

[Cite as *State v. Trem*, 2016-Ohio-392.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102894

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

JOSEPH TREM

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-94-312378-A

BEFORE: Stewart, J., E.T. Gallagher, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: February 4, 2016

ATTORNEYS FOR APPELLANT

Timothy J. McGinty
Cuyahoga County Prosecutor

Daniel T. Van
Assistant County Prosecutor
Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113

ATTORNEY FOR APPELLEE

Edward M. Heindel
The Standard Building, Suite 450
1370 Ontario Street
Cleveland, OH 44113

MELODY J. STEWART, J.:

{¶1} In 1995, appellee Joseph Trem pleaded guilty to multiple counts of rape and gross sexual imposition committed over a period of years against his daughter, the daughter’s friend, and the friend’s brother. The court imposed an aggregate prison term of 20 years to life. After we affirmed the court’s refusal to grant Trem’s 2014 motion to withdraw his guilty plea, *see State v. Trem*, 8th Dist. Cuyahoga No. 101265, 2014-Ohio-4934, the court classified him as a sexually oriented offender under the former Megan’s Law. The state appeals, solely assigning as error that the court abused its discretion by refusing to classify Trem as a sexual predator.

{¶2} Former R.C. 2950.01 et seq., codified under H.B. 180 and popularly known as “Megan’s Law,” creates three classifications for sexual offenders: sexually oriented offender, habitual sex offender, and sexual predator.¹ *See* former R.C. 2950.09. The principle distinctions in the classifications are the reporting requirements: sexual predators have to register their address every 90 days for life; habitual sex offenders have to register their address annually for 20 years; and sexually oriented offenders have to register their address annually for 10 years. *See* former R.C. 2950.04(C)(2); former 2950.06(B)(1) and (2); and former 2950.07(B)(1) and (2).

{¶3} The state argues that the court erred by not classifying Trem as a sexual predator. Former R.C. 2950.01(E) defined a “sexual predator” 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.” The state had the burden of proving by clear and

¹ The current sexual offender registration act, the Adam Walsh Act, became effective January 1, 2008. However, because Trem committed his sexual offenses before the enactment of the Adam Walsh Act, he was subject to Megan’s Law. *State v. Howard*, 134 Ohio St.3d 467, 2012-Ohio-5738, 983 N.E.2d 341, ¶ 17.

convincing evidence that Trem was a sexual predator. *State v. Hendricks*, 8th Dist. Cuyahoga No. 102365, 2015-Ohio-3035, ¶ 13.

{¶4} Former R.C. 2950.09(B)(3) provided certain factors to guide the court's determination as to whether an offender is a sexual predator.² These factors include the age of the offender and criminal record; the victim's age; whether the offense involved multiple victims; whether the offender used drugs or alcohol to impair the victim; if the offender has previously been convicted of any criminal 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. *See* former R.C. 2950.09(B)(3)(a)-(j). Although the court must consider the factors set forth in former R.C. 2950.09(B), it is not required to make an individual assessment of those factors nor is one factor or any combination of factors dispositive. *State v. Caraballo*, 8th Dist. Cuyahoga No. 89757, 2008-Ohio-2046, ¶ 8.

{¶5} Sexual predator classifications under Megan's Law are considered civil in nature, *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, syllabus, so the civil manifest weight of the evidence standard of review applies on appeal. *State v. Nelson*, 8th Dist. Cuyahoga No. 101228, 2014-Ohio-5285, ¶ 8. That standard gives "great deference" to findings of fact, so judgments supported by competent, credible evidence must be affirmed. *Wilson* at ¶ 26.

² Under the Adam Walsh Act, sexually oriented offenders are automatically classified by tier "based solely upon the offense for which a person is convicted and the judge has no discretion to modify the classification[.]" *State v. Blankenship*, Slip Opinion No. 2015-Ohio-4624, ¶ 11.

{¶6} The state argues that it offered clear and convincing evidence of Trem’s likelihood to engage in the future in one or more sexually oriented offenses based on the circumstances of the crimes to which he pleaded guilty. Its proof consisted primarily of the details of the offenses as testified to by the daughter at the classification hearing.

{¶7} Trem’s crimes were heinous: his daughter was eight years old when he first began sexually abusing her and he continued to do so for a period of five years. Although the daughter’s memory had faded because of the passage of time (nearly 30 years had passed), she recalled that Trem’s conduct originally began with his asking her to watch him bathe. She recalled that he “consistently had pornography available like sitting out where you could not not notice and ask questions and be curious.” This escalated to having her and her friend playing “strip pool” and his request that they “touch each other” while he watched. Trem then began “touching” the daughter, using alcohol or gifts to facilitate his desires. He soon had the daughter watch pornography in video form, and at some point thereafter began having sexual intercourse with her. She described how one year her desire for a ten-speed bicycle required “ten interactions for Christmas.” During an outing on the family boat with the daughter, her friend, and the friend’s brother, Trem asked his daughter to touch her friend’s brother while Trem watched. The daughter testified that “I just remember many of my friendship interactions even as I got a little bit older always trying to figure out either; one, did I have to do something to be allowed to go out; or two, if I brought friends to the house what did I have to do to avoid this turning into a sexual interaction.”

{¶8} Arguing against a sexual predator classification, Trem cited his sterling record as an inmate as proof that he had been rehabilitated and the low likelihood that he would commit another sexually oriented offense in the future. As even the state conceded, Trem had been a

model inmate: he had no behavior tickets in 20 years of imprisonment and was in the lowest prison security level; he earned a college degree in horticulture and completed course work in psychology and hotel and restaurant management. He started several prison programs to assist inmates, had been credited with 5,200 hours of community service, had completed psychological reintegration counseling, and participated in sex offender and victim awareness programs. His institutional history showed a commendation from prison staff for preventing the rape of a university professor by another inmate.

{¶9} In addition to his institutional record, Trem noted the results of testing and assessments by the court's psychological clinic. In particular, he pointed to the raw results of a Static-99 assessment showing that he had a nine percent likelihood of sexually reoffending within five years; a 13 percent likelihood of reoffending in 10 years; and a 16 percent likelihood of reoffending within 15 years. With his age (64 years old) factored into those results, the Static-99 predicted with a 95 percent confidence interval a sexual offense recidivism rate of 2.1 percent within 5 years, a level that the evaluator described as "low."

{¶10} After considering the factors set forth in former R.C. 2950.09(B)(3), the court stated:

The Court does not in any way, shape or form diminish in its holding on this issue of whether or not Mr. Trem should be considered a sexual predator or something else for his reporting requirements post-release from prison to any way diminish what happened to his daughter and the two young victims who are now deceased. What he did to his daughter is unthinkable, is horrendous, and it's still showing 29 years later. But I am not here to sentence him on what he did to his daughter or those other two young people. I have to follow the law in terms of the classification that I give him. And in that regard, considering all these factors, and the State's burden of proof to demonstrate that he will, in fact, repeat this kind of conduct, what it comes down to is that Static-99 which the courts do rely upon. It's a test that's not perfect, there is no doubt about it. It's not perfect. But better stated by [counsel for Trem] in terms of with Mr. Trem being rated as a negative 1 overall, that includes his age of 64, but even not considering his age, his risk

factor he was a 2, which is low to moderate, and when you state it in the terms that [counsel] did in terms of the percentage, I do not believe based upon all the factors that I've considered, all the evidence, and again without discounting the horror that Mr. Trem caused to his family and others, for purposes of this evaluation, this hearing, I do not find that he is a sexual predator, the State has not proven that by clear and convincing evidence.

{¶11} The state makes a two-prong argument against the court's determination that it lacked clear and convincing evidence to find that Trem had a likelihood of committing a future, sexually oriented offense: first, that the court's ruling was inconsistent with a number of appellate decisions that have affirmed sexual predator classifications based on similar and sometimes less egregious facts; second, that the court gave too much weight to the results of the Static-99 given that this court has criticized the use of the Static-99 as a diagnostic tool.

