[Cite as *State v. Tillery*, 2002-Ohio-1587.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 79166

THE STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
-vs-	:	AND
	:	OPINION
IRA TILLERY	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION: APRIL 4, 2002

CHARACTER OF PROCEEDING: CIVIL APPEALS FROM COURT OF COMMON PLEAS CASE NO. CR-255396

JUDGMENT: AFFIRMED.

DATE OF JOURNALIZATION:

APPEARANCES:

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JUDGE TERRENCE O'DONNELL:

{¶1} Ira Tillery appeals from a civil judgment of the common pleas court classifying him as a "sexual predator." On appeal, Tillery contends that the state failed to present clear and convincing evidence that he "is likely to engage in the future in one or more sexually oriented offenses," and he also challenges the constitutionality of Ohio's sexual predator law. After careful review of the record, we affirm the judgment of the trial court classifying Tillery as a sexual predator.

{¶2} The record before us reveals that, on August 10, 1990, the grand jury indicted Tillery for rape and kidnapping with aggravated felony specifications. In accordance with a plea agreement, he pled guilty to rape with the aggravated felony specification deleted, and the state nolled the kidnapping charge. Thereafter, the court sentenced him to a term of five to twenty-five years.

{¶3} On December 20, 2000, the court conducted a sexual predator determination hearing in this case, and on December 29, 2000, the court classified Tillery as a sexual predator.

{¶4} Tillery now appeals and presents five assignments of error for our review. We will consider the first and fifth assignments of error together because they contain common issues of law and fact. They state:

{¶5} I. THE EVIDENCE IS INSUFFICIENT, AS A MATTER OF LAW, TO PROVE "BY CLEAR AND CONVINCING EVIDENCE" THAT APPELLANT "IS LIKELY TO ENGAGE IN THE FUTURE IN ONE OR MORE SEXUALLY ORIENTED OFFENSES."

{¶6} V. AS DISCUSSED BY THE TENTH DISTRICT COURT OF APPEALS IN *STATE V. BURKE*, THE TRIAL COURT ERRED IN DETERMINING THAT THE APPELLANT WAS A SEXUAL PREDATOR WITHOUT CONSIDERING ANY OF THE RELEVANT FACTORS CODIFIED AT R.C. 2950.09(B)(2).

{¶7} Tillery claims that the state failed to present sufficient evidence that he "is likely to engage in the future in one or more sexually oriented offenses." He points out that, pursuant to R.C. 2950.09(B)(3), the state must prove this by clear and convincing evidence. He further notes that, under R.C. 2950.09(B)(2), a trial court should consider the following factors when making a sexual predator determination:

{¶8} (a) The offender's age;

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

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

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

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

{¶13} (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;

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

{¶15} (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 sex-ual context was part of a demonstrated pattern of abuse;

{¶16} (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;

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

{¶18} "After reviewing all testimony and evidence presented at the sexual predator hearing and the factors specified in division (B)(2) of this section, the judge shall determine by clear and convincing evidence whether the offender is a sexual predator." R.C. 2950.09(C)(2)(b). An appellate court will review this civil determination under a manifest weight standard. See *State v. Cook* (1998), 83 Ohio St.3d 404, 426, 700 N.E.2d 570.

{¶19} In *Cook*, at pages 425-426, the court concluded:

{¶20} We find that while this may not have been a model classification hearing, it was not so prejudicial so as to require a remand. When asked by defense counsel the basis for finding defendant a sexual predator, the court referred to the following: (1) the factors listed in the statute; (2) the defendant's prior sexually oriented offenses; (3) defendant's criminal conduct; and (4) defendant's past criminal record.

{¶21} * *

{¶22} Our review of the record persuades us that the defendant had a fair hearing, that he was ably represented by competent counsel, and that the court considered the criteria under R.C. 2950.09(B)(2), and fairly evaluated the defendant and his counsel's responses. Although the trial judge did not state that his findings were to a "clear and convincing standard," we presume that the judge followed the law. *State v. Martin* (1955), 164 Ohio St. 54, 59, 57 Ohio Op. 84, 87, 128 N.E.2d 7, 12. The statute does not require the court to list the criteria, but only to "consider all relevant factors, including" the criteria in R.C. 2950.09(B)(2) in making his or her findings. We find here, from the evidence in the record, that the judge did so.

{¶23} "Sexual predator" is defined in R.C. 2950.01(E) 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." Defendant's conviction of gross sexual imposition constitutes a conviction of a sexually oriented offense. R.C. 2950.01(D)(1). As for the likelihood that defendant would engage in the future in one or more sexually oriented offenses, the trial court had in its possession information regarding the 1995 incident involving sexual contact with a girl in Florida, as well as the 1996 disorderly conduct conviction based on sexual contact with a six- and an eight-year- old. This court finds no plain error on these facts. Therefore, the determination that defendant is a sexual predator ***is not against the manifest weight of the evidence.*** (Emphasis added.)

{¶24} Recently, in *State v. Eppinger* (2001), 91 Ohio St.3d 157, 158, 743 N.E.2d 881, the court adopted the following model procedure for sexual offender classification hearings:

> **{¶25}** In a model sexual offender classification hearing, there are essentially three objectives. First, it is critical that a record be created for review. Therefore, the prosecutor and defense counsel should identify on the record those portions of the trial transcript, victim impact statements, presentence report, and other pertinent aspects of the defendant's criminal and social history that both relate to the factors set forth in R.C. 2950.09(B)(2) and are probative of the issue of whether the offender is likely to engage in the future in one or more sexually oriented offenses. If the conviction is old, as in this case, the state may need to introduce a portion of the actual trial record; if the case was recently tried, the same trial court may not need to actually review the record. In either case, a clear and accurate record of what evidence or testimony was considered should be preserved, including any exhibits, for purposes of any potential appeal.
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> **{¶26}** Second, an expert may be required, as discussed above, to assist the trial court in determining whether the offender is likely to engage in the future in one or more sexually oriented offenses. Therefore, either side should be allowed to present expert opinion by testimony or written report to assist the trial court in its determination, especially when there is little information available beyond the conviction itself. While providing an expert at state expense is within the discretion of the trial court, the lack of other criteria to assist in predicting the future behavior of the offender weighs heavily in favor of granting such a request.
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> **{¶27}** Finally, the trial court should consider the statutory factors listed in R.C. 2950.09(B)(2), and should discuss on the record the particular evidence and factors upon which it relies in making its determination regarding the likelihood of recidivism. See *State v. Thompson*, *supra*. See, also, *State v. Russell*, 1999 Ohio App. LEXIS 1579 (Apr. 8, 1999), Cuyahoga App. No. 73237, unre-ported, 1999 WL 195657; *State v. Casper*, 1999 Ohio App. LEXIS 2617 (June 10, 1999), Cuyahoga App. Nos. 73061, 73064, 73062 and 73063, unreported, 1999 WL 380437.

{¶28} In the case *sub judice*, the state emphasized R.C. 2950.09(B)(2)(b)——[t]he offender's prior criminal record regarding all offenses, including, but not limited to, all sexual offenses——and then presented Tillery's presentence investigation report to the court. This exhibit detailed the underlying sexually oriented offense, during which Tillery forcibly raped his victim and then threatened to kill her if she told anyone.

{¶29} In addition, the report detailed his criminal and social history as follows: On December 19, 1980, police arrested him for rape, two counts of gross sexual imposition, aggravated burglary, and felonious assault in Case No. CR-161164. On October, 2, 1981, a jury found him guilty of rape, two counts of gross sexual imposition, and assault. The court in that case sentenced Tillery to a term of four to twenty-five years.

{¶30} The state paroled him on February 8, 1988. Thereafter, on January 20, 1989, the police arrested him again for rape in Case No. 235963. This case resulted in a no bill. Then, on June 25, 1990, the police arrested him in the instant case.

{¶31} The record reveals several factors listed in R.C. 2950.09(B)(2), including Tillery's age of thirty-one at the time of his latest offense; his prior criminal record; the fact that his underlying conviction involved one victim; his claim that drugs were involved in the incident; the fact that he had previously been convicted in 1981 for rape, gross sexual imposition and assault;

the nature of his crimes; and his use of violence and threats during the latest rape. The trial court relied on these factors and considered them, as is evidenced by the judge's statement during the hearing that she made her decision "relying upon all of the evidence presented to me in the arguments and the factors."

{¶32} Our decision to employ a civil manifest weight standard, rather than a criminal sufficiency test, emanates in part from the Supreme Court of Ohio's decision in *Cook*, wherein it found that "the determination that defendant is a sexual predator ***is not against the manifest weight of the evidence.***" *Id.*, at 426. (Emphasis added.)

{¶33} Further, a review of case law demonstrates that the majority of appellate districts has applied the ***civil manifest weight standard*** set forth in *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, to sexual predator determinations. See, *e.g., State v. Wilkerson* (2000), 138 Ohio App.3d 861 (First Appellate District); *State v. Gerhardt* (Aug. 31, 2001), Clark App. No. 00CA0090, unreported (Second Appellate District); *State v. Scott* (Feb. 15, 2001), Logan App. No. 8-2000-26, unreported (Third Appellate District); *State v. Hood* (Nov. 14, 2001) Washington App. No. 00CA51, unreported (Fourth Appellate District); *State v. Cooper* (Oct. 24, 2001), Muskingum App. No. CT2001-0013, unreported (Fifth Appellate District); *State v. Parsons* (Aug. 17, 2001), Huron App. No. H-00-042, unreported (Sixth

Appellate District); *State v. Childs* (2001), 142 Ohio App.3d 389, 395, 755 N.E.2d 958 (Eighth Appellate District).[1]

{¶34} As the Sixth Appellate District succinctly stated in *Parsons*:

> **{¶35}** Pursuant to R.C. 2950.09(B)(3), the trial court shall determine whether an offender is a sexual predator by "clear and convincing evidence." In *State v. Cook* (1998), 83 Ohio St.3d 404, 700 N.E.2d 570, the Ohio Supreme Court found that R.C. Chapter 2950 is remedial in nature and not punitive. Accordingly, the civil manifest weight standard of review applies, under which a trial court's determination that a particular offender is a sexual predator will be upheld if the court's judgment is supported by some competent, credible evidence going to all the essential elements of the case. See *C.E. Morris Co. v. Foley Constr.* (1987), 54 Ohio St.2d 279, 376 N.E.2d 578.

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[1] The Seventh, Ninth, Eleventh, and Twelfth Appellate Districts have also applied a manifest weight standard of review to sexual predator appeals, although they have applied the criminal manifest weight test. See, *e.g., State v. Sims* (June 27, 2001), Jefferson App. Nos. 99-JE-43 and 99-JE-57, unreported (Seventh Appellate District); *State v. Austin* (Nov. 21, 2001), Summit App. No. 20554, unreported (Ninth Appellate District); *State v. Robinson* (Nov. 21, 2001), Lake App. No. 99-L-177, unreported (Eleventh Appellate District); *State v. Benson* (Aug. 28, 2000), Butler App. No. CA99-11-194, unreported.

{¶36} Simply put, the criminal sufficiency standard set forth in *State v. Thompkins* (1997), 78 Ohio App.3d 380, 678 N.E.2d 541, does not apply to civil proceedings, including sexual predator determination hearings. As our court stated in *Siegal v. Magic Carpet & Upholstery* (Aug. 12, 1999), Cuyahoga App. No. 74645, unreported:

> **{¶37}** It is clear from the language of *Thompkins* that this standard is applicable, without modification, only to the review of criminal cases. Accord *Reed*, *supra*. We note that this court has continued to apply the *C.E. Morris* standard to civil appeals even after the release of the *Thompkins* decision. See *Baughman*, *supra*; *Lalak v. Crestmont Construction, Inc.* (Jan. 14. 1999), Cuyahoga App. 72567, unreported; *Thomas v. Jacobs* (Nov. 5, 1998), Cuyahoga App. No. 73292, unreported; *et al.*

{¶38} Further, in Lakeshore *Properties v. Sharonville* (Feb. 16, 2001), Hamilton App. No. C-000321, unreported, the First Appellate District succinctly stated:

> **{¶39}** While the Thompkins standard is only applicable to the review of criminal cases, we note that the weight standard set forth in *C.E. Morris Co.* is much like the standard of review for sufficiency of the evidence set forth in *Thompkins*. [Footnote omitted.] ***It appears, therefore, that in civil cases an appellate court is precluded from recognizing any qualitative or quantitative distinctions between the weight of the evidence and sufficiency of the evidence.*** [Footnote omitted.] While this may be inconsistent with the standard we use in criminal appeals, we are nevertheless constrained by the holding set forth in *C.E. Morris Co.* (Emphasis added.)

{¶40} Finally, as quoted above, in *Eppinger*, *supra*, the Supreme Court set forth the procedure for a model sexual predator classification hearing. The court, however, did not suggest that

the state first proceed with its evidence to try to establish elements of such a classification as is required in a criminal trial, nor did it suggest that a sexual offender could make an oral Crim.R. 29 motion at the close of the presentation of the state's evidence.

{¶41} Rather, what is described in *Eppinger* is the presentation of evidence by the state and the sexual offender, and then a determination by the court as to whether the manifest weight of the evidence does or does not constitute a clear and convincing likelihood that the offender will commit another sexual offense.

{¶42} Based on the foregoing, we have determined that the trial court's decision to classify Tillery as a sexual predator is not against the manifest weight of the evidence. Accordingly, we overrule these assignments of error.

{¶43} The second, third, and fourth assignments of error state:

{¶44} II. THE TRIAL COURT ERRED WHEN IT DECIDED TO CONDUCT THE SEXUAL PREDATOR HEARING AGAINST THE APPELLANT WHERE THE APPELLANT MAY NOT BE RELEASED FROM PRISON FOR AT LEAST FIFTEEN YEARS IN VIOLATION OF THE REVISED CODE AND BOTH THE OHIO AND UNITED STATES CONSTITUTION.

{¶45} III. THE TRIAL COURT ERRED WHEN IT REFUSED TO DISMISS THE PROCEEDING BECAUSE AN INDIVIDUAL'S PROTECTABLE LIBERTY INTEREST IN PRIVACY IS ENCUMBERED BY THE SEXUAL PREDATOR LABEL AND THE FACTORS LISTED AT R.C. §2950.09(B)(2) VIOLATE THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I OF THE OHIO CONSTITUTION, WHERE THE LEGISLATURE DID NOT PROVIDE GUIDANCE ON HOW THE CLASSIFYING FACTORS SHOULD BE APPLIED.

{¶46} IV. R.C. §2950.09(C) VIOLATES THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I OF THE OHIO CONSTITUTION, BECAUSE A WRITTEN CHARGE WAS NOT PROVIDED TO THE APPELLANT.

{¶47} Here, Tillery raises three constitutional challenges to Ohio's sexual predator legislation. "Ohio courts have consistently re-jected every conceivable attack on the constitutionality of the sexual predator law." See *State v. Wilson* (Oct. 26, 2000), Cuyahoga App. No. 77530, unreported, citing *State v. Williams* (2000), 88 Ohio St.3d 513, 728 N.E.2d 342; *State v. Cook* (1998), 83 Ohio St.3d 404, 700 N.E.2d 570; *State v. Ward* (1999), 130 Ohio App.3d 551, 720 N.E.2d 603. This includes the identical assignments of error raised here. See, *e.g., State v. Bouyer* (Aug. 23, 2001), Cuyahoga App. No. 78547, unreported; *State v. Kennedy* (July 12, 2001), Cuyahoga App. No. 78600, unreported. Accordingly, we summarily reject these assignments of error and affirm the trial court's determination.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been

affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

TERRENCE O'DONNELL
JUDGE

JAMES J. SWEENEY, P.J. CONCURS

ANNE L. KILBANE, J. DISSENTS
(See separate opinion)

{¶48} N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E)unless a motion for reconsideration with supporting brief, per App.R.26 (A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

ANNE L. KILBANE, J. DISSENTING:

{¶49} On this appeal from an order of Judge Janet R. Burnside, I dissent. I would sustain Tillery's first assignment of error because the judge improperly classified him as a sexual predator based solely upon the fact of his two prior sexual offense convictions, and found that evidence alone was sufficient to prove his likelihood of re-offending. I would find the other assignments of error moot.

{¶50} I first note that the author of the majority opinion has decided that this court now reviews sufficiency of the evidence challenges using a manifest weight standard.[2] I protest this erroneous standard of review, not because it is less demanding than sufficiency review, but because it implies that the evidence is sufficient even if none is presented and that an accused sexual predator can never obtain a remedy that will bar a subsequent prosecution.

{¶51} The judges of this court should simply admit that one does not employ a manifest weight standard to address a sufficiency challenge,[3] and cease blindly accepting this misstatement. To do otherwise reflects a conscious intent by members of this court to decide that an accused sexual predator does not have the right to make a sufficiency challenge, and thus provide some members of this court with a rationale for denying preclusive effect to sexual

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[2]*State v. Childs* (2001), 142 Ohio App.3d 389, 395, 755 N.E.2d 958, 962, written by Judge O'Donnell, citing as his authority *State v. Perry* (Nov. 16, 2000), Cuyahoga App. No. 77724, unreported, also written by Judge O'Donnell, citing *State v. Cook* (1998), 83 Ohio St.3d 404 where, based upon the underlying appellate opinion, the relevant challenge appears to be a general assignment that the judge erred in determining the defendant to be a sexual predator, a challenge in part relating to the credibility, to the "manifest weight," of evidence in a presentence report that was not part of the record. *State v. Cook* (Aug. 7, 1997), Allen App. No. 1-97-21, unreported.

[3]See, *e.g.*, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541, 546-547 (discussing difference between weight and sufficiency).

predator determinations reversed for insufficient evidence,[4] since a reversal on weight of the evidence does not have preclusive effect, but is instead grounds for a new trial.[5]

{¶52} The majority reasons that a civil manifest weight standard applies to Tillery's sufficiency challenge because this is a civil, and not a criminal, proceeding. The majority declines to explain why one cannot attack legal sufficiency in a civil case, but simply cites *State v. Cook*, *supra*, for the proposition that the manifest weight standard applies in all sexual predator proceedings, and then cites a number of cases from other districts in an effort to show that they, too, apply a manifest weight analysis in sexual predator appeals.

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[4]The current rationale is, in most instances, an appeal to mistaken remand orders in cases where the parties apparently did not argue the remedy, and without any discussion of the rationale for such remand. See *State v. Wilson* (Oct. 26, 2000), Cuyahoga App. No. 77530, unreported, citing *State v. Ward* (1999), 130 Ohio App.3d 551, 562-563, 720 N.E.2d 603, 611. I note, however, that while *Ward* mistakenly cast its review as sufficiency, the court in fact found that the judge erred by failing to consider all the evidence that had been presented, and remanded for "further consideration of 'all parts of the record that may well substantiate the trial court's decision * * *.'" *Id.*, citing *State v. Wilson* (Sept. 11, 1998), Hamilton App. NO. C-970880, unreported. While I have since questioned my concurrence in *Ward* for other reasons, discussed *infra*, and might also reach a different result on the remand issue today, there is a marked difference between remanding a case for review of evidence that was previously presented and a remand for the purpose of presenting new evidence.

[5]Civ.R. 59(A)(6).

{¶53} In *Cook*, the Ohio Supreme Court reversed an appellate judgment in favor of the offender, and made a manifest weight finding as a means of affirming the trial judgment, in the apparent absence of any assignment of error from the offender and in response to a general assignment of error made in the appellate court. As will be shown below, manifest weight review includes sufficiency review and, therefore, manifest weight analysis was appropriate in this circumstance because Cook had no specific evidentiary challenge before the court, and had made a general assignment in the court below that arguably attacked the weight of the evidence. In an exercise of prudence, then, the Ohio Supreme Court addressed manifest weight in *Cook* to ensure proper resolution.

{¶54} I must also mention that the majority's perception of *State v. Eppinger*[6] as precluding a sufficiency review in sexual predator cases is insupportable. In a portion of its opinion titled "Sufficiency of the Evidence" the *Eppinger* court stated:

{¶55} [I]n order for the offender to be designated a sexual predator, the state must prove by clear and convincing evidence that the offender has been convicted of a sexually oriented offense *and* that the offender is likely to engage in

[6](2001), 91 Ohio St.3d 158, 743 N.E.2d 881.

the future in one or more sexually oriented offenses. (Emphasis *sic*.)[7]

{¶56} The court made clear that the State must prove each element to justify the classification, and concluded that the State had failed to provide sufficient evidence of the defendant's likelihood of re-offending.[8] The court failed to enter judgment as a matter of law in defendant's favor only because the question was not raised; the case was brought on the State's appeal of a remand order from the Court of Appeals for Cuyahoga County, and defendant-appellee Eppinger did not cross-appeal.

{¶57} Of the remaining eleven cases cited by the majority, eight are irrelevant to the issue here because the defendants specifically challenged the manifest weight of the evidence.[9] In the three remaining cases, one uses a manifest weight analysis to

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[7]*Id*. at 163, 743 N.E.2d at 886-887.

[8]*Id*. at 164-165, 743 N.E.2d at 887-888.

[9]*State v. Wilkerson* (2000), 138 Ohio App.3d 861, 863, 742 N.E.2d 716, 717; *State v. Gerhardt* (Aug. 31, 2001), Clark App. No. 00CA0090, unreported; *State v. Hood* (Nov. 14, 2001), Washington App. No. 00CA51, unreported; *State v. Cooper* (Oct. 24, 2001), Muskingum App. No. CT2001-0013, unreported; *State v. Sims* (June 27, 2001), Jefferson App. Nos. 99-J-43, 99-JE-57, unreported; *State v. Austin* (Nov. 21, 2001), Summit App. No. 20554, unreported; *State v. Robinson* (Nov. 21, 2001), Lake App. No. 99-L-177, unreported; *State v. Benson* (Aug. 28, 2000), Butler App. No. CA99-11-194, unreported. I am at this point unconcerned with the majority's distinction between cases applying a purportedly civil or criminal standard of manifest weight. The existence of this dispute, however, may be instructive when considering subsequent issues.

address a sufficiency challenge without explanation,[10] one concerns a Civ.R. 41(B)(2) motion to dismiss in a non-jury proceeding, which is irrelevant because it applies only where the court grants dismissal of the plaintiff's (in this case, the State's) case,[11] and the third, *State v. Childs*, *supra*,[12] authored by the same majority writer, uses the same unexplained citation to *Cook* that he relies upon here.

{¶58} I agree with the proposition that Tillery's case is civil,[13] although with the qualification that it is not a civil case in the tradition of an ordinary negligence or contract dispute, but is classified as a civil proceeding only because it cannot properly be called part of the fundamental criminal proceedings. As will be discussed, the fact that this is nominally a civil case does not mean that Tillery is stripped of all rights otherwise

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[10]*State v. Parsons* (Aug. 17, 2001), Huron App. No. H-00-042, unreported. Reference to the burden of proof is not an explanation, and reference to the "remedial" nature of the hearing bears on the civil or criminal nature of the proceeding, not the nature of the evidentiary challenge.

[11]*State v. Scott* (Feb. 15, 2001), Logan App. No. 8-2000-26, unreported. Furthermore, as discussed *infra*, nothing in Civ.R. 41(B)(2) would prevent a defendant from expressly moving for dismissal solely on legal sufficiency, or a judge from expressly ruling on such grounds.

[12]Even though *Childs* is a reported decision, I do not consider it binding on this issue because the Ohio Supreme Court decision in *Thompkins* applies.

[13]*State v. Gowdy* (2000), 88 Ohio St.3d 387, 398, 727 N.E.2d 579, 589.

granted to persons facing deprivations of important liberty interests. The Ohio Supreme Court has specifically recognized the "profound impact"[14] and "grave consequences"[15] flowing from a sexual predator finding, and has liberally interpreted the statutory scheme, which already grants rights ordinarily reserved to criminal defendants.[16]

{¶59} The majority's argument, however, does not go beyond stating that the proceeding is civil, followed by unexplained citation to largely irrelevant authority. As it stands, then, the majority opinion is based on a finding that this is a civil case, and that other courts addressing manifest weight challenges have applied manifest weight analysis. I cannot accept this as an argument, and will not further address it. Instead, I find it necessary to address the logical propositions upon which I believe the majority opinion (albeit incorrect) could be based.

{¶60} The argument supporting the majority opinion appears to result from two conclusions: (1) that there is no difference between the civil standards of review for manifest weight and sufficiency; and (2) that sufficiency review is therefore unavailable in civil cases, because all review tests the manifest weight of the evidence. These propositions are derived from the

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[14] *Id.*

[15] *Eppinger*, 91 Ohio St.3d at 162, 743 N.E.2d at 885.

[16] *Id.*, at syllabus; R.C. 2950.09(B)(1).

mistaken belief that *State v. Thompkins*, *supra*, applies only to criminal cases, and that the appropriate standard of manifest weight review in civil cases remains that stated in *C.E. Morris Co. v. Foley Constr. Co.*[17]

{¶61} This view of *C.E. Morris*, however, does not posit that sufficiency review is unavailable, but holds only that, in civil cases, manifest weight review is identical to sufficiency review.[18] Consequently, in a civil case, this view holds that if the evidence is legally sufficient to support the verdict, there can be no finding that the verdict is against the manifest weight of the evidence.[19] From this misunderstanding of *Thompkins* and the civil manifest weight standard, I fear the majority intends to prohibit accused sexual predators from making sufficiency challenges (even at the risk of prohibiting such challenges in all civil cases) by casting them as manifest weight challenges.

{¶62} I first note that, even accepting the argument that civil sufficiency and manifest weight challenges are identical, this counsels for the elimination of the remedy for civil manifest weight challenges, and not for sufficiency challenges. The *Thompkins* distinction between sufficiency and manifest weight is

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[17](1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578.

[18]*Reed v. Key-Chrysler Plymouth* (1998), 125 Ohio App.3d 437, 440, 708 N.E.2d 1021, 1023.

[19]*Id.*

comparable, at least in one respect, to the geometric comparison between a square and a rectangle; any verdict based on insufficient evidence (the square) is necessarily also against the manifest weight of the evidence (the rectangle), but a verdict that is against the manifest weight of the evidence is not necessarily insufficient. If this distinction does not exist in civil cases because a manifest weight challenge must show insufficiency (the rectangle must prove it is a square) before it is recognized, the logical result is that only insufficiencies (squares) are recognized; it makes no sense to treat the squares as though they were rectangles after one has ceased to recognize rectangles. Similarly, if the only civil evidentiary standard is for legal sufficiency, it makes no sense to apply the remedy for manifest weight after the defendant has shown he is entitled to judgment as a matter of law.

{¶63} There should be no doubt that even civil litigants are allowed to challenge the legal sufficiency of evidence and seek judgment as a matter of law:

> **{¶64}** When a motion for a directed verdict is entered, what is being tested is a question of law; that is, the legal sufficiency of the evidence to take the case to the jury. This does not involve weighing the evidence or trying the credibility of witnesses; it is in the nature of a demurrer to the evidence and assumes the truth of the evidence supporting the facts essential to the claim of the party against whom the motion is directed, and gives to that party the benefit of all reasonable inferences from that evidence.[20]

[20]Ruta v. Breckenridge-Remy Co. (1982), 69 Ohio St.2d 66, 68, 23 O.O.3d 115, 116-117, 430 N.E.2d 935, 938.

{¶65} Furthermore, there should be no doubt that when an appellate court finds that a litigant is entitled to judgment as a matter of law, it has a duty to enter that judgment or instruct the trial judge to do so.[21]

{¶66} The more important point this analysis should illuminate, however, is the fundamental error in believing that *C.E. Morris* mandates a civil standard that makes no distinction between sufficiency and manifest weight. This error stems not only from a misreading of that case, but the unjustified limitation of *Thompkins* to criminal proceedings.

{¶67} *Thompkins* states, at paragraph two of its syllabus, the following:

> **{¶68}** The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different.

{¶69} Nowhere within these nineteen words are the words "criminal" or "civil" found, and no distinction is made or implied. There is no reason to assume that this rule of law does not apply in civil cases simply because it was announced in a criminal case, and no such distinction is stated in App.R. 12. Moreover, in reaching this conclusion, the *Thompkins* court noted that the "differences between a reversal grounded on the weight of the

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[21]App.R. 12(B); *Moncol v. Bd. of Edn. of N. Royalton School Dist.* (1978), 55 Ohio St.2d 72, 77-78, 9 O.O.3d 75, 378 N.E.2d 155, 158-159.

evidence and one based on legally insufficient evidence" had been recognized in civil, as well as criminal cases.[22]

{¶70} In all of these civil cases, the Ohio Supreme Court recognized that weight and sufficiency were different concepts, analyzed using different standards, and having different effects.[23] In general all these cases recognize that manifest weight can be remedied by granting a new trial, while a judgment based on legally insufficient evidence entitles the defendant to judgment as a matter of law.[24] In *Lieberman*, the Court specifically noted that manifest weight review occurs only after the evidence has been found sufficient, and that insufficiency results in reversal and entry of judgment as a matter of law, barring further proceedings.[25]

{¶71} Furthermore, the *Thompkins* court specifically overruled a civil case, *Brittain v. Indus. Comm.*,[26] that found the concepts of manifest weight and sufficiency identical for purposes of constitutional interpretation.[27] There is no indication that *Thompkins*

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[22]*Thompkins*, 78 Ohio St.3d at 388, 678 N.E.2d at 547.

[23]*In re Lieberman* (1955), 163 Ohio St. 35, 39, 56 O.O. 23, 125 N.E.2d 328, 330; *Bown & Sons v. Honabarger* (1960), 171 Ohio St. 247, 252, 12 O.O.2d 375, 168 N.E.2d 880, 884; *Baxter v. Baxter* (1971), 27 Ohio St.2d 168, 170-171, 56 O.O.2d 104, 271 N.E.2d 873, 875.

[24]*Lieberman*, *supra*.

[25]*Id.*

[26](1917), 95 Ohio St. 391, 115 N.E. 110.

[27]*Thompkins*, 78 Ohio St.3d at 388-389, 678 N.E.2d at 547-

intended to overrule *Brittain* only with respect to criminal cases, and no reasonable basis for concluding that *Thompkins* is so limited. After *Thompkins*, it is nonsensical to believe the erroneous proposition that weight and sufficiency are synonymous can still be considered good law in a civil case, when *Brittain* itself has been overruled without qualification.

{¶72} There should be no dispute that any appellant, civil or criminal, should have the right to choose whether to attack a judgment for legal insufficiency or upon manifest weight. The majority citation to *State v. Scott*, *supra*, however, deserves further scrutiny to avoid misunderstanding.[28]

{¶73} In *Scott*, the State appealed a trial judge's grant of directed verdict to an accused after the State's presentation of evidence at a sexual predator hearing. The Court of Appeals for Logan County ruled that the State's challenge was subject to the dismissal standards of Civ.R. 41(B)(2), and not the directed verdict standard of Civ.R. 50. Consequently, the court ruled that, in order to obtain reversal, the State must prove the judgment was

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[28]I do not suggest that the Court of Appeals for Logan County would construe *Scott* as supporting the denial of sufficiency challenges, but address the issue only in an abundance of caution; I note again that the majority has not relied on *Scott*'s reasoning, but has simply included the case among a string of uncritical citations to irrelevant or unexplained authority.

erroneous as a matter of law or against the manifest weight of the evidence.

{¶74} This standard, applied in non-jury proceedings after the plaintiff's presentation of evidence, is intended to provide a judge more discretion in a bench trial because he is the finder of fact. However, it would be unfair and unreasonable to hold that Civ.R. 41(B)(2) was intended to deny a defendant the choice or opportunity to obtain judgment as a matter of law, or to deny the judge or an appellate court the authority to make the same determination.

{¶75} App.R. 12(B) and (C) state, in relevant part, as follows:

{¶76} (B) Judgment as a matter of law

> **{¶77}** * * When the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order. * * *

{¶78} (C) Judgment in civil action or proceeding when sole prejudicial error found is that judgment of trial court is against the manifest weight of the evidence

> **{¶79}** In any civil action or proceeding which was tried to the trial court without the intervention of a jury, and when upon appeal a majority of the judges hearing the appeal find that the judgment or final order rendered by the trial court is against the manifest weight of the evidence and do not find any other prejudicial error of the trial court in any of the particulars assigned and argued in the appellant's brief, * * * the court of appeals shall reverse the judgment or final order of the trial court and either weigh the evidence in the record and render the judgment or final order that the trial

court should have rendered on that evidence or remand the case to the trial court for further proceedings * * *.

{¶80} These provisions make clear not only that there is a difference between judgment as a matter of law and judgment upon the weight of the evidence, but App.R. 12(C) also contemplates a litigant who **chooses** to challenge a judgment upon the weight of the evidence,[29] rather than one forced to do so solely because he did not have the benefit of a jury trial. Civ.R. 41(B)(2) is designed to aid defendants by expanding the judge's discretion, and does not thereby remove the judge's discretion to enter judgment as a matter of law if the defendant is so entitled. Similarly, the lack of a jury cannot immunize a judge's ruling from sufficiency review under App.R. 12(B); a non-jury proceeding has no characteristics justifying such immunity.

{¶81} Because manifest weight review encompasses sufficiency review, one might think it harmless to apply the broader manifest weight standard where the defendant has challenged only sufficiency. Even though some might see the broader review as granting extra protection to defendants, I fear that the manifest weight analysis is intended to, or likely will be, employed to justify this court's continued remands of sexual predator proceedings reversed for insufficiency, where the proper remedy should be entry of judgment in favor of the accused. Where the

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[29]"* * *and do not find any other prejudicial error of the trial court in any of the particulars assigned and argued in the appellant's brief * * *."

defendant expressly attacks sufficiency and claims entitlement to judgment as a matter of law, this court should review that claim rather than, or at least before, converting it to a manifest weight challenge. Sufficiency and manifest weight are different standards with different remedies, and should be separately addressed.

{¶82} Before addressing the sufficiency of the evidence here, I feel it necessary to address the majority's contention that a civil manifest weight standard applies, rather than the criminal standard set forth in *Thompkins*. The important question raised in *Reed v. Key-Chrysler Plymouth*, after all, is not whether there is a difference between sufficiency and weight analysis in civil cases (for there clearly is), but whether the civil manifest weight analysis is less demanding than that employed in criminal cases.[30] Moreover, even though sexual predator proceedings are nominally civil, the majority notes a significant split of authority between application of criminal or civil manifest weight standards in sexual predator proceedings.[31]

{¶83} While I believe this issue should be resolved in favor of criminal standards because sexual predator proceedings have "grave

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[30]*Reed*, 125 Ohio App.3d at 440-441, 708 N.E.2d at 1023-1024.

[31]The majority concludes that the civil standard is applicable because it counts more courts applying it than have applied the criminal standard, and makes no attempt to address the reasoning in favor of either position.

consequences"[32] and "profound impact"[33] on defendants, and concern governmental restrictions on important individual liberties, the question need not be decided here because sufficiency of the evidence is measured under the same standard in both criminal and civil proceedings. The test is whether a reasonable trier of fact could find, based on the evidence presented, that all required elements reach the threshold necessary in accordance with the applicable burden of proof.[34]

{¶84} In finding that Tillery was a sexual predator, the judge stated:

> **{¶85}** This really presents a narrow question for me to decide. I mean, there are the mitigating factors that Mr. Tillery did participate in prison programs, and I am not comfortable using the charge, the no bill case, even though it involved similar criminal behavior. But I am still of the mind that having two rape convictions under these circumstances is sufficient basis to convince me by clear and convincing evidence that Mr. Tillery is a sexual predator. So that is my conclusion today, relying upon all of the evidence presented to me in the arguments and the factors.

{¶86} I disagree with the judge's conclusion that the two sexual offense convictions, standing alone, were sufficient to show that Tillery "is likely to engage in the future in one or more sexually oriented offenses."

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[32] *Eppinger*, 91 Ohio St.3d at 162, 743 N.E.2d at 885.

[33] *Gowdy*, 88 Ohio St.3d at 398, 727 N.E.2d at 589.

[34] *State v. Thompkins*; *Ruta v. Breckenridge-Remy Co.*; see, also, *Cross v. Ledford* (1954), 161 Ohio St. 469, 477, 120 N.E.2d 118, 123 (reviewing court assesses challenge under applicable burden of proof).

{¶87} This court has held that a single conviction for a sexually oriented offense is not, standing alone, sufficient to sustain a sexual predator determination.[35] While a second conviction for a sexual offense is evidence indicating a likelihood of future offenses, it cannot be conclusive. R.C. 2950.09(C)(2)(b)(ii) is inconsistent with such a presumption, because it specifically considers offenders who have been found not to be sexual predators despite having two convictions for sexually oriented offenses, and states that such offenders shall be classified as habitual sex offenders. If two convictions, standing alone, were conclusively sufficient to sustain a sexual predator determination, there would be no need for a separate habitual sex offender classification, and R.C. 2950.09(C)(2)(b)(ii) would be meaningless.

{¶88} Not only is the statutory scheme inconsistent with a conclusive presumption that two sexual offense convictions are sufficient to sustain a sexual predator determination, the requirement of further evidence prevents the extension of the rule to include allegations instead of convictions. The majority relies on an allegation that failed to lead even to an indictment as evidence in support of the sexual predator determination, despite the fact that the judge expressly (and correctly) refused to

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[35] *State v. Ward* (1999), 130 Ohio App.3d 551, 561, 720 N.E.2d 603, 610.

consider the allegation as relevant evidence. Even though the Ohio Supreme Court stated, in *State v. Cook*,[36] that the Rules of Evidence do not strictly apply in sexual predator hearings and that a judge may consider "reliable hearsay," such as a presentence investigation report,[37] judges must remember that the presentence report is usually only the final repetition of multiple hearsay statements, and one must look further to determine whether the hearsay is "reliable." The presentence report might reliably record the fact that prior allegations were made; it cannot, however, aid the reliability of the hearsay allegations themselves. The judge understood this in refusing to consider the unsubstantiated allegations, expressly stating that the no-bill result extinguished any valid reliance on the unsworn allegations.[38]

{¶89} The majority, however, in raising the no-billed allegations as relevant evidence even though they were not considered below, illustrates the danger of allowing particular evidence to conclusively outweigh all other factors when making a sexual predator determination. A conclusive presumption that applies to a second conviction might easily be stretched to include

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[36](1998), 83 Ohio St.3d 404, 700 N.E.2d 570.

[37]*Id.* at 425, 700 N.E.2d at 587.

[38]I do not, therefore, exclude this evidence based upon an assessment of its weight, but based upon the fact that the judge excluded it from evidence.

a single conviction accompanied by further allegations, regardless of the nature of the allegations or their reliability.

{¶90} Although a second sexual offense conviction is evidence contributing to a sexual predator determination, the conviction evidence must be supported by other evidence tending to show the accused's likelihood of committing future offenses. Here, however, the judge specifically relied solely on the convictions themselves to sustain the determination, and that reliance was insufficient. While I would not sustain the fifth assignment of error because I believe the judge considered the factors of R.C. 2950.09(B)(2), I would reverse the sexual predator determination as based on insufficient evidence because the judge relied solely on Tillery's two sexual offense convictions as conclusive evidence of his likelihood of re-offending.

{¶91} After responding to Tillery's sufficiency challenge by finding that the determination was not against the manifest weight of the evidence (although this finding was based, in part, on evidence the judge found inadmissible), the majority next summarily rejects Tillery's constitutional arguments, citing a number of previous decisions of this court that summarily rejected the same arguments. While I agree that this court has validly addressed and rejected the arguments raised in assignments of error two and three, I do not agree that this court has properly considered the arguments raised in Tillery's fourth assignment of error. A

summary rejection that is based on a summary rejection is not a decision, but an abdication.

{¶92} While I would find Tillery's constitutional arguments moot because of my disposition of the first assignment of error, I must protest the majority's failure to analyze the issues raised or the authority upon which it relies in rejecting the fourth assignment of error. The majority cites *State v. Ward*, *supra*, in which this court stated, without analysis, that Ohio's sexual predator scheme satisfied procedural due process concerns because it provided "notice and an opportunity to be heard."[39] This boilerplate response cannot substitute for the reasoning necessary to address the concerns raised in the fourth assignment of error.[40] Again, although I would find this assignment moot, my dissenting opinion in *State v. Hills* (Feb. 7, 2002), Cuyahoga App. No. 78546, unreported, concerning an identical assignment of error, is fully applicable here as well.

{¶93} I would reverse the judgment as based on insufficient evidence and find Tillery's remaining assignments moot.

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[39]*Ward*, 130 Ohio App.3d at 558, 720 N.E.2d at 608.

[40]See, *e.g.*, *Mathews v. Eldridge* (1976), 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (stating factors that must be considered when analyzing adequacy of procedural protections).