

[Cite as *State v. Hendricks*, 2015-Ohio-3035.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102365

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BENJAMIN HENDRICKS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-08-507237-A

BEFORE: Kilbane, J., E.A. Gallagher, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: July 30, 2015

ATTORNEY FOR APPELLANT

Ruth R. Fischbein-Cohen
3552 Severn Road #613
Cleveland, Ohio 44118

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
Brett Hammond
Assistant County Prosecutor
The Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Benjamin Hendricks (“Hendricks”), appeals from the trial court’s judgment classifying him as a sexual predator.

{¶2} The facts underlying the instant appeal were set forth by this court in Hendricks’s prior appeal, *State v. Hendricks*, 8th Dist. Cuyahoga No. 92213, 2009-Ohio-5556.

[In 2007,] Hendricks was on probation for pandering sexually oriented matter involving a minor. While he was on probation, the Cuyahoga County Sheriff’s Department received a phone call from Hendricks’s roommate reporting that Hendricks was in possession of a laptop computer containing child pornography. The message was forwarded to Hendricks’s probation officer, Cheryl Parker.

Ms. Parker consulted with her supervisor, and they decided to conduct a home visit pursuant to the rules of probation. Under the rules of probation, each probationer consents to warrantless searches of himself, his home, and his vehicle.

Ms. Parker, her supervisor, two detectives from the sheriff’s department, and an officer from the sex offender unit went to Hendricks’s apartment to conduct a search. Prior to the search, Hendricks was informed that they would be looking at his apartment, his computer, and his vehicle. Hendricks signed a form consenting to the warrantless search.

A search of the house produced a laptop computer containing child pornography. The laptop was found in Hendricks’s bedroom, on the bed. The computer was on, and the program “Media Player” was open, as well as the programs “Internet Explorer” and “My Shared Folder.” Ms. Parker testified that they did not open any files, but they did minimize the Media Player window and observed that there were three videos that, from their titles, appeared to contain child pornography. After reading the titles, the detectives from the sheriff’s department seized the computer and then spoke with Hendricks. Hendricks explained where, when, and from whom he bought the computer.

The sheriff's department obtained a search warrant to search the contents of the computer. Two videos containing child pornography and three still photos of child pornography were recovered. Hendricks was indicted.

After his motion for speedy trial and his motion to suppress were denied, Hendricks pled no contest to five counts of pandering sexually oriented matter involving a minor under R.C. 2907.322(A)(1), felonies of the second degree; and five counts under R.C. 2907.322(A)(5) with notice of prior conviction, felonies of the third degree. [The trial court classified him as a Tier III sexual offender because his convictions occurred after the enactment of S.B. 10.]

Id. at ¶ 2-7.

{¶3} On appeal, Hendricks raised several assignments of error challenging the denial of his motion to suppress and his motion for a speedy trial, his sentence, and his sexual offender classification. We overruled all of his assignments of error, except for the assignment of error challenging his sentence. We overruled this assigned error in part and sustained it in part, instructing the trial court to merge the five pandering sexually oriented matter involving a minor under R.C. 2907.322(A)(1) counts with the five counts under R.C. 2907.322(A)(5). *Id.* at ¶ 33.

{¶4} Following our remand, the trial court resentenced Hendricks in February 2010. The trial court merged Counts 1-5 with Counts 6-10, and the state of Ohio elected to proceed with sentencing on Counts 1-5. The trial court imposed a total of seven years in prison. The trial court also classified Hendricks as a Tier III sexual offender.

{¶5} Then in November 2013, Hendricks was before the trial court for a H.B. 180 sexual predator hearing in light of the Ohio Supreme Court's ruling in *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108. Hendricks had to be

reclassified because the *Williams* court found that R.C. Chapter 2950, as amended by S.B. 10, and applied to sex offenders who committed an offense prior to the enactment of S.B. 10, violated the Retroactivity Clause of the Ohio Constitution. *Id.* at syllabus.

