[Cite as *State v. Sevayega*, 2004-Ohio-4909.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83392

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
REGINALD SEVAYEGA	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION:	September 16, 2004
CHARACTER OF PROCEEDING:	Civil appeal from Common Pleas Court Case No. CR-290548
JUDGMENT:	AFFIRMED
DATE OF JOURNALIZATION:	_____

APPEARANCES:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor RENEE L. SNOW Assistant County Prosecutor Justice Center, 8th Floor 1200 Ontario Street Cleveland, Ohio 44113
For Defendant-Appellant:	KENNETH D. MYERS 75 Public Square, Suite 1300 Cleveland, Ohio 44113

ANTHONY O. CALABRESE, JR., J.:

{¶ 1} Defendant-appellant, Reginald Sevayega ("appellant"), appeals from the judgment of the Cuyahoga County Common Pleas Court finding him to be a sexual predator. Appellant contends that the evidence was insufficient to support this finding, and the trial court should have stayed the sexual offender classification hearing pending resolution of his petition for postconviction relief. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the trial court.

I.

{¶ 2} Appellant was working at Cuyahoga Community College ("Tri-C") as a professor on July 20, 1992. On that day, appellant saw one of his students, the victim in this case, after leaving his evening philosophy class. In response to a question by appellant, the victim told him that she was on her way home. After some additional conversation, appellant told her that he knew a shortcut she could use to go to her car. The victim, who was new to Tri-C and unfamiliar with the campus, followed appellant, who said he would show her the shortcut. As they walked along, appellant engaged the victim in pleasant conversation. He led the victim to a piano practice room in the music building. Once they reached the room, appellant grabbed the victim's arm, pushed her into the room, and pinned her against the wall. He held both of her arms above

her head, removed her pants, and raped her. After a short time, the victim managed to get away and run to her car.

{¶ 3} The victim did not immediately report the rape to the police because she was initially embarrassed. Appellant called her the day after the incident and said "I want more *** of your juices flowing." On the next day he called her again and asked why she was not in class for the midterm examination. The victim continued to skip class and asked university officials to transfer her to another class. She told them initially that appellant exposed himself to her, but later told them that he had raped her.

{¶ 4} Appellant was subsequently arrested. During the investigation of the crime, appellant asked Vicki Challenger, one of his other students, to write a letter on his behalf. In her letter, Challenger described what happened on July 22, the day of the midterm examination. She wrote that the victim did not attend class on that day. Challenger also wrote that she left the classroom with appellant after the exam and that they talked briefly about her plans to go to a local coffee shop with another student. According to Challenger, appellant headed to his car after their conversation. Though Challenger's letter correctly indicated that the midterm examination and the other events described in the letter took place on July 22, appellant later changed the date to July 20.

{¶ 5} Before appellant's trial, the trial court granted a motion in limine filed by appellant to prevent the state from introducing evidence from eight other women at Tri-C who claimed to have been sexually harassed by appellant. After a jury trial, appellant was convicted of rape and tampering with evidence and was sentenced to seven to twenty-five years for the rape, followed by two concurrent one-year sentences for tampering with evidence. *State v. Sevayega*, Cuyahoga App. No. 65942, 1994-Ohio-4209.

{¶ 6} Appellant filed an appeal with this court and his appeal was denied on all assignments of error. In November 1997, appellant filed a pro se petition for postconviction relief. The trial court subsequently denied the petition. Appellant was released from prison in April 2003. In May 2003, after his release, he filed a second petition for postconviction relief.

{¶ 7} Pursuant to a recommendation from the Ohio Department of Rehabilitation and Correction that appellant be classified as a sexual predator, the trial court held a sexual offender classification hearing in July 2003. The trial court denied appellant's motion to postpone the hearing pending resolution of his second petition for postconviction relief.

{¶ 8} At the sexual offender classification hearing, the state of Ohio presented the testimony of five women who testified that appellant had sexually harassed them while he was a professor at Tri-C. The testimony of the women had been excluded from trial as

more prejudicial to appellant than probative. In addition to the testimony from the women, Detective Mark Hastings and licensed clinical counselor Martha Beltz also testified at the hearing. Appellant was found to be a sexual predator at the above hearing and is now appealing that finding to this court.

II.

