

[Cite as *State v. Vanek*, 2007-Ohio-6194.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89125

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHARLES VANEK

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-481371

BEFORE: Cooney, J., Sweeney, P.J., and Kilbane, J.

RELEASED: November 21, 2007

JOURNALIZED:

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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).

[Cite as *State v. Vanek*, 2007-Ohio-6194.]

COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Charles Vanek (“Vanek”), appeals his classification as a sexual predator. Finding no merit to the appeal, we affirm the trial court’s classification.

{¶ 2} In 2006, Vanek was charged with six counts of pandering sexually oriented matter involving a minor and one count of possessing criminal tools. The State alleged that Vanek downloaded images of young children engaged in sexual acts. Vanek pled guilty to two counts of pandering sexually oriented matter involving a minor, one of which was a second degree felony and the other, a fourth degree felony.

{¶ 3} The trial court held a sexual classification hearing and determined that Vanek should be classified as a sexual predator. The trial court also sentenced him to three years of community control sanctions.

{¶ 4} Vanek appeals his classification as a sexual predator, arguing in his sole assignment of error that the trial court’s decision was against the manifest weight of the evidence.

{¶ 5} The trial court must hold a hearing to determine whether an offender who is convicted of or pleads guilty to a sexually oriented offense should be classified as a sexual predator. R.C. 2950.09(B). During the sexual predator hearing, the court "shall determine by clear and convincing evidence whether the offender is a sexual predator." R.C. 2950.09(B)(3). "Clear and convincing evidence is

that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *State v. Eppinger*, 91 Ohio St.3d 158, 164, 2001-Ohio-247, 743 N.E.2d 881, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, 477, 120 N.E.2d 118.

{¶ 6} A sexual predator is defined 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." R.C. 2950.01(E). In making a sexual predator determination, a trial court should consider all relevant factors, which include, but are not limited to, the following: the offender's age, the offender's criminal record, the victim's age, whether there were multiple victims, whether the offender used drugs or alcohol to impair the victim or to prevent the victim from resisting, whether the offender has participated in available programs for sexual offenders, any mental illness or mental disability of the offender, the nature of the offender's conduct with the victim and whether that conduct was part of a demonstrated pattern of abuse, whether the offender displayed cruelty during the commission of the crime, and any other behavioral characteristics that contributed to the offender's conduct. R.C. 2950.09(B)(3); see also *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264.

{¶ 7} Further, a trial court should discuss on the record the evidence and factors of R.C. 2950.09(B)(3) upon which it relied in making its determination. *Eppinger* at 166. That being said, a trial court is not required to list or find a specific number of factors under R.C. 2950.09(B)(3) before it can adjudicate an offender a sexual predator, so long as its determination is grounded upon clear and convincing evidence. *State v. Purser*, 153 Ohio App.3d 144, 149, 2003-Ohio-3523, 791 N.E.2d 1053. Moreover, R.C. 2950.09(B) does not require that each of the above factors be met; the statute simply requires the trial court to consider those factors that are relevant. *State v. Grimes* (2001), 143 Ohio App.3d 86, 89, 757 N.E.2d 413.

{¶ 8} In reviewing a sexual predator classification, this court's role is to determine whether the weight of the evidence supports the trial court's decision. "[A] trial court's determination in a sex-offender-classification hearing must be viewed under the civil manifest-weight-of-the-evidence standard and may not be disturbed when the judge's findings are supported by some competent, credible evidence." *Wilson* at syllabus. A reviewing court must presume that the findings of the trial court are correct. *Id.* at ¶24. Thus, under the standard enunciated in *Wilson*, we must affirm the trial court's determination if it is supported by some competent, credible evidence." See *Id.* at ¶41.

{¶ 9} In the instant case, Vanek argues that his classification was against the manifest weight of the evidence, and he cites the following factors in support of his argument: he was fifty-one years old at the time of the hearing; he had no prior

criminal record; he had a steady job performance; he took full responsibility for his actions; and he showed remorse for his crimes.¹ Vanek also points to the results of his Static-99 and Rapid Risk Assessment of Sex Offender Recidivism Scale (“RRASOR”) tests, which indicated that he was at a low risk of reoffending.

