

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-08-018

Appellee

Trial Court No. 88 CR 346

v.

David Cox

DECISION AND JUDGMENT

Appellant

Decided: March 31, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
William Connelly, Jr., and Jacqueline Kirian, Assistant Prosecuting
Attorneys, for appellee.

Robert E. Searfoss, III, for appellant.

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OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas classifying appellant as a sexual predator. On February 22, 1989, appellant entered a plea of guilty and was convicted on two counts of rape, one count of attempted rape, and one count of kidnapping. On April 11, 1989, appellant was ordered to concurrently

serve six to 25 years for the first count of rape and five to 25 years for the second count of rape. The trial court ordered that these terms be served consecutively with a sentence of six to 25 years for attempted rape and three to 15 years for kidnapping. In January 2008, appellant was classified as a sexual predator. For the reasons set forth below, we affirm the decision of the trial court.

{¶ 2} Sex offender classification proceedings were initiated by the state in August 2006. Appellant remained incarcerated at that time. The Wood County Adult Probation Department was ordered to prepare a background and criminal history report on appellant. The trial court referred appellant to the Court Diagnostic and Treatment Center for diagnosis and evaluation by an expert. The court granted appellant's request for an independent evaluation by his expert.

{¶ 3} Appellant was released from prison on May 14, 2007. The sex offender classification hearing was held on December 4 and 13, 2007. The trial court found that appellant was a sexual predator pursuant to statutory guidelines. The trial court next conducted a sexual classification notification hearing on January 29, 2008. The court informed appellant of his classification as a sexual predator and enumerated the registration requirements and duties under R.C. 2950.032. On March 17, 2008, appellant filed timely notice of appeal.

{¶ 4} Appellant sets forth the following three assignments of error on appeal:

{¶ 5} "The trial court's determination that Appellant is a sexual predator must be reversed pursuant to statute and *State v Brewer* [sic] because the hearing was not held while Appellant was still incarcerated.

{¶ 6} "Appellant received ineffective assistance of counsel because trial counsel did not raise as a defense that the sexual predator hearing was not conducted while Appellant was still incarcerated.

{¶ 7} "Appellee did not prove with clear and convincing evidence that Appellant is a sexual predator pursuant to law."

{¶ 8} As a preliminary matter, we note that appellant's first two assignments of error are grounded in a common legal premise. Both assignments are rooted in the assertion that R.C. 2950.09 requires that a sex offender classification hearing be held while the individual is still incarcerated. Given their shared legal basis, these two assignments will be addressed simultaneously.

{¶ 9} The following undisputed facts are relevant to the issues raised on appeal. Appellant was still imprisoned at the time sexual predator classification proceedings were initiated by the state. The sexual predator classification hearing was scheduled for April 10, 2007, but was continued until December 2007. In the interim, appellant was released on May 14, 2007.

{¶ 10} The hearing was held on December 4 and 13, 2007. At this hearing, the victim, an 18 year old woman at the time, testified that she had been walking home one evening when appellant and an accomplice blocked her path with their truck and offered

her a ride. The victim declined to accept a ride from the strangers. Appellant and his partner left, but quickly returned in pursuit of the victim. Appellant exited the truck, forcibly grabbed the victim from behind and instantaneously thrust her into his vehicle.

{¶ 11} Appellant's accomplice restrained the thrashing victim while appellant forcefully removed her clothing. As she continued to resist in an effort to protect herself, appellant and his partner removed her shoes and threw them from the vehicle. Despite the victim's resolute efforts, she was overpowered and her clothing removed. Appellant then began digitally penetrating the victim.

{¶ 12} After driving the captive victim to a remote rural area, appellant's truck got caught in a ditch. When his accomplice went in search of help, appellant vaginally raped the victim. Upon his accomplice's return with a third person, appellant dragged the victim across a bean field, shoved her down to the ground, and threatened to kill her if she screamed for help. With the truck still ensnared and immobile, the accomplice set out a second time in search of assistance. Upon his departure, appellant repeatedly raped the victim once again.

{¶ 13} Upon the accomplice's return, appellant restrained the victim so that his accomplice could rape her. The victim testified that appellant threatened to tie her to the truck and drag her through the field if she fought the rape. Due to the victim's kicking and resistance, appellant's partner was unable to commit penile rape. The accomplice proceeded to penetrate the victim with his tongue. The accomplice then left a final time to find help. After the accomplice's third departure, appellant again raped the victim.

{¶ 14} Ultimately the perpetrators secured another vehicle and transferred the victim to it. They blindfolded the victim, confused her by driving around, then dropped off their beaten, barefoot victim a mile from her home. The ordeal lasted nearly six hours.

{¶ 15} Appellee's expert, Dr. Cassel, took the stand after the victim completed her testimony. During direct examination, Dr. Cassel recited her extensive educational and professional history, including her substantial experience in the treatment of sex offenders. The court accepted Dr. Cassel as an expert in clinical psychology without objection.

{¶ 16} Dr. Cassel stated during testimony, inter alia, that appellant continued to claim that he and the victim engaged in consensual sex. She emphasized appellant's continual minimization of responsibility and blame shifting. She concluded that treatment was unsuccessful and that appellant posed a significant risk of recidivism. Additional evaluations via a Static-99 Risk Assessment and Sex Offender Risk Appraisal Guide indicated a moderate to high level of risk to re-offend.

{¶ 17} In his first assignment of error, appellant claims the trial court lacked jurisdiction to conduct a sex offender classification hearing, because R.C. 2950.09 requires that the hearing be held while the individual is still imprisoned. The second assignment of error states that appellant received ineffective assistance of counsel, because trial counsel failed to raise the aforementioned lack of jurisdiction as a defense.

{¶ 18} Appellant determinatively relies on the court's decision in *State v. Brewer* (1999), 86 Ohio St.3d 160, holding that "a sexual predator hearing conducted pursuant to ORC § 2950.09(C)(2) must take place prior to the offender's release from confinement." We note that appellant did not raise the court's lack of jurisdiction at the hearing. However, appellant refers to the statute as a "dead-bang winner defense."

{¶ 19} The Ohio legislature amended R.C. 2950.09 in 2002. The modification deleted the requirement that the hearing take place prior to release. In its place, the legislature added that a hearing can be held "any time within one year following the offender's release." This amendment overrides *Brewer*.

{¶ 20} The record clearly shows appellant was released on May 14, 2007. The record clearly shows that the hearing commenced on December 4, 2007, well within the one-year statutory timeframe. Regardless, appellant waived the lack of in personam jurisdiction as a defense by failing to raise it at the hearing, pursuant to Civ.R. 12(H). Appellant's defense is not a dead-bang winner.

{¶ 21} The statute cited by appellant has been superseded by the above-referenced legislative amendments. Accordingly, appellant's trial counsel cannot be deemed ineffective for failure to misinterpret a statute. Appellant's first two assignments of error are without merit and found not well-taken.

{¶ 22} In his final assignment of error, appellant contends that the evidence was insufficient to prove by clear and convincing evidence that he is a sexual predator. A sexual predator is someone who has been convicted of or pleads guilty to a sexually

oriented offense, which includes attempted rape, and is likely to engage in one or more sexually oriented offenses in the future. R.C. 2950.01(D)(1)(a) and (g); R.C. 2950.01(E)(1). The standard for determining whether an offender is a sexual predator is by clear and convincing evidence. R.C. 2950.09(B)(4); *State v. Cook* (1998), 83 Ohio St.3d 404, 423-24.

{¶ 23} The standard of clear and convincing evidence is that measure or degree of proof which is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74. Clear and convincing evidence is that degree of proof which is sufficient to establish in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Id.*

{¶ 24} When determining whether an offender is a sexual predator, the court must consider all testimony and evidence presented at the hearing, along with the following non-exhaustive factors enumerated in R.C. 2950.09(B)(3):

{¶ 25} "(a) The offender's age;

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

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

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

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

{¶ 30} "(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;

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

{¶ 32} "(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;

{¶ 33} "(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;

{¶ 34} "(j) Any additional behavioral characteristics that contribute to the offender's conduct."

{¶ 35} In the case at bar, appellant pled guilty and was convicted of two counts of rape, and one count each of attempted rape and kidnapping. This satisfies the first prong of the sexual predator definition in R.C. 2950.01(E). Therefore, in order to classify appellant as a sexual predator, the trial court needed only to find that appellant was likely

to engage in one or more sexually oriented offenses in the future by clear and convincing evidence.

{¶ 36} The trial court's decision noted that appellant's offense involved multiple sexual acts, including assisting another person in raping the victim. The manner in which the victim was abducted showed facially predatory behavior. The court cited the statutory factor on which it found that appellant made a threat of cruelty, by threatening to tie the victim to the truck and drag her through a field.

{¶ 37} The court noted that the Static-99 Risk Assessment indicated appellant had a moderate to high level risk of recidivating. Appellant met five of the nine categories in the Sex Offender Risk Appraisal Guide, suggesting a high level of risk to re-offend. Dr. Cassel's expert evaluation consistently concluded that appellant's failure to take responsibility by continuing to claim that victim consented to sex indicates that treatment was unsuccessful.

{¶ 38} Appellant would have this court find differently based solely on the evaluation of his own expert, which he argues nullifies Dr. Cassel's opinion. However, the law does not rely solely on psychological findings. As required, the trial court evaluated all facts and testimony presented at the hearing and considered the factors listed in R.C. 2950.09(B)(3).

{¶ 39} This court has thoroughly reviewed and considered the record of evidence. We find the trial court had an ample evidentiary basis to determine by clear and

convincing evidence that appellant is a sexual predator. Accordingly, appellant's third assignment of error is found not well-taken.

{¶ 40} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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