

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J
	:	Hon. John F. Boggins, J
-vs-	:	
	:	
RUFUS GRIER	:	Case No. 2003CA32
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 95CR350D
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	October 6, 2003
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APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

JAMES A. SCHOREN
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DANIEL E. PRICE
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Farmer, J.

{¶1} On July 7, 1995, the Richland County Grand Jury indicted appellant, Rufus Grier, on one count of rape in violation of R.C. 2907.02.

{¶2} On October 4, 1995, appellant pled guilty as charged. A sentencing hearing was held on October 16, 1995. By judgment entry filed same date, the trial court sentenced appellant to five to twenty-five years in prison.

{¶3} On January 22, and March 3, 2003, hearings were held to determine appellant's status pursuant to the Sex Offender Registration Act, R.C. Chapter 2950. By judgment entry filed March 4, 2003, the trial court classified appellant as a "sexual predator."

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO ADJUDICATE APPELLANT AS BEING A SEXUAL PREDATOR PRIOR TO HIS ACTUAL RELEASE DATE FROM PRISON."

II

{¶6} "THE APPELLANT'S CONSTITUTION RIGHT TO DUE PROCESS WAS VIOLATED BECAUSE HE WAS NOT OFFERED THE CHANCE TO CONFRONT EXPERT WITNESSES."

III

{¶7} "THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO PROPERLY ADJUDICATE APPELLANT AS A SEXUAL PREDATOR PURSUANT TO R.C. 2950.09(B)(3)."

IV

{¶8} "THE APPELLANT WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE COUNSEL."

I

{¶9} Appellant claims the trial court erred in adjudicating him a sexual predator five days after his release from prison. We disagree.

{¶10} On October 16, 1995, appellant was sentenced to five to twenty-five years in prison. Prior to his release from prison, a classification hearing was held on January 22, 2003. At the start of the hearing, defense counsel requested an independent psychological evaluation. January 22, 2003 T. at 3. The trial court then heard testimony from Kenneth Starbuck of the Ohio Adult Parole Authority. At the conclusion of the hearing, the trial court ordered an evaluation by the Forensic Center. Id. at 30. Appellant was released from prison on February 28, 2003. Following the evaluation, a final hearing was held on March 3, 2003 wherein the trial court adjudicated appellant a sexual predator.

{¶11} Appellant argues the trial court lacked jurisdiction to make the sexual predator finding because the final hearing was held after his release date. In support, appellant cites the case of *State v. Jones* (August 2, 1999), Stark App. No. 1997CA00233, wherein this court reversed a classification determination because the hearing was held after the defendant's release from prison in violation of then R.C. 2950.09(C)(1). However, R.C. 2950.09(C) was amended on July 5, 2002 to read as follows in pertinent part:

{¶12} "(1) If a person was convicted of or pleaded guilty to a sexually oriented offense prior to January 1, 1997, if the person was not sentenced for the offense on or

after January 1, 1997, and if, on or after January 1, 1997, the offender is serving a term of imprisonment in a state correctional institution, the department of rehabilitation and correction shall determine whether to recommend that the offender be adjudicated as being a sexual predator."

{¶13} "(2)(a) ***The court may deny the recommendation and determine that the offender is not a sexual predator without a hearing but shall not make a determination that the offender is a sexual predator in any case without a hearing. The court may hold the hearing and make the determination prior to the offender's release from imprisonment or at any time within one year following the offender's release from that imprisonment."

{¶14} In *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, the Supreme Court of Ohio determined R.C. 2950.09 is remedial in nature and may be applied retrospectively. Therefore, we conclude the July 5, 2002 amendment vested the trial court with jurisdiction to continue the classification hearing until after appellant's release date.

{¶15} Assignment of Error I is denied.

II, IV

{¶16} In these assignments of error, appellant claims he was denied due process of law because he was unable to cross-examine the evaluators of the psychological reports, and his trial counsel was ineffective for failing to object when the evaluators were not present for the hearings. We disagree.

{¶17} As this issue involves both a plain error analysis and an ineffective assistance of counsel analysis, we will address them jointly.

{¶18} In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *State v. Long* (1978), 53 Ohio St.2d 91. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* at paragraph three of the syllabus. This standard is relatively similar to the second prong in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011. In order to establish ineffective assistance of counsel, appellant must demonstrate the following:

{¶19} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶20} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶21} As previously noted, Mr. Starbuck testified during the first hearing in January. He testified from psychological reports contained within the parole placement packet. January 22, 2003 T. at 5. In particular, Mr. Starbuck testified to a report by N. Duchac wherein said evaluator opined appellant "presents with multiple risk factors for reoffending" and if paroled to the community, would be "considered at high risk for

reoffending." *Id.* at 7, 8. Mr. Starbuck testified to the same issues as the reports from Victoria Glorioso, a licensed social worker, and James Sunbury, a psychologist, admitted during the second hearing in March. Both Miss Glorioso and Dr. Sunbury opined appellant should be viewed as high risk to sexually reoffend. March 3, 2003 T. at 11-12. The history of the offense and appellant's criminal history were similar in detail at both hearings. All the reports detailed appellant's mental health problems and anti-social behavior.

