

[Cite as *State v. Harris*, 2005-Ohio-6493.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86127

STATE OF OHIO	:	
	:	
Plaintiff-appellee	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
KENNETH HARRIS	:	
	:	
Defendant-appellant	:	

DATE OF ANNOUNCEMENT OF DECISION	:	DECEMBER 8, 2005
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CHARACTER OF PROCEEDING	:	Civil appeal from Cuyahoga
	:	County Court of Common Pleas
	:	Case No. CR-269072

JUDGMENT	:	AFFIRMED.
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DATE OF JOURNALIZATION	:	
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APPEARANCES:

For plaintiff-appellee	:	WILLIAM D. MASON Cuyahoga County Prosecutor MARY H. McGRATH, Assistant 9 th Floor Justice Center 1200 Ontario Street Cleveland, Ohio 44113
For defendant-appellant	:	SUSAN J. MORAN, ESQ. 55 Public Square, Suite 1010 Cleveland, Ohio 44113

KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant Kenneth Harris appeals from the trial court order that classified him as a sexual predator.

{¶ 2} Harris argues the trial court's decision lacks an adequate basis in the record. This court disagrees; therefore, the order is affirmed.

{¶ 3} The record reflects Harris originally was indicted in this case in June 1991 on three counts that charged him with one count of aggravated burglary, one count of rape, and one count of kidnapping, each with a violence specification for Harris' 1988 conviction for sexual battery. Although Harris entered pleas of not guilty at his arraignment, he later accepted a plea offer by the state. Pursuant to the offer, he agreed to plead guilty to one count of attempted rape in exchange for the dismissal of the remaining charges.

{¶ 4} The trial court accepted Harris' plea and convicted him of attempted rape before ordering the preparation of a presentence report. Upon receiving the report in January 1992, the trial court sentenced Harris to a term of incarceration of five to fifteen years; however, the court ordered execution of that sentence suspended and placed Harris on three years of active probation.

{¶ 5} The record reflects that Harris thereafter proved to be a poor candidate for probation; he violated probationary terms each time the trial court afforded it to him. Eventually, in late 1996, the court ordered Harris' original sentence into execution, with

credit for time served. Harris' subsequent efforts to retract his plea and appeal from his conviction proved unavailing. *State v. Harris*, Cuyahoga App. No. 80772, 2002-Ohio-4573.

{¶ 6} In 2004, the trial court received a request from the state to schedule a sexual predator evaluation hearing pursuant to R.C. 2950.09(C). Prior to the hearing, the trial court ordered from the psychiatric clinic a psychological assessment "in accordance with the provisions of [R.C.] 2950.09" of Harris. The court further ordered the resulting report, however, was "not to be shared with the court, the prosecutor, or any other individual," since it was "work product" of "solely" Harris and his defense attorney.

{¶ 7} Thus, when the court conducted the hearing, it considered Harris' criminal and institutional records, along with the information contained in the presentence report submitted in the instant case.¹ This indicated that beginning in 1981, Harris had been convicted of the offenses of receiving stolen property, grand theft, sexual battery, and aggravated robbery.²

{¶ 8} The presentence report also indicated that in the instant case, the victim was a 35-year-old female with whom Harris

¹A copy of this report was a part of the institutional record.

²During the hearing, the prosecutor, and, later, the trial court, consistently referred to the sexual battery conviction as one for "gross sexual imposition," which was the charge in the original indictment.

previously had a relationship; the victim alleged Harris broke into her home and forced her into sexual intercourse. Soon afterward, in another incident for which Harris was convicted in a separate case, Harris broke into the same home, threatened the same victim and her female friend with a knife, and after an altercation, the other female received a cut on her hand.

{¶ 9} The prosecutor pointed out to the court that Harris' institutional record contained a "clinical assessment that was completed on 4/18/2002." According to this source, Harris presented "with several risk factors associated with reoffending," which included "deviant behavior," failure to obtain sexual offender treatment while incarcerated, and a history of substance abuse.

{¶ 10} The trial court, however, questioned the reliability of the foregoing assessment, since the person who completed it "[g]ot all confused." Additionally, the court refused to review the assessment prepared by the court psychiatric clinic, advising the prosecutor that, since the state had the burden of proof, only the defendant could use the assessment. Nevertheless, the court gave little credit to defense counsel's suggestions that his client met some of the factors which indicated he was unlikely to reoffend. Instead, the court made a finding that Harris qualified as a sexual predator.

{¶ 11} The court cited as the bases for its finding the

following: two convictions for sexually-oriented offenses; a criminal record of "violent crimes against other human beings;" indications that Harris was "a bully," did not "stay sober," and had not been "successful as a parolee;" reports of "lewd behavior" and numerous violations of the prison rules while incarcerated; and, finally, the fact that, in spite of having obtained a clinical assessment, Harris had "brought in no evidence to contradict all of this evidence that was against him in this [institutional] record."

{¶ 12} Upon classifying Harris as a sexual predator, the trial court entered a journal entry to that effect.

{¶ 13} Harris appeals the foregoing with one assignment of error as follows:

{¶ 14} "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'."

{¶ 15} Harris argues the trial court's determination that he is a sexual predator is inadequately supported; therefore, the order should be reversed. His argument is unpersuasive.

{¶ 16} At a sexual classification hearing, the state is required to prove by clear and convincing evidence that the offender has not only been convicted of a sexually oriented offense, but also that the offender is likely to engage in the future in one or more sexually oriented offenses. *State v. Eppinger*, 91 Ohio St.3d 158,

163, 2001-Ohio-247.

{¶ 17} "Clear and convincing evidence" is defined as "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, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶ 18} "Likely," on the other hand, according to Webster's New Collegiate Dictionary, Seventh Edition, "means such as [either] may be or may become***actual;" it differs from the word "probable" in that "probable applies to what is supported by evidence that is strong but not conclusive." Thus, the word "likely differs from [the word] probable in implying either more superficial or more general grounds for judgment or belief."

{¶ 19} Given this low and somewhat contradictory standard in making its determination as to whether a risk of future sexual reoffense is "likely," the trial court must consider all relevant factors listed in the statute, and is required to discuss on the record the particular evidence and factors upon which it relies in making its determination regarding the offender's recidivism. *State v. Thompson*, 92 Ohio St.3d 584, 588, 2001-Ohio-1288.

{¶ 20} The *Thompson* requirement aids the appellate court's function, which in reviewing the trial court's decision at the

hearing, is to examine the record to determine whether the evidence upon which the trial court relied meets the statutory standard of "clear and convincing." *Id.* Thus, it is helpful for the trial court to include in the appellate record all the evidence it obtained on the issue. *Id.*

{¶ 21} Although the Ohio Supreme Court, therefore, has directed a trial court to engage in a weighing process, the trial court is neither required to "tally up or list the statutory factors in any particular fashion," nor required to find that each statutory factor is met. *State v. Ford*, Cuyahoga App. No. 83683, 2004-Ohio-3293. A review of the transcript of the hearing in this case reveals the trial court complied with its duties; consequently, its determination that Harris qualified as a sexual predator finds support in the record.

{¶ 22} The trial court remained mindful that a portion of the evidence submitted by the state was unreliable, thus, that fact was weighed. Pursuant to the supreme court's analysis in *Thompson*, the entire purpose of a psychological assessment is to aid the court in making its determination. Harris' failure to object to the court's decision to limit access to the clinical psychological assessment, therefore, suggests it contained evidence which was deleterious to his defense. Finally, the court considered the facts that: 1) Harris' criminal record indicated he already was a recidivist; and, 2) Harris had been committing still more sexual acts while he was

in prison. *State v. Eppinger*, supra.

{¶ 23} Since the trial court's decision is supported by the evidence contained in the record, Harris' assignment of error, accordingly, is overruled.

{¶ 24} Harris' classification as a sexual predator is affirmed.

It is ordered that appellee recover of appellant 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.

KENNETH A. ROCCO
JUDGE

FRANK D. CELEBREZZE, JR., P.J. and

JAMES J. SWEENEY, J. CONCUR

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).

