to testify, present evidence, call and examine witnesses and expert witnesses, and cross-examine witnesses and expert witnesses regarding the determination as to whether the offender is a sexual predator. The offender shall have the right to be represented by counsel and, if indigent, the right to have counsel appointed to represent the offender."[3] (Emphasis added.)

[2] This statute was repealed in 2007. See Am.S.B. No. 10, 2007 Ohio laws 10.

[3] R.C. 2950.09 was enacted by H.B. No. 180, 1996 Ohio Laws 200 with an effective date of January 1, 1997. Insomuch as appellant's sentencing hearing was conducted on July 30, 1997, these provisions would have been applicable.

{¶ 13} In *State v. Gowdy*, 88 Ohio St.3d 387, 398, 727 N.E.2d 579 (1999), the Ohio Supreme Court held that the notice provisions of R.C. 2950.09(B)(1) demand "strict compliance." The Court explained that "[d]efendants must have notice of the hearing in order to "have an opportunity to testify, present evidence, call and examine witnesses and expert witnesses, and cross-examine witnesses and expert witnesses regarding the determination as to whether the offender is a sexual predator." (Citation omitted.) 88 Ohio St.3d at 398. The Supreme Court noted that the "[d]efendant received no notice of the hearing, either orally or in writing." (Emphasis added.) Id. In the case sub judice, at the July 8, 1997 hearing the trial court explained the newly enacted sexual offender classifications and informed the appellant that a determination would be made as "to whether or not someone is a sexual predator." The trial court went on to state that such determination would be made in this case "*probably* at the time of sentencing." (Emphasis added.)

{¶ 14} In *State v. Cate*, 8th Dist. Cuyahoga No. 82985, 2004-Ohio- 1107, the Cuyahoga County Common Pleas Court (at a change of plea hearing) scheduled a case for sentencing, and then announced to the defendant "at that time I'll take up the issue of sentencing and the sexual predator hearing." Id. at ¶6. Our Eighth District colleagues distinguished *Cate* from *Gowdy* on grounds that oral notice of classification hearing was given, whereas in *Gowdy* no oral notice was given. We believe the same thing occurred here. The only difference between the oral notice in *Cate* and the oral notice in this case is the trial court's use of the word "probably." Appellant stresses in his brief that this is too equivocal to satisfy the mandatory notice provision that the statute required. We disagree.

{¶ 15} The word "probably" is generally taken to mean "more likely than not." See *State v. D.L.*, 202 Or.App. 329, 341, 122 P.3d 97 (2005). In rejecting an argument that use of the word "probably" rendered an event speculative, the United States Court of Appeals for Veterans Claims stated "'probably' means 'most likely.'" See *Rotella v. Shinseki*, United States Court of Appeals for Veteran's Claims No. 09–3840, 2011 WL 3624999 (Aug. 18, 2011). Although it is admittedly not definitive, we agree that the word "probably" is sufficient to put appellant on notice that a sexual offender hearing would be held at the time of his sentencing hearing.

{¶ 16} Additionally, we find nothing in the record to indicate that any other notice was provided as to a possible time and date of the sexual offender classification hearing. Also, appellant does not contend that he was deprived of notice of the sentencing hearing. In view of the particular facts and circumstances present in this case, we conclude that appellant did receive the R.C. 2950.09(B)(1) mandatory notice and should have been prepared to introduce whatever evidence he had to rebut the State's argument.

{¶ 17} Accordingly, we hereby overrule appellant's third assignment of error.

III

{¶ 18} In his fourth assignment of error, appellant argues that the trial court erred when it adjudicated him a sexual predator without first considering his seventeen year "history as a prisoner."

{¶ 19} The underlying premise for this argument is that because the 2014 dismissal of unresolved counts of the indictment rendered the 1997 sentencing order final for purposes of R.C. 2505.02, the trial court should fully consider appellant's conduct from 1997 to 2014 before it determines appellant's sexual predator status.

{¶ 20} We recognize that appellant's conduct during this time period may have some bearing upon the factors that the trial court must consider. Thus, in the interests of justice, appellant should be permitted to submit any such evidence before the court makes a sexual predator determination. However, we emphasize that our decision should not be construed in any manner as a comment on the trial court's eventual determination of appellant's status. Rather, we simply hold that appellant must be allowed the opportunity to present his evidence, if any. Accordingly, we hereby sustain appellant's fourth assignment of error for this limited reason.

{¶ 21} Therefore, based upon the foregoing reasons, we hereby affirm, in part, and reverse, in part, the trial court's judgment and remand this matter for the limited purpose of conducting a hearing to consider anew appellant's sexual offender status.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

Harsha, J., concurring in part and dissenting in part:

I would sustain both the third and fourth assignments of error and start the classification process anew. That way both Brown and the State can provide the court with all the information it needs to make an informed decision on whether Brown is a sexual offender/predator.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed in part, reversed in part and the cause remanded for further proceedings consistent with this opinion. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J.: Concurs in Judgment & Opinion
Harsha, J.: Concurs in Part & Dissents in Part with Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.