{¶6} After an evaluation by the court psychiatric clinic, the court conducted the sexual predator hearing. At the hearing, the state requested that the trial court classify Hendricks as a sexual predator because of his prior criminal history.¹ Hendricks has three prior cases: a 2003 case of importuning resulting from an internet sting operation where he was chatting online with someone he believed to be a 14-year-old girl, and drove to another county to meet her; a 2006 case of child pornography found on his computer while he was on probation; and the current 2007 case, which resulted from child pornography found on his computer while he was on probation. The results from his Static-99 test revealed that he scored a 5, which placed him at the moderate to high-risk category of reoffending.

{¶7} Defense counsel asked that Hendricks be classified as a habitual sexual offender because of his prior convictions. Hendricks argued that the state has not met its burden of proof with respect to classifying him as a sexual predator. After considering all the evidence, including the court psychiatric clinic report and the presentence investigation report, the trial court classified Hendricks as a sexual predator.

¹Alternatively, the state requested, at a minimum, that he be classified as a habitual sexual offender.

{¶8} Hendricks now appeals, raising the following three assignments of error for review, which shall be discussed together.

Assignment of Error One

It was error to classify [Hendricks] a sexual predator.

Assignment of Error Two

The State of Ohio failed to prove by clear and convincing evidence that [Hendricks] is likely to sexually reoffend in the future.

Assignment of Error Three

The designation of “sexual predator” was an overclassification relative to [Hendricks].

{¶9} Within these assigned errors, Hendricks challenges his sexual predator classification. Hendricks argues that the state failed to prove by clear and convincing evidence that he is “likely to engage in the future in one or more sexually oriented offenses.”

{¶10} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court held that

[b]ecause sex-offender-classification proceedings under R.C. Chapter 2950 are civil in nature, a trial court’s determination in a sex offender classification hearing must be reviewed under a civil manifest-weight-of-the-evidence standard and may not be disturbed when the trial judge’s findings are supported by some competent, credible evidence.

Id. at syllabus.

{¶11} The civil manifest weight of the evidence standard “affords the lower court more deference than the criminal standard.” *Id.* at ¶ 26. “Thus, a judgment supported

by ‘some competent, credible evidence going to all the essential elements of the case’ must be affirmed.” *Id.*, citing *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978).

{¶12} “To earn the most severe designation of sexual predator, the defendant must have been convicted of or pled guilty to committing a sexually oriented offense and must be ‘likely to engage in the future in one or more sexually oriented offenses.’ R.C. 2950.01(E).” *State v. Eppinger*, 91 Ohio St.3d 158, 161, 2001-Ohio-247, 743 N.E.2d 881.

{¶13} The state has the burden of proving that the offender is a sexual predator by clear and convincing evidence. *Wilson* at ¶ 20, citing former R.C. 2950.09(B)(4). “Clear and convincing evidence is evidence that ‘will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.’” *Id.*, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. The “clear-and-convincing standard requires a higher degree of proof than a ‘preponderance of the evidence,’ but less than ‘evidence beyond a reasonable doubt.’” *Id.*, quoting *State v. Ingram*, 82 Ohio App.3d 341, 346, 612 N.E.2d 454 (2d Dist.1992).

{¶14} In making its determination as to whether an offender is a sexual predator, the trial court must consider all relevant factors to determine whether the individual is likely to engage in future sex offenses. These factors include, but are not limited to: the offender’s age and prior criminal record; the age of the victim; whether the sex offense involved multiple victims; whether the offender used drugs or alcohol to impair the

victim of the sex offense; if the offender has previously been convicted of or pleaded guilty to any criminal offense; 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; whether the offender demonstrated a pattern of abuse or displayed cruelty toward the victim; any mental illness or disability of the offender; and any other behavioral characteristics that contribute to the sex offender's conduct. Former R.C. 2950.09(B)(3)(a)-(j).

{¶15} We note that the “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; *State v. Purser*, 153 Ohio App.3d 144, 149, 2003-Ohio-3523, 791 N.E.2d 1053 (8th Dist.). “The court need not elaborate on its reasons for finding certain factors as long as the record includes the particular evidence upon which the trial court relied in making its adjudication.” *Caraballo* at ¶ 8, citing *Ferguson*; *Eppinger*, 91 Ohio St.3d at 166, 743 N.E.2d 881 (2001).