{¶ 9} First assignment of error: "The court erred by overruling appellant's motion to stay proceedings pending the resolution of appellant's petition for post-conviction relief."

{¶ 10} We find appellant's first argument to be without merit. First, there is nothing within the statutory scheme of R.C. 2950 which requires such action. R.C. 2950.09(C) instructs a trial court that, upon recommendation by the Department of Rehabilitation and Correction that a defendant be adjudicated a sexual predator, it must hold a sexual offender classification hearing within one year from the inmate's release from prison. There is no provision in the statute for a stay of the hearing pending the outcome of other motions or petitions.

{¶ 11} In addition, appellant offers no evidence to demonstrate how he was prejudiced by the trial court's failure to stay the hearing until the court had ruled on his petition. Our review of the record indicates that he was not prejudiced in any way by the order in which the hearings were held. At the conclusion of the

sexual offender classification hearing, the trial judge stated, in reference to appellant's petition for postconviction relief:

> **"I will set it for a hearing, and should in fact it come out that you end up getting a new trial, to add more confusion to everything here, if that's the case, this court is going to be voided."**

{¶ 12} Thus, it is apparent that the trial judge recognized that his decision regarding appellant's sexual predator status could change, depending upon his ruling on the petition for postconviction relief.

{¶ 13} Appellant's first assignment of error is therefore overruled.

{¶ 14} Appellant's second assignment of error states the following: "The evidence was 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."

{¶ 15} R.C. 2950.09, is titled "classification as sexual predator; determination hearing; petition for removal from classification." More specifically, R.C. 2950.09(B)(3)(a) through (j) provides the following:

> **"(3) In making a determination under divisions (B)(1) and (4) of this section as to whether an offender or delinquent child is a sexual predator, the judge shall consider all relevant factors, including, but not limited to, all of the following:**
>
> **(a) The offender's or delinquent child's age;**

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

(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;

(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;

(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;

(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;

(g) Any mental illness or mental disability of the offender or delinquent child;

(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;

(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;

(j) **Any additional behavioral characteristics that contribute to the offender's or delinquent child's conduct."**[1]

{¶ 16} Despite this seemingly exhaustive list, the statute does not require that the trial court list or satisfy each of these factors in order to make a sexual predator determination. It simply requires that the trial court consider all factors which are relevant to its determination. *State v. Cook* (1998), 83 Ohio St.3d 404, 426, 1998-Ohio-291; *State v. Ivery* (Feb. 18, 1999), Cuyahoga App. No. 72911, citing *State v. Tracy* (May 20, 1998), Summit App. No. 18623; and *State v. Cole*, Cuyahoga App. No. 82338, 2003-Ohio-7061.

{¶ 17} We find that the evidence presented in the record demonstrates

{¶ 18} that the sexual predator classification was proper. The testimony

{¶ 19} of Detective Mark Hastings is a typical example of the evidence given to support the trial court's sexual predator classification. Detective Hastings testified that he was struck by

[1]Note that R.C. Sections 2950.09(B)(2)(a) through (j) are now listed in R.C. 2950.09(B)(3).

the similarities between what happened to the victim compared to what happened to other women who testified that the defendant acted inappropriately with them. In addition, we find the words of the trial court judge to be worth mentioning. The trial court's comments were enlightening and significant. The lower court judge stated that:

> **"*** *the record doesn't really depict the demeanor of these people on the witness stand*. They couldn't look at you, and you didn't want to look at them either. While that doesn't make someone guilty, *they were terrified of you, terrified of you*. If you are going to put this web out again, you are going to get caught in it, at least we are going to know where you are because I am going to determine that you are a sexual predator, and I would like your address sir."**

{¶ 20} (Emphasis added.)

{¶ 21} In either a criminal or a civil case, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts. *State v. DeHass* (1967), 10 Ohio St.2d 230. The trial judge in the case at bar was able to observe the demeanor of the witnesses firsthand and, as such, was in a better position to judge the testimony.

{¶ 22} We find the evidence presented is more than sufficient to establish by clear and convincing evidence that appellant is likely to engage in the future in one or more sexually oriented offenses.

{¶ 23} Appellant's second assignment of error is overruled and the trial court's decision is hereby 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.