{¶12} We reject the state's attempt to find the court's decision in this case to be against the manifest weight of the evidence based on unrelated appellate decisions. The Ohio Supreme Court has stated that the factors listed in R.C. 2950.09(B)(2) "do not control a judge's discretion" because the statute "does not direct the court on what weight, if any, it must assign to each factor." *State v. Thompson*, 92 Ohio St.3d 584, 587-588, 2001-Ohio-1288, 752 N.E.2d 276. Consequently, Megan's Law must be applied on a case-by-case basis. *See State v. Gropp*, 9th Dist. Lorain No. 97CA006744, 1998 Ohio App. LEXIS 1465, *18 (Apr. 8, 1998); *State v. Robertson*, 147 Ohio App.3d 94, 2002-Ohio-494, 768 N.E.2d 1207, ¶ 20 (3d Dist.). And if Megan's Law is applied on a case-by-case basis, classifications must be reviewed on appeal the same way.

{¶13} The state's remaining argument is that the court gave too much weight to the results of the Static-99 assessment, an assessment that this court has criticized.

{¶14} It is true that we have been critical of the Static-99 assessment. In *State v. Ellison*, 8th Dist. Cuyahoga No. 78256, 2002-Ohio-4024, we explained:

The [Static-99] evaluation merely performs an actuarial assessment of an offender's chances of reoffending. See *State v. Colpetzer*, 8th Dist. Cuyahoga 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. In fact, the use of an actuarial assessment could arguably be at odds with Ohio's statutory scheme. R.C. 2950.01(E) and R.C. 2950.09(B) require a determination that the offender is likely to engage in the future in one or more sexually oriented offenses. This is an individualized determination for a particular offender. The STATIC-99 cannot purport to make an individualized assessment of future conduct any more than a life expectancy table can provide a accurate prediction of a particular individual's longevity.

{¶15} We have stated that “while the trial court could consider the Static-99 results, it was not required to defer to those results when weighing the statutory factors.” *State v. Gray*, 8th Dist. Cuyahoga No. 100492, 2014-Ohio-3139, ¶ 19; see also *State v. Purser*, 153 Ohio App.3d 144, 2003-Ohio-3523, 791 N.E.2d 1053, ¶ 42 (8th Dist.) (“psychological tests designed to indicate a sexual offender's propensity to reoffend, and the resulting risk level, must * * * not be blindly relied upon.”). But like any other factor, the weight a court gives to a Static-99 assessment is within the court's discretion. We cannot substitute our judgment for that of the trial judge. *State v. Blake-Taylor*, 8th Dist. Cuyahoga No. 100419, 2014-Ohio-3495, ¶ 12.

{¶16} An examiner from the court's psychiatric clinic wrote a report stating that the Static-99 assessment, after adjustments for the age of the offender, predicted a sexual offense recidivism rate for Trem of 2.1 percent within five years, with a 95 percent confidence interval of 1.3 to 3.4 percent. The examiner said this meant he could state with a 95 percent confidence level that the “true sexual recidivism rate” in the next five years for a male in the age category 60 years and older was 1.3 to 3.4 percent.

{¶17} The parties devoted a great deal of argument on the results of the Static-99 assessment — Trem arguing that it showed he posed a low risk of reoffending; the state arguing that the Static-99 assessment alone should not control the outcome given the nature and extent of the sexual abuse perpetrated by Trem. The court addressed these results when announcing its decision, telling the parties that “it comes down to” the Static-99, a test that “the courts do rely upon.” It acknowledged that the Static-99 was “not perfect,” but concluded that the assessment indicated such a low risk of reoffending that the state did not prove by clear and convincing evidence that Trem was likely to commit future sexually oriented offenses.

{¶18} The court’s finding was not against the manifest weight of the evidence. Apart from the nature of the offenses that Trem had committed some 30 years earlier, the state had nothing to counter the results of the Static-99. And the court also heard that Trem had established an exemplary record as an inmate. What is more, the court’s own expert noted that offenders like Trem who were over 60 years of age were less likely to reoffend than similar, younger offenders. So while the court did place emphasis on the results of the Static-99, Trem’s exemplary prison record and his age at the time of the classification greatly diminished the state’s case that Trem was a sexual predator. On this record, we have no basis for concluding that there was clear and convincing evidence that Trem would in the future commit sexually oriented offenses such that the court’s classification ignored the evidence.

{¶19} Judgment affirmed.

It is ordered that appellee recover of said 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.

MELODY J. STEWART, JUDGE

EILEEN T. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR