[Cite as *State v. Malone*, 2015-Ohio-1379.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 101701 and 101702

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TONY MALONE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-13-CR-13-581218-A and CR-14-CR-14-583476-A

BEFORE: McCormack, J., E.A. Gallagher, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: April 9, 2015

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TIM McCORMACK, J.:

{¶1} Defendant-appellant, Tony Malone, appeals his sexual predator classification. For the reasons that follow, we affirm.

{¶2} On December 26, 2013, Malone was charged in Cuyahoga C.P. No. CR-13-581218 with two counts of rape, in violation of R.C. 2907.02(A)(2), and one count of kidnapping, in violation of R.C. 2905.01(A)(4). All counts stem from an incident that occurred on January 8, 1994, involving the victim later identified as L.B.

{¶3} On March 28, 2013, Malone was charged in Cuyahoga C.P. No. CR-14-583476 in a multiple count indictment pertaining to three victims. He was charged with two counts of rape, in violation of R.C. 2907.02(A)(2), and one count of kidnapping, in violation of R.C. 2905.01(A)(4), regarding an incident on January 8, 1994, involving the victim, L.B. He was also charged with six counts of rape, in violation of R.C. 2907.02(A)(2), and one count of kidnapping, in violation of R.C. 2905.01(A)(4), regarding an incident that occurred on October 15, 1994, involving the victim later identified as A.D. Finally, Malone, along with an unknown male, was charged with three counts of rape, in violation of R.C. 2907.02(A)(2), three counts of complicity to commit rape, in violation of R.C. 2923.03(A)(2), and one count of kidnapping, in violation of R.C. 2905.01(A)(4), regarding an incident that occurred on May 14, 1995, involving the victim later identified as P.L.

{¶4} On May 22, 2014, Malone pleaded guilty to amended indictments in both cases. In Case No. CR-13-581218, he pleaded guilty to the rape charge in Count 2 involving L.B. In Case No. CR-14-583476, Malone pleaded guilty to amended Counts 4 and 12, involving A.D. and P.L. Both counts were amended from rape to sexual battery, in violation of R.C. 2907.03(A)(1). All remaining counts were dismissed. The trial court ordered an H.B. 180 sexual offender evaluation and a presentence investigation report ("PSI").

{¶5} On June 23, 2014, prior to imposing sentence, the court heard from the prosecutor, defense counsel, and Malone. The prosecutor provided details regarding each offense and stated that the three offenses were violent in nature. On January 8, 1994, Malone dragged L.B. behind a building at 3:45 a.m., threatened her with a two-by-four, and orally and vaginally raped her. On October 15, 1994, Malone approached A.D. with a knife and orally and vaginally raped her. On May 14, 1995, Malone approached P.L. with a razor blade, forced her into a car where he and another male raped her orally, vaginally, and anally. Malone then dropped P.L. off in a place that was unfamiliar to her, and she had to hitchhike back home. The prosecutor noted that because the three victims sought medical attention and rape kits were collected, the state was able to identify Malone as the perpetrator many years later. The prosecutor also stated that Malone has refused to provide the identity of the other male perpetrator.

{¶6} Defense counsel provided that Malone does not remember the identity of the other male perpetrator because it was 20 years ago. He also stated that Malone was

under the influence of drugs during the time of the incidents. Defense counsel further stated that Malone is 68 years old, has emphysema, and, according to Malone, is not able to have sexual relations anymore. Counsel submits, therefore, that Malone is not a threat to anyone. Malone apologized and offered that he was "messed up on drugs a long time ago."

{¶7} Thereafter, the court sentenced Malone in Case No. CR-13-581218 to 24 months each on Counts 4 and 12, to be served concurrently. The court sentenced Malone in Case No. CR-14-583476 to 10 to 25 years imprisonment on Count 2, to be served concurrently with the sentence in Case No. CR-13-581218.

{¶8} Subsequently, the court conducted an H.B. 180 hearing. The court noted that it reviewed the PSI and the H.B. 180 sexual predator report. The parties stipulated to the contents in the report. The state requested sexual predator classification, arguing that Malone's actions, the nature of the crimes, the pattern of behavior, and his prior history support a sexual predator classification. The state further advised the court that Malone was convicted in 2001 for sexual battery and assault, stating that Malone threatened an ex-girlfriend with a razor and forced her to engage in vaginal and oral sex. The prosecutor noted the similarities in Malone's behavior between the offenses of 1994/1995 and 2001, and it urged the court to classify Malone as a sexual predator. Following the hearing, the court designated Malone a sexual predator.

{¶9} Malone now appeals, arguing in two assignments of error that the trial court erred in classifying him as a sexual predator. Specifically, he contends that the

classification was against the weight of the evidence and violated his due process because there was no evidence showing that he will likely re-offend. In support of his claim, he argues that he is not a threat to anyone because of his age and his present inability to have sexual relations. We address the arguments together.

{¶10} H.B. No. 180, more commonly known as "Megan's Law," is Ohio's former sexual registration law that is codified in the former R.C. Chapter 2950. Megan's Law divided sex offenders into three categories: sexually oriented offenders; habitual sex offenders; and sexual predators. *State v. Cook*, 83 Ohio St.3d 404, 407, 700 N.E.2d 570 (1998); R.C. 2950.09. A sexual predator is defined as an individual 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." Former R.C. 2950.01(E); *State v. Eppinger*, 91 Ohio St.3d 158, 161, 743 N.E.2d 881 (2001). The state must prove that the offender is a sexual predator by clear and convincing evidence. *Id*.