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

ANTHONY O. CALABRESE, JR.
JUDGE

SEAN C. GALLAGHER, J., CONCURS IN JUDGMENT ONLY
WITH SEPARATE CONCURRING OPINION;

TIMOTHY E. McMONAGLE, P.J., CONCURS WITH ASSIGNMENT
OF ERROR ONE AND DISSENTS REGARDING ASSIGNMENT OF ERROR TWO
WITH SEPARATE CONCURRING AND DISSENTING OPINION.

SEAN C. GALLAGHER, J., CONCURRING:

{¶ 24} I respectfully concur with the analysis and judgment of the opinion authored by Judge Calabrese affirming the decision of the trial court to classify Sevayega as a sexual predator. I write separately to address concerns about the application of R.C. 2950.09 to specific facts and the practicality of the statute as a protection for the general public as intended by the Ohio legislature. I also wish to address many of the compelling points raised by Judge McMonagle in his thoughtful dissent.

{¶ 25} A sexual predator is defined by 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." The statute, in its present form, provides little clarity for identifying who is a risk to reoffend. The stark reality is that determinations involving sexual predator classifications are often based on a "hodge podge" of standards with varying and sometimes questionable degrees of certainty covering various "risk" factors. There is a growing view that the resulting classifications are inconsistent, unscientific, and untenable. Many feel they do not actually assess risks or provide sufficient protection to the general public.

{¶ 26} Under the statute that applies to Sevayega, to classify an offender as a sexual predator a trial court must determine, by clear and convincing evidence, that the offender 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)(4). Clear and convincing evidence is that evidence which establishes in the mind of the trier of fact a firm belief or conviction as to the facts sought to be proved. *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶ 27} In making a determination under the statute, the trial court must consider all relevant factors, including, but not limited to, the following: (a) the offender's age; (b) the offender's prior criminal record; (c) the age of the victim of the sexually oriented offense; (d) whether the sexually oriented offense involved multiple victims; (e) whether the offender used drugs or alcohol to impair the victim or prevent the victim from resisting; (f) if the offender previously had 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 sex offenders; (g) any mental illness or mental disability of the offender; (h) the nature of the offender's sexual conduct, contact, or interaction in a sexual context with the victim and whether the conduct was part of a demonstrated pattern of abuse; (i) whether the offender, during the commission of the offense, displayed cruelty or threatened cruelty; and (j) any additional behavioral characteristics that contribute to the offender's conduct. R.C. 2950.09(B)(3)(formerly R.C. 2950.09(B)(2)).

{¶ 28} In the instant case, as Judge McMonagle points out, much of the purported evidence was never actually admitted into the record. Although I agree with Judge McMonagle's thoughtful analysis on that issue, I believe the testimony evidenced in the record by the five victims sexually harassed by Sevayega is compelling. Although it is significant that the events outlined in this testimony are more than ten years old and Sevayega is now aged 66, prior conduct is a clear indicator of future behavior. The behavior described in the testimony, in my view, goes beyond sexual harassment. This conduct, outlined by multiple victims, shows a serial pattern of inappropriate behavior

towards women warranting a sexual predator classification. This testimony establishes by clear and convincing evidence that Sevayega is likely to reoffend.

{¶ 29} There are inherent problems with the application of the sexual predator statute that are evident in this case. First, the entire analysis is clouded by conducting a House Bill 180 hearing, years after the initial conviction.[1] In addition, the best evidence of whether a person is likely to reoffend, or even the clinical analysis of the risk to reoffend, is often based on behavioral characteristics exhibited years earlier. Further, current behaviors offered as evidence, both against and in favor of the designation, must be measured in light of the fact that they are displayed in a controlled prison setting, away from the realities of everyday life.

{¶ 30} The record reflects that the trial court referenced R.C. 2950.09(B)(2)(h) and (j) as the basis for the predator determination, yet these provisions are very broad and do not take into account the age of the information or the specific nature of the evidence presented. Arguably, Sevayega only minimally meets any of the factors for predator classification outlined in the statute. Nevertheless, despite these shortcomings, it is the consistent testimony of ancillary victims, albeit dated, detailing prior misconduct, that is the most compelling predictor of future behavior in this case.