{¶22} In *Cook*, *supra*, at 425, the Supreme Court of Ohio held, "we hold that the Ohio Rules of Evidence do not strictly apply to sexual predator determination hearings. Thus, reliable hearsay, such as a presentence investigation report, may be relied upon by the trial judge." This includes psychological reports included within an Adult Parole Authority file. *State v. Kelly* (2001), 142 Ohio App.3d 179.

{¶23} Because all the reports reached the same conclusions, we find no showing that further inquiry would have affected the outcome of the proceeding. Therefore, we find no plain error nor any prejudice to appellant.

{¶24} Assignments of Error II and IV are denied.

III

{¶25} Appellant claims the trial court failed to properly address the statutory guidelines set forth in R.C. 2950.09(B)(3) in classifying him a sexual predator. We disagree.

{¶26} In *Cook*, *supra*, the Supreme Court of Ohio determined R.C. Chapter 2950 is remedial in nature and not punitive. As such, we will review this assignment of error under the standard of review contained in *C.E. Morris Co. v. Foley Construction* (1978),

54 Ohio St.2d 279. We find this to be the applicable standard as the *Cook* court addressed a similar challenge under a manifest weight standard of review. See, *Cook* at 426.

{¶27} R.C. 2950.01(E) defines a "sexual predator" as "a person who has been convicted of or pleaded guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses." R.C. 2950.09(B)(3) sets forth the relevant factors a trial court is to consider in making its determination:

{¶28} "(3) In making a determination under divisions (B)(1) and (4) of this section as to whether an offender is a sexual predator, the judge shall consider all relevant factors, including, but not limited to, all of the following:

{¶29} "(a) The offender's or delinquent child's age;

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

{¶31} "(c) The age of the victim of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made;

{¶32} "(d) Whether the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made involved multiple victims;

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

{¶34} "(f) If the offender or delinquent child previously has been convicted of or pleaded guilty to, or been adjudicated a delinquent child for committing an act that if committed by an adult would be, a criminal offense, whether the offender or delinquent child completed any sentence or dispositional order imposed for the prior offense or act

and, if the prior offense or act was a sex offense or a sexually oriented offense, whether the offender or delinquent child participated in available programs for sexual offenders;

{¶35} “(g) Any mental illness or mental disability of the offender or delinquent child;

{¶36} “(h) The nature of the offender's or delinquent child'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;

{¶37} “(i) Whether the offender or delinquent child, during the commission of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made, displayed cruelty or made one or more threats of cruelty;

{¶38} “(j) Any additional behavioral characteristics that contribute to the offender's or delinquent child's conduct.”

{¶39} The trial court had before it the Adult Parole Authority placement packet which included the presentence investigation report and psychological reports, and additional psychological reports conducted at appellant's request. At the time of the offense, the victim was seventeen and appellant was forty-three. January 22, 2003 T. at 26; March 3, 2003 T. at 6. Appellant has an extensive criminal record including crimes of violence and aggression. Id. at 12-13, 26; Id. at 6, 9. He did complete an institutional sex offender program, but suffers from mental health problems, including schizophrenia and anti-social behavior. Id. at 13-15, 18, 27; Id. at 6. During the incident, appellant used a butcher knife to intimidate the victim, threatening to kill her. Id. at 10-11, 28; Id. at 6, 8. He minimizes his mental health and substance abuse

problems, and is unable to admit culpability. Id. at 11-12, 28-29; Id. at 7, 9-12. All evaluators opined appellant was at high risk for reoffending. Id. at 7-8; Id. at 11-12.

{¶40} In classifying appellant a sexual predator, the trial court held the following:

{¶41} "So based on those reports and the other collateral information it does look like I have to put you in that category by the evidence I have before me. The standard is clear and convincing evidence. The evidence I have here, especially in the form of psychological evaluation plus the other various factors; difference in age, threats of violence, all those factors that are involved that we talked about the other day seem to put you in that category of sexual predator according to the way the law is written, so that's where I have to put you." March 3, 2003 T. at 14.

{¶42} Upon review of the record, we find the trial court did consider the factors enumerated in R.C. 2950.09(B)(3), and its conclusion is supported by clear and convincing evidence and is not against the manifest weight of the evidence.

{¶43} Assignment of Error III is denied.

{¶44} The judgment of the Court of Common Pleas of Richland County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Boggins, J. concur.