{¶ 10} The trial court in the instant case found the following evidence relevant: (1) that although Vanek was currently engaged in sex-offender treatment, he was in treatment because “he enjoys those images”; (2) Vanek admitted that he would have continued his criminal behavior if he had not been caught; (3) Vanek’s version of the offenses was “less than an admission” and he related different versions to his counselor and the court psychologist; (4) his frequent use of drugs and alcohol; (5) his use of alcohol while committing the offenses; (6) and the court’s inability to prevent Vanek’s access to computers. Based on these factors, the court found that Vanek is likely to engage “in this kind of conduct in the future.” The court concluded that “all the indicators in these reports as well as the conduct causes this court to find that there is clear and convincing evidence that [Vanek] would participate in this conduct in the future.” The court marked as evidence the presentence report, the psychiatric clinic’s report, and the Static-99 and RRASOR reports that were administered by Vanek’s counselor at Advanced Psychotherapy Services.

¹ The record reflects that Vanek had two prior convictions for driving under the influence.

{¶ 11} Although there are factors that favor Vanek in the instant case, we nonetheless cannot ignore the other factors upon which the trial court relied in reaching its determination. As we stated in *State v. Butler*, Cuyahoga App. No. 86554, 2006-Ohio-4492, "[t]he trial court may place as much or as little weight on any of the factors as it chooses; the test is not a balancing one. Nor does the trial court have to find the majority of the factors to be applicable to the defendant in order to conclude the defendant is a sexual predator."

{¶ 12} Although Vanek's statistical risk of reoffending appears low, we note that "the utility of the Static-99 evaluation as a diagnostic tool for individual risk assessment is open to question." *State v. Ellison*, Cuyahoga App. No. 78256, 2002-Ohio-4024. The evaluation merely performs an actuarial assessment of an offender's chances of reoffending. See *State v. Colpetzer*, Cuyahoga App. No. 79983, 2002-Ohio-967. "While actuarial risk assessments are said to outperform clinical risk assessments, actuarial assessments do not, and cannot, purport to make a prediction of a particular offender's future conduct." *Ellison*, supra. We also note that, although Vanek's counselor used the Static-99 test, the court psychiatric clinic did not administer that test, noting that the test is not meant to be used unless a person is charged with or convicted of having sexual contact. We also note that the ABEL assessment test performed by the court psychiatric clinic indicated that Vanek had no sexual interest in children. That same report, however, also stated that a risk factor for sexual offense recidivism was the fact that the computer images Vanek

possessed depicted male child victims. Moreover, we note that Vanek admitted that the images confiscated from his computer depicted sexual contact with children that he thought were around age ten.

{¶ 13} In addition, it bears mentioning that although Vanek's counsel stated during the hearing that there was "no identifiable victim" in this case, the children depicted in the pornographic images found on Vanek's computer are actual victims of Vanek's crimes. See *State v. Stancombe*, Lake App. Nos. 2006-L-021 and 2006-L-045, 2006-Ohio-5181, citing *United States v. Norris* (C.A.5, 1998), 159 F.3d 926, 929-930 (noting that (1) "the simple fact that the images have been disseminated perpetuates the abuse initiated by the producer of the materials," (2) "the mere existence of child pornography represents an invasion of the privacy of the child depicted," and (3) "the consumer of child pornography instigates the original production of child pornography by providing an economic motive for creating and distributing the materials"); *State v. Tish*, Cuyahoga App. No. 88247, 2007-Ohio-1836 (finding that each child pictured is a victim).

{¶ 14} Additionally, even though the report by Vanek's counselor found him to be a low risk for reoffending, it is important to consider as the trial court did, the differing version of events Vanek provided his counselor and the rendition he gave the court psychiatric clinic. In other words, the fact that Vanek downplayed his actions to his counselor could have affected his counselor's findings.

{¶ 15} Therefore, we find that there was competent, credible evidence to support the trial court's finding that the State proved by clear and convincing evidence that Vanek is a sexual predator.

{¶ 16} Accordingly, the sole assignment of error is overruled.

Judgment 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 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.

COLLEEN CONWAY COONEY, JUDGE

JAMES J. SWEENEY, P.J., and
MARY EILEEN KILBANE, J., CONCUR