{¶ 31} Although Judge McMonagle is correct that the Supreme Court of Ohio in *Eppinger*, supra, clearly stated "* * * a psychologist, psychiatrist or other expert in the field of predicting future behavior may be the best tool available to the court to assist it in making these determinations," these reports, in their present form, are rarely definitive.

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[1] R.C. 2950.09(C)(1) addresses sexually oriented offenders convicted prior to

The psychiatric evaluation offered here categorized Sevayega as having a low risk to reoffend. The analysis indicates Sevayega as having a 6 percent risk to reoffend within five years, a 7 percent risk to reoffend within ten years, and a 7 percent risk to reoffend within fifteen years. Surprisingly, this evaluation places Sevayega at a higher risk to reoffend at the age of 81, twenty-five years after the original offense, than today. Often the evaluations in these cases are in conflict. Such divergent evaluations by purported experts do little to increase confidence in the current psychiatric evaluation process involving alleged predators.[2]

{¶ 32} By not mandating narrow, clearly defined factors for sexual predator classifications, inconsistencies and inequities in classification occur between similarly situated sexual offenders. By mandating a clear legal standard for classification, the factual inconsistencies between judgments would diminish. The questionable "a la carte" method of selection between purported factors does little to effectively label those at high risk to reoffend or offer valid protection to the public. Nevertheless, because the evidence in the record details a serial pattern of prior misconduct, which is arguably the best predictor of future conduct, I would affirm the decision of the trial court.

TIMOTHY E. McMONAGLE, J.:

January 1, 1997. Sevayega was convicted of rape under R.C. 2907.02 on July 6, 1993.

[2] In this case, the trial court rejected the testimony of the state's expert witness, a licensed clinical counselor. Her evaluation categorized the risk as "somewhere between the high side of medium and the low side of high," yet she admitted she never conducted any research on recidivism and had only taken a three-day seminar on the issue of predicting sexual offender behavior before testifying in twenty-five cases as an expert.

{¶ 33} Although I concur with the majority's disposition of Sevayega's first assignment of error, I respectfully dissent from its conclusion that the evidence adduced at the sexual offender classification hearing was sufficient to prove by clear and convincing evidence that Sevayega is likely to engage in another sexually oriented offense in the future.

{¶ 34} The majority relies upon the testimony of five women who testified at the hearing that Sevayega made inappropriate sexual comments to them or tried to inappropriately touch them while he was a professor at Tri-C in finding the evidence sufficient to indicate that Sevayega is likely to reoffend in the future. The majority totally ignores the fact, however, that each woman's testimony concerned events that occurred nearly twelve years prior to the hearing. Moreover, although the allegations of all of these women had been investigated prior to Sevayega's rape trial, none of the complaints resulted in additional charges against him. Thus, Sevayega's behavior toward these woman, although objectionable, was not criminal.

{¶ 35} In his defense, Sevayega presented a psychiatric report from the Court Psychiatric Clinic at the hearing. This report, dated April 24, 2003 and authored by Michael Caso, chief social worker at the clinic, indicated that Sevayega had been interviewed by Caso for approximately two hours over a two-day period. Caso's report stated that in evaluating Sevayega, he also reviewed the House Bill 180 packet sent by the Belmont Correctional Institution to the court, which included "Belmont Correctional Institution Summary Report, Offense Record, Sex Offender Education Programming Completion Certificate, Inmate Evaluation Reports, Victim Awareness Completion Report, Positive

Solutions/Cognitive Thinking Program Completion Certificate, Learning to Live Without Violence Completion Certificate, Cage the Rage Completion Certificate, Perfect Attendance at Church Certificate, ODRC Memo, Presentence Investigation Report prepared by JoAnna Hairston of the Cuyahoga County Court of Common Pleas Probation Department on 7/22/93, ODRC Education Verification Form, Cleveland Public Schools-Secondary Permanent Record Form."[1]

{¶ 36} Caso also gave Sevayega the Static-99 test, an actuarial instrument designed to estimate the probability of sexual recidivism among adult males convicted of at least one sexual offense. Caso reported that Sevayega received a Static-99 score of 1, which placed him in the low risk category for reoffending. Caso's report further indicated that Sevayega's score equated to an actuarially-determined recidivism rate of 6% within five years, 7% within ten years and 7% within 15 years.

{¶ 37} Significantly, Caso's report found that Sevayega did not present with eight factors significantly correlated with sexual recidivism: 1) never married - he had been married and resided with a significant other for at least two years; 2) deviant sexual preference - there was no documentation that he has a deviant sexual preference; 3) prior sexual offense - this was Sevayega's first offense; 4) failure to complete treatment - Sevayega completed treatment for sexual offenders; 5) antisocial personality disorder - Sevayega does not have a history or traits characteristic of this disorder; 6) any prior criminal offenses - this was Sevayega's first criminal offense; 7) age - offenders who are

[1]We find no such packet anywhere in the record, however, nor were any such documents admitted into evidence as court exhibits during the sexual offender classification hearing.

younger than 25 present a higher risk to sexually reoffend; Sevayega was age 66; 8) male child victim - the victim of the offense was female. Caso reported that the only risk factor associated with recidivism that applied to Sevayega was the fact that the victim was not related to him.

{¶ 38} At the hearing, the trial court excluded the testimony of the State's expert regarding Sevayega's likelihood to reoffend because she had artificially inflated her credentials on her curriculum vitae. Moreover, although the trial judge stated that he had reviewed "a great deal of testimony in the underlying case," none of the transcript from the trial is part of the record. Likewise, as noted earlier, none of the documents contained in the House Bill 180 packet are contained in the record. Thus, the record consists only of State's Exhibit 1, which is a witness affidavit authored by one of the women who testified at the hearing; Defendant's Exhibit A, which is the Court Psychiatric Clinic Report finding Sevayega not likely to sexually reoffend; and the transcript of the hearing. A determination that an individual is a sexual predator is based upon a prediction of future sexual misconduct. In *State v. Eppinger* (2001), 91 Ohio St.3d 158, 163, the Ohio Supreme Court found that "the evidence presented by a psychologist, psychiatrist or other expert in the field of predicting future behavior may be the *best tool available to the court* to assist it in making these determinations." (Emphasis added.) Here, the Court Psychiatric Clinic Report, completed only three months prior to the sexual offender classification hearing, predicted Sevayega's risk of future sexual misconduct as low. It also reported that in his ten years of incarceration, he had completed treatment for sexual offenders and received excellent work evaluations. In addition, it reported that he does not display many

factors significantly correlated with sexual recidivism and displays only one factor associated with reoffending.

{¶ 39} The trial court, however, without any explanation, totally ignored the report. Although a trial court is not obligated to concur with the findings of the Court Psychiatric Clinic, in this case, the court should have given deference to the report since the *only evidence* presented by the State was historical data regarding offensive, although not criminal, acts that occurred twelve years prior to the hearing. Although I do not condone Sevayega's behavior toward the women who testified, their testimony merely reported Sevayega's past behavior; it did not predict his current likelihood of reoffending in the future. The only evidence presented at the hearing regarding Sevayega's likelihood of reoffending was the psychiatric report from the court clinic, which put his risk of reoffending at low.

{¶ 40} In *State v. Abelt* (2001), 144 Ohio App.3d 168, this court held that an expert assessment of the defendant's current condition regarding his likelihood of sexually reoffending was necessary where the defendant's sexual offenses were committed at least ten years prior to the sexual offender classification hearing and he had made a concerted effort at rehabilitation while incarcerated. We noted that "absent this expert assessment of [the defendant's] current condition *** the State is simply asking for a determination based on a generalized fear and/or expectation that the individual will re-offend." Id. at 175. This cannot be a proper application of R.C. 2950.09.

{¶ 41} Likewise, it is not an appropriate application of R.C. 2950.09 to ignore that current assessment without an adequate foundation in the evidence. Here, the trial court

was presented with a current expert evaluation that rated Sevayega's risk of sexually reoffending as low. Instead, "the trial court *** relied upon only historical facts in making its decision in this case, and without apparent reason, did so to the exclusion of more recent evidence that related more relevantly to appellant's current likelihood to re-offend. Consequently its decision is unsupported by the weight of the evidence." *State v. Youlten*, 151 Ohio App.3d 518, 2003-Ohio-430, at ¶31.

{¶ 42} On the totality of this record, I would hold that the State failed to demonstrate by clear and convincing evidence that Sevayega is likely to reoffend in the future. Accordingly, I respectfully dissent from the majority's resolution of assignment of error two.