{¶11} Clear and convincing evidence is that which will produce in the trier of fact "a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. While requiring a greater standard of proof than a preponderance of the evidence, clear and convincing evidence requires less than proof beyond a reasonable doubt. *In re Parsons*, 9th Dist. Lorain No. 97CA006662 and 97CA006663, 1997 Ohio App. LEXIS 5141 (Nov. 12, 1997).

{¶12} Under former R.C. 2950.09, the trial court must hold a hearing to determine if an offender convicted of a sexually oriented offense is a sexual predator. *State v. Nelson*, 8th Dist. Cuyahoga No. 101228, 2014-Ohio-5285, ¶ 7. The failure to hold a classification hearing mandated under the statute is plain error. *State v. Jackson*, 8th Dist. Cuyahoga No. 100877, 2014-Ohio-5137, ¶ 27.

{¶13} In making a determination as to whether an offender is a sexual predator, former R.C. 2950.09 mandates that the trial court consider all relevant factors, including the following: (1) the offender's age and prior criminal record; (2) the age of the victim; (3) whether the sex offense involved multiple victims; (4) whether the offender used drugs or alcohol to impair the victim of the sex offense; (5) if the offender has previously been convicted of or pleaded guilty to any criminal offense; (6) whether the offender completed a sentence for any conviction and, if a prior conviction was for a sex offense, whether the offender participated in any available program for sex offenders; (7) whether the offender demonstrated a pattern of abuse or displayed cruelty toward the victim; (8) any mental illness or disability of the offender; and (9) any other behavioral characteristics that contribute to the sex offender's conduct. Former R.C. 2950.09(B)(3).

{¶14} Although these statutory factors should be considered, "a trial court is not required to individually assess each of these statutory factors on the record nor is it required to find a specific number of these factors before it can adjudicate an offender a sexual predator so long as its determination is grounded upon clear and convincing evidence." *State v. Caraballo*, 8th Dist. Cuyahoga No. 89757, 2008-Ohio-2046, ¶ 8,

citing *State v. Ferguson*, 8th Dist. Cuyahoga No. 88450, 2007-Ohio-2777. Therefore, "'so long as the totality of the relevant circumstances provides clear and convincing evidence that the offender is likely to commit a future sexually-oriented offense,'" the trial court may classify an offender as a sexual predator. *Caraballo*, quoting *State v. Randall*, 141 Ohio App.3d 160, 166, 750 N.E.2d 615 (11th Dist.2001).

{¶15} A sex offender classification under Megan's Law is considered civil in nature, and therefore, this court reviews a trial court's determination under a civil manifest weight of the evidence standard. *State v. Larson*, 8th Dist. Cuyahoga No. 101000, 2014-Ohio-4685, ¶ 17, citing *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, syllabus. The civil manifest weight of the evidence standard "affords the lower court more deference than the criminal standard." *Wilson* at ¶ 26. As such, the trial court's determination will not be disturbed where the court's findings are supported by some competent, credible evidence. *Id*.

{¶16} Here, we find that the record includes multiple factors that support the trial court's classification of Malone as a sexual predator. The record demonstrates that Malone was 68 years old at the time of his H.B. 180 hearing. At the time he committed the rape and sexual assaults in 1994 and 1995, respectively, he was approximately 48 or 49 years old. In 2001, he was arrested and charged with rape. He pleaded guilty to an amended indictment and was convicted of sexual battery and felonious assault. The court declared Malone to be a sexually oriented offender. He was approximately 55 years old at the time. The record also shows that in June 2009, when Malone would have

been approximately 63 years old, he was arrested on a parole violation in connection with a gross sexual imposition charge. He was released back on parole, however, in July 2009. Moreover, the record indicates that Malone's extensive criminal history also includes murder, felonious assault, armed robbery, and assault.

{¶17} Additionally, the Static-99, an actuarial instrument designed to assess the risk for sexual offense recidivism, placed Malone at "moderate-high" risk for reoffending. When his age was factored in, however, he was placed in the "low-moderate" risk for reoffending. Malone was diagnosed with antisocial personality disorder and substance dependence. The report recommended substance abuse treatment and indicated that Malone may benefit from participation in sexual offender treatment.

{¶18} Finally, the record shows that the trial court considered several of the statutory factors enumerated in former R.C. 2950.09(B)(3) before classifying Malone as a sexual predator:

> Well, the Defendant's criminal history, as we previously noted, is extensive. And the Defendant in these two cases used force. He used violent force, in fact, and he also has multiple victims here. He has prior sex convictions and, as I stated, he has a long criminal history. He also has a failure to register in the past. He has a score of, you're correct, Mr. Martin, point 40 to offend within 15 years; point 33 within 5; point 38 within 10; he was placed in the moderate-high risk category. He's previously been convicted of murder, assault, and felonious assault. He has prior sex offenses. Based

> on time and date of offense, these would be previous, but he does have sexual offense convictions since the offenses here but before the prosecution of these offenses. The Court believes that the State's request for sexual predator is a fair request given the Defendant's history and the activity in these cases.

{¶19} In light of the above, we find, after reviewing the record, that the state provided clear and convincing evidence that Malone committed violent sexually oriented offenses against multiple victims and he is likely to re-offend. Further, the trial court considered the relevant factors enumerated in former R.C. 2950.09(B)(3) in classifying Malone as a sexual predator. The trial court's sexual predator classification is therefore not against the manifest weight of the evidence, because the court's determination was supported by some competent, credible evidence.

{¶20} Malone's assignments of error are overruled, and his sexual predator classification is affirmed.

{¶21} 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. 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.

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TIM McCORMACK, JUDGE

EILEEN A. GALLAGHER, P.J., and
EILEEN T. GALLAGHER, J., CONCUR