{¶16} Hendricks maintains that his prior history of sexual offenses does not automatically label him as a sexual predator, and his diagnosis of personality disorder with antisocial features should not have any bearing on his classification. He further maintains that the factors set forth in R.C. 2950.09(B)(3) were not met. He states that

the crimes were passive in that there was no direct contact with the victims, there were no drugs or alcohol involved, there was no abuse of the victims, and he completed a sexual offender program while in prison. He also notes that his medical issues disallow future sexual offenses. He suffers from Crohn's disease, he utilizes an oxygen tank at all times, he has a seizure disorder, pulmonary fibrosis, a fractured left shoulder, and a hernia.

{¶17} However, in reviewing the record, we find that multiple factors support the trial court's classification of Hendricks as a sexual predator. Hendricks was almost 38 years old at the time of the hearing in 2014. Hendricks's criminal history consists of a 2003 case of importuning resulting from an internet sting operation where he was chatting online with someone he believed to be a 14-year-old girl, and drove to another county to meet her; a 2006 case of child pornography found on his computer while he was on probation; and the current 2007 case, which resulted from child pornography found on his computer while he was on probation. He was approximately 27 to 31 years of age when these offenses were committed. With regard to his medical issues, Hendricks did not present any evidence that his medical condition existed after the commission of these sexually oriented offenses. The record demonstrates that he was diagnosed with Crohn's disease and he had left shoulder surgery in 2002. These medical conditions did not prevent his past sexual criminal acts, and there is no evidence that these conditions will disallow future offenses.

{¶18} The results from his Static-99 test revealed that he scored a 5, which placed him at the moderate- to high-risk category of reoffending. Hendricks is 33 percent likely

to commit another sexual offense within five years, 38 percent more likely to commit another sexual offense in 10 years, and 40 percent more likely to commit another sexual offense in 15 years. Hendricks was also diagnosed with personality disorder with antisocial features and posttraumatic stress disorder.

{¶19} Additionally, the court considered several statutory factors enumerated in former R.C. 2950.09(B)(3) before classifying Hendricks as a sexual predator, including:

[H]is prior sexual offenses, the importuning in 2003, these pandering allegations, or convictions, in 2006. The 2003 victim is not related to the defendant.

[His] antisocial personality disorder, which truly concerns the Court, with respect to defendant's ability to conform to the norms of society.

[H]e violated his probation several times on the prior case.

{¶20} The court further noted that Hendricks appeared to manipulate his responses to the testing. The court stated that:

the indication that perhaps the test results and the actual testing of this defendant were purposefully manipulated by the defendant, due to his — how he responded. As described in [the Court Psychiatric Clinic Report], I believe it's describe as reflexive responding after being instructed how not to reflexively respond.

And that his subjective rating of his sexual interest as — or indication of his moderately sexually disgusting with — or in reference to adult females, and that other gender/race categories highly sexually disgusting as — this self-reporting, this reflexive responsiveness kind of indicates this pattern to manipulate the results of testing.

{¶21} In light of the foregoing, we find that the state provided clear and convincing evidence that Hendricks committed sexually oriented offenses against multiple victims and he is likely to reoffend. This has been established by the record and

Hendricks's consistent criminal behavior occurring in 2003, 2006, and 2007. Each offense involved a different minor victim and the 2007 offense was committed while he was on probation. His Static-99 results placed him at a moderate- to high-risk category of reoffending, with the likelihood to reoffend increasing as time passes. Furthermore, the trial court considered the relevant factors enumerated in former R.C. 2950.09(B)(3) in classifying Hendricks as a sexual predator. Therefore, the trial court's sexual predator classification is supported by competent, credible evidence and is not against the manifest weight of the evidence.

{¶22} Accordingly, the first, second, and third assignments of error are overruled.

{¶23} Judgment 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 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.

MARY EILEEN KILBANE, JUDGE

EILEEN A. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR