

[Cite as *State v. Gus*, 2007-Ohio-3413.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 88502**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

VS.

**ROBERT GUS**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
REVERSED AND REMANDED

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-452651

**BEFORE:** Gallagher, P.J., Rocco, J., and McMonagle, J.

**RELEASED:** July 5, 2007

**JOURNALIZED:**

[Cite as *State v. Gus*, 2007-Ohio-3413.]

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[Cite as *State v. Gus*, 2007-Ohio-3413.]  
SEAN C. GALLAGHER, P.J.:

{¶ 1} This is a second appeal taken by defendant-appellant, Robert Gus. Gus appeals from the decision of the Cuyahoga County Court of Common Pleas that classified him as a sexual predator. Finding error in the proceedings below, we reverse and remand.

{¶ 2} Gus’s first assignment of error states the following:

{¶ 3} “The trial court erred by finding Mr. Gus a sexual predator after this court sustained his appeal and vacated the habitual sex offender classification because there was no predicate sexually oriented offense.”

{¶ 4} At trial, a jury found Gus guilty of multiple counts of gross sexual imposition against his two stepdaughters. The trial court held a sexual predator classification hearing and found that “while there was clear and convincing evidence that the defendant has been convicted of or pleaded guilty to committing a sexually-oriented offense, there was **not** clear and convincing evidence that the defendant is likely to engage in the future in one or more sexually-oriented offenses. **The Court therefore finds that the offender is NOT a sexual predator.** This determination was made pursuant to R.C. 2950.09(C)(2) \* \* \*.” (Emphasis in original.) The trial court went on to find Gus a habitual sex offender. Gus appealed his convictions and his habitual sexual offender classification in *State v. Gus*, Cuyahoga App. No. 85591, 2005-Ohio-6717. This court stated the following:

“Gus maintains that the court erred in doing so [finding him to be a habitual sex offender] since he had no prior conviction for a sexually

oriented offense as required by R.C. 2950.09(C)(2)(c)(ii). The state concedes this argument, as the record does not show that Gus had the predicate prior conviction for a sexually oriented offense. We therefore sustain this assignment of error. \* \* \* In conclusion, we overrule all but the seventh assignment of error relating to the habitual sexual offender classification. That finding is vacated and remanded to the court for a new hearing.”

{¶ 5} Upon remand, the trial court held a *new* sexual predator hearing and, with essentially the same evidence, found Gus to be a sexual predator. We find that the trial court erred when it revisited the sexual predator issue because that issue had already been decided by the trial court. Since the state did not appeal the trial court’s finding that Gus was not a sexual predator, this court addressed and vacated only the habitual sexual offender classification. Although we disagree with the trial court’s original finding that Gus was not a sexual predator, it remains a final decision. *State v. Hultz*, Wayne App. No. 06CA0032, 2007-Ohio-2040 (sexual predator finding is a final appealable order under R.C. 2505.02).

{¶ 6} Gus’s first assignment of error is sustained; therefore, his second assignment of error is moot. The sexual predator finding is reversed, and the case is remanded for the trial court to correct the journal entry and to make a finding that Gus is a sexually oriented offender by operation of law.

Judgment reversed, and case remanded.

It is ordered that appellant recover from appellee 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 common pleas court 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

KENNETH A. ROCCO, J., CONCURS (SEE SEPARATE CONCURRING OPINION) and CHRISTINE T. MCMONAGLE, J., CONCURS IN JUDGMENT ONLY

KENNETH A. ROCCO, CONCURRING:

{¶ 7} I must reluctantly concur with the majority's determination that this court's mandate limited the issues the trial court could address on remand. The limited scope of our order of remand precluded the trial court from reconsidering its determination that appellant was not a sexual predator. I concur separately in order to lament this limitation, because I firmly believe that the court's second determination – that appellant was a sexual predator – was the correct one.

{¶ 8} The court psychiatric clinic's sexual predator evaluation of appellant was unhelpful at best, and may well have misguided the court to its first determination that appellant was not a sexual predator. This evaluation was based almost exclusively on information reported by the appellant himself. Thus,

appellant's denial that he committed these offenses – even after he was found guilty beyond a reasonable doubt – precluded the psychiatrist from exploring any of the psychiatric factors involved in the crimes themselves. Intriguingly, however, the psychiatrist indicated that appellant “scored high on the ‘denier-dissimulator’ scale,” and that “[i]ndividuals who score high on this scale are thought to be attempting to conceal abuse.”

{¶ 9} The psychiatric clinic's report states that the child victims are “related” to appellant, a factor which indicates that there is a lower risk that appellant will reoffend than if the victims were unrelated. However, this broad conclusion fails to note the subtly complicating fact that the victims were appellant's step-children, not his natural children. The psychiatrist noted that appellant's responses to the written portion of the Abel assessment for sexual interest was similar to those of a person who had abused girl victims outside the family, and not like those of individuals involved in incest with female victims. Despite this red flag, however, the report contains no further exploration of appellant's relationship with the girls. This inquiry might have proved fruitful to assess appellant's likelihood of reoffending.

{¶ 10} Not surprisingly, the Static 99 actuarial assessment of appellant's risk of recidivism places appellant at a low risk of reoffending. This assessment does not take into account that, while appellant had no prior convictions, he was convicted in this case of 12 separate sexually oriented offenses which occurred over a nine

month period and involved two child victims whose relationship to appellant was somewhat ambiguous. In my view, the Static 99 is essentially flawed because it fails to take into account the number of separate and distinct sexual offenses of which the defendant is convicted in the case under consideration.

{¶ 11} Based as it was on appellant's self-report, it was also not surprising that the Abel Assessment determined from appellant's written responses that he had no interest in deviant sexual activities, including child molestation – despite the contrary evidence of his convictions here – and that his primary sexual interest involved adolescent and adult females, despite the fact that he was convicted of gross sexual imposition with two barely pubescent female children.

{¶ 12} The court must look beyond the Static 99, the Abel Assessment and the psychiatric evaluations to the relevant factors, including those listed in R.C. 2950.09, to assess whether the offender is likely to engage in the future in one or more sexually oriented offenses. Psychiatric evaluations alone are not enough to support a determination either way, particularly where, as here, the offender refuses to acknowledge his crimes. The question “[w]hether an offender is ‘likely to reoffend sexually’ is not bound by or couched in terms of recidivism test results, but is instead defined by the application and examination of statutory factors and consideration of relevant circumstances and evidence on a case-by-case basis.” *State v. Robertson*, 147 Ohio App.3d 94, 102, 2002-Ohio-494. In this case, appellant was convicted of 12 offenses involving two victims – his step-daughters -- ages 11 and 12. The

offenses occurred over a period of nine months, and involved considerable physical and emotional cruelty, including beatings and threats. Both victims suffered emotional harm as a result of these crimes and required psychiatric treatment. Appellant has been diagnosed with paranoid schizophrenia, a very serious mental illness, as well as post-traumatic stress disorder as a result of physical and sexual abuse he suffered as a child at the hands of his own stepfather. There is ample competent, credible evidence to support a decision that the state proved by clear and convincing evidence that appellant was likely to engage in the future in one or more sexually oriented offenses, and thus was a sexual predator.

{¶ 13} Unfortunately, however, the court's prior decision – that appellant was not a sexual predator – stands because the state never challenged it. I do not believe the public was well-served in this case. Nonetheless, I must agree that the trial court could not reconsider its earlier decision after remand.