[Cite as *State v. Dobrski*, 2007-Ohio-3121.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO	C. A. No. 06CA008925
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
STANLEY DOBRSKI	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 05 CR066974

DECISION AND JOURNAL ENTRY

Dated: June 25, 2007

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

DICKINSON, Judge.

{¶1} Stanley Dobrski, Jr. pleaded no contest to six charges of rape, six charges of gross sexual imposition, and one charge of kidnapping. The trial court's journal entry incorrectly recited that he had pleaded guilty to the charges against him and did not include a finding that he was guilty. In that entry, the trial court sentenced him to a total of 18 years imprisonment and classified him a sexual predator. He has argued on appeal that the trial court erred in imposing sentence on him by following the Ohio Supreme Court's ruling in *State v. Foster*, 109 Ohio St. 3d 1 (2006). He has also argued that the trial court erred by failing to make necessary findings under Section 2950.09(B)(3) of the Ohio Revised Code

before classifying him a sexual predator. The first issue on appeal, however, which this Court raises sua sponte, is whether the trial court's sentencing entry and sexual predator determination are final and appealable. This Court dismisses Mr. Dobrski's first assignment of error based upon its recent holding in *State v. Miller*, 9th Dist. No. 06CA0046-M, 2007-Ohio-1353, that a trial court's failure to include either "the verdict or findings" in its journal entry prevents that journal entry from being a final, appealable order. Further, however, because the trial court's sexual predator determination is an order that affected a substantial right made in a special proceeding, it is final and appealable. This Court reverses the trial court's sexual predator determination and remands for a new hearing on that issue because the trial court failed to discuss on the record the particular evidence and factors upon which it relied in making that determination.

I.

A.

{¶2} Mr. Dobrski's first assignment of error is that the trial court erred in imposing sentence on him by following the Ohio Supreme Court's ruling in *State v. Foster*, 109 Ohio St. 3d 1 (2006). This Court is without jurisdiction to consider this assignment of error.

{¶3} In *Miller*, this Court held that a journal entry must contain five things to comply with Rule 32(C) of the Ohio Rules of Criminal Procedure:

> This rule requires that the trial court's judgment of conviction contain:

1. the plea;
2. the verdict or findings;
3. the sentence;
4. the signature of the judge; and
5. the time stamp of the clerk to indicate journalization.

Id. at ¶5. But see *State v. Williams*, 9th Dist. No. 06CA008927, 2007-Ohio-1897 (Dickinson, J., concurring). This Court further held in *Miller* that the failure to satisfy Rule 32(C) renders a journal entry a non-final order that cannot be appealed. *Miller* at ¶20. But see *Williams* (Dickinson, J., concurring).

{¶4} In this case, the trial court failed to include "the verdict or findings" in its journal entry. Accordingly, under this Court's holding in *Miller*, it is not a final, appealable order. This Court is without jurisdiction to consider Mr. Dobrski's first assignment of error.

B.

{¶5} Mr. Dobrski's second assignment of error is that the trial court incorrectly classified him a sexual predator without considering, reviewing, or discussing the factors listed in Section 2950.09(B) of the Ohio Revised Code. Despite the fact that this Court is without jurisdiction to consider Mr. Dobrski's first assignment of error, it does have jurisdiction to consider his second assignment of error.

{¶6} Section 2505.02(B)(2) of the Ohio Revised Code provides that an order is final and appealable if it is "[a]n order that affects a substantial right made

in a special proceeding[.]" Section 2505.02(A)(2) of the Ohio Revised Code defines a "special proceeding" as "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity." The proceeding to classify an offender as a sexual predator was created by Section 2905.09 of the Ohio Revised Code and did not exist prior to 1853. Such a proceeding, therefore, is a "special proceeding" within the meaning of Section 2505.02(A)(2). Section 2505.02(A)(1) of the Ohio Revised Code defines a substantial right as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." Classification as a sexual predator affects where an offender may live and imposes upon him a duty to register with law enforcement agencies where he lives and works. Such a classification, therefore, affects a substantial right. Inasmuch as a sexual predator classification is an order that affects a substantial right in a special proceeding, it is final and appealable. See *State v. Hultz*, 9th Dist. No. 06CA0032, 2007-Ohio-2040, at ¶22.

{¶7} The concurring opinion suggests that Section 2950.09 of the Ohio Revised Code provides additional support for the conclusion that a sexual predator determination is a final, appealable order. While that section does provide that either the prosecutor or the offender may appeal the court's determination of whether the offender is or is not a sexual predator, it does not provide when that

appeal may be taken and, more significantly, does not purport to provide that the determination is a final, appealable order. Section 2505.02(B)(2) does that.

{¶8} The trial court conducted a hearing on whether Mr. Dobrski should be classified as a sexual predator on April 14, 2006, immediately prior to his sentencing. The State requested that he be classified a sexual predator because the victim was his 12-year-old daughter, whom he had assaulted repeatedly over a year and a half. The State also noted that there were drinking and domestic issues "involved in the house." It concluded that "there is a severe likelihood that [Mr. Dobrski] will continue to repeat that behavior whenever it is that he is released."

{¶9} Mr. Dobrski's lawyer argued that Mr. Dobrski's situation did not satisfy "enough of the factors under the statute to be labeled as a sexual predator." He requested that he be classified a sexually oriented offender.

{¶10} The trial court asked the prosecutor and Mr. Dobrski's lawyer to help him with the classifications, saying, "[i]t's been a while since I worked with it at this point." Mr. Dobrski's lawyer explained that a classification as a sexually oriented offender requires registration for 10 years, a classification as a habitual sexual offender requires registration for 20 years, and a classification as a sexual predator requires registration for life. The trial court then stated that it was going to classify Mr. Dobrski as a habitual sexual offender:

> This Court's going to make a classification that because of the number of offenses involved here, it was not over a huge period, but

> it was over a period of one year, going to make a classification of a habitual sexual predator at this point.

There was then a discussion about Mr. Dobrski signing a form explaining the restrictions that would apply to him as a habitual sexual offender.

{¶11} The court next indicated that it was ready to move on to sentencing. As it was beginning to do so, however, the prosecutor interrupted and asked if she and Mr. Dobrski's lawyer could have a discussion with the court at side bar. Following that discussion, the court changed its classification of Mr. Dobrski from a habitual sexual offender to a sexual predator. The only reason stated by the trial court for classifying Mr. Dobrski as a sexual predator was that he could not properly be classified as a habitual sexual offender:

> THE COURT: The Court having been advised that the fact that there is not a prior to this, the Court will make then -- withdraws its finding on habitual and make the, make a classification of sexual predator at this point.
>
> . . . .
>
> THE COURT: . . . Now, I think, Ms. [Prosecutor], does that satisfy your classification at this point?
>
> [Prosecutor]: Yeah. As I look at it, I have another guide, and I believe that the issue we discussed at side bar regarding prior is a requirement for habitual.
>
> THE COURT: Now --
>
> [Mr. Dobrski's Lawyer]: I think we can stipulate, Judge, that Stanley does not have a prior sexually oriented offense.
>
> THE COURT: At least I can't -- I don't see one listed.

> [Mr. Dobrski's Lawyer]: Or offense that would kick in the habitual sexual offender possibility. And so it's our position that the only classification that the Court could make, would be a sexually oriented offender. The Court has found otherwise, and we will leave that for a later date with the appellate court.

The trial court then proceeded to sentence Mr. Dobrski.

{¶12} In *State v. Eppinger*, 91 Ohio St. 3d 158 (2001), the Ohio Supreme Court suggested a model sexual offender classification hearing that would accomplish three objectives. The third objective listed by the court is particularly relevant to this case. A trial court should consider and discuss on the record the evidence and factors upon which it relies in making a classification:

> Finally, the trial court should consider the statutory factors listed in R.C. 2950.09(B)(2), and should discuss on the record the particular evidence and factors upon which it relies in making its determination regarding the likelihood of recidivism.

Id. at 166.

{¶13} In this case, the trial court failed to articulate any evidence or factors that it relied upon in determining that Mr. Dobrski is likely to again commit a sexually oriented offense once he is released from prison. As noted by the Supreme Court in *Eppinger*, the legislature did not contemplate that every individual who commits a sexually oriented offense will automatically be classified a sexual predator:

> Although certainly even one sexually oriented offense is reprehensible and does great damage to the life of the victim, R.C. Chapter 2950 is not meant to punish a defendant, but instead, "to

> protect the safety and general welfare of the people of this state." R.C. 2950.02(B). Thus, if we were to adjudicate all sexual offenders as sexual predators, we run the risk of "being flooded with a number of persons who may or may not deserve to be classified as high-risk individuals, with the consequence of diluting both the purpose behind and the credibility of the law. This result could be tragic to many." . . . Moreover, the legislature would never have provided for a hearing if it intended for one conviction to be sufficient for an offender to be labeled a "sexual predator."

Eppinger, 91 Ohio St. 3d at 165.

{¶14} Perhaps Mr. Dobrski should be classified a sexual predator. At this point, however, the record is inadequate to allow meaningful review of the trial court's classification of him as one. Accordingly, his second assignment of error must be sustained.

II.

{¶15} Mr. Dobrski's first assignment of error is dismissed for lack of subject matter jurisdiction. This Court encourages the trial court to enter a final, appealable order as soon as possible. After the trial court files such an entry, if Mr. Dobrski desires to appeal, he must file a new notice of appeal. The parties may then move this Court to transfer the record from this appeal to the new appeal and for leave to submit the matter on the same briefs as were filed in this case. If they do, this Court will consider that appeal in an expedited manner. See *State v. Sandlin*, 4th Dist. No. 05CA23, 2006-Ohio-5021, n.4.

{¶16} Mr. Dobrski's second assignment of error is sustained. The trial court's sexual predator determination is reversed, and this matter is remanded for further proceedings consistent with this opinion.

Appeal dismissed in part
reversed in part,
and cause remanded in part.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

CLAIR E. DICKINSON
FOR THE COURT

SLABY, P. J.
CONCURS, SAYING:

{¶17} I concur in the majority's determination that a sentencing order lacking a finding is not a final appealable order, and that it does not give this Court jurisdiction over any claims related to the sentencing. I write separately to point to an additional reason that this Court has jurisdiction over this appeal.

{¶18} The statute governing sexual predator adjudications, R.C. 2950.09, specifically provides for an offender's appeal as of right upon the trial court's determination: "The offender *** and the prosecutor who prosecuted the offender *** for the sexually oriented offense in question may appeal as a matter of right the court's determination under this division as to whether the offender *** is, or is not, a sexual predator." R.C. 2950.09(B)(4). Moreover, R.C. 2950.09 does not require that a defendant be sentenced before the trial court holds a hearing to decide whether an offender is a sexual predator. Instead, the statute requires only that an offender be convicted of or plead guilty to a sexually oriented offense. R.C. 2950.09(A). The statute further states that that "the judge *shall* conduct the [sexual predator hearing] *prior to sentencing*[.]" R.C. 2950.09(B)(2) (Emphasis added.) Nowhere does this statute contemplate that the sentencing order itself must be final before the trial court has determined that the offender is a sexual predator. See *State v. Hultz*, 9th Dist. No. 06CA0032, 2007-Ohio-2040.

CARR, J.
CONCURS, IN PART, AND DISSENTS, IN PART, SAYING:

{¶19} I concur with the majority's finding that this Court lacks subject matter jurisdiction to address appellant's first assignment of error, because the trial court did not enter any finding of guilt after appellant entered his no contest plea.

{¶20} I respectfully dissent, however, as to the majority's finding that we have jurisdiction to consider appellant's second assignment of error that the trial court incorrectly classified him as a sexual predator. Under the circumstances of this case, I would find that this Court lacks subject matter jurisdiction to consider appellant's second assignment of error.

{¶21} The concurring opinion correctly states that R.C. 2950.09 does not require that a defendant be sentenced prior to holding a hearing to determine whether an offender is a sexual predator. Specifically, R.C. 2950.09(A) provides for automatic classification as a sexual predator under certain circumstances where the offender has also either been convicted of or pleads guilty to committing a sexually oriented offense. In this case, appellant pled no contest, rather than guilty. Furthermore, because the trial court failed to enter a finding of guilt after appellant's no contest plea, appellant has not yet technically been convicted of the offenses.

{¶22} R.C. 2950.09(B)(1)(a) mandates that the "judge who is to impose sentence on a person who is convicted of or pleads guilty to a sexually oriented offense *** shall conduct a hearing to determine whether the offender is a sexual

predator ***." In this case, the trial judge could not have imposed sentence on appellant, because he had not yet been convicted absent a finding of guilt after his no contest plea. The statute is clear that, while sentencing itself shall follow the sexual offender classification hearing, a conviction on a sexually oriented offense is a prerequisite to the determination of sexual predator status. Accordingly, the matter was not ripe for hearing and determination that appellant is a sexual predator.

{¶23} I am further troubled by the majority's determination that this Court has jurisdiction to review a sexual predator classification without an underlying conviction, because a significant number of the relevant factors that the trial court is directed to consider in its determination are directly related to facts arising out of the offender's conviction. Specifically, R.C. 2950.09(B)(3) directs the trial court to consider the age of the *victim* of the sexually oriented offense *for which sentence is to be imposed*; whether the sexually oriented offense *for which sentence is to be imposed* involved multiple *victims*; whether the offender used drugs or alcohol to impair the *victim of the sexually oriented offense* or to prevent the *victim* from resisting; the nature of the offender's sexual contact, or interaction in a sexual context with the *victim of the sexually oriented offense* and whether the sexual conduct, contact, or interaction was part of a demonstrated pattern of abuse; and whether the offender, during the commission of the sexually oriented offense *for which sentence is to be imposed*, displayed cruelty or made threats of cruelty.

R.C. 2950.09(B)(3)(c), (d), (e), (h) and (i). Without an underlying conviction, there can be no established victim and no sexually oriented offense for which sentence could be imposed. It is axiomatic that, without the facts which give rise to the underlying conviction, the facts necessary for a subsequent determination whether an offender may be classified as a sexual predator have not been established.

{¶24} Finally, I am concerned about the practical impact of the decision to address a challenge to a sexual predator determination in the absence of a final, appealable order of conviction. This Court recently held that we do not have jurisdiction to address piecemeal appeals of criminal convictions. In *State v. Goodwin*, 9th Dist. No. 23337, 2007-Ohio-2343, we stated:

> "Allowing, or indeed requiring, a criminal defendant who wishes to appeal to appeal on some charges before all charges against him or her in a case have been disposed of would potentially result in multiple appeals from the same case, each appeal addressing less than all the issues. Among other things, such a procedure would unnecessarily generate law of the case issues.
>
> "***
>
> "This Court concludes that requiring all charges against a defendant in a single case to be disposed of before the trial court's judgment on any charge is final is what the legislature intended in adopting Section 2505.02(B)(2) of the Ohio Revised Code and furthers the purpose underlying Article IV, Section 3(B)(2), of the Ohio Constitution. Further, to the extent possible, this Court needs to be consistent for the guidance of trial courts and future litigants." Id. at ¶¶11 and 13.

{¶25} In *Goodwin*, in recognizing the requirement in R.C. 2505.02(B)(1) that a "final order" be an order "that in effect determines the action," this Court found that the word "action," when used in connection with a legal proceeding, "refers to the entire legal proceeding, regardless of how many individual claims are included in that legal proceeding." Id. at ¶10.

{¶26} Although I dissented in *Goodwin*, I did so upon reasoning that each conviction and sentence is independent from all others, irrespective of whether multiple charges have been disposed in a single case. In this case, a sexual predator classification cannot by its nature be independent of the underlying conviction of a sexually oriented offense. The sexual predator determination is a proceeding necessary to the complete disposition of the underlying criminal action. Accordingly, I find that this Court is bound by stare decisis and is precluded from reviewing on appeal appellant's sexual predator classification in the absence of a final, appealable order of conviction.

{¶27} The majority has not addressed the contingency, where we uphold the trial court's determination that the offender is a sexual predator, yet reverse his conviction of the sexually oriented offense(s) in a later appeal. Under those circumstances, will a defendant be permitted to file a second appeal regarding his sexual predator adjudication? Would a defendant have the sophistication and knowledge to file a motion to vacate the sexual predator adjudication pursuant to Civ.R. 60(B)? Would an indigent defendant have any meaningful ability to appeal

the collateral disability which is not supported by any legal basis? For the reasons set forth above, I respectfully dissent from the majority's finding that this Court has jurisdiction to consider appellant's second assignment of error regarding the propriety of his classification as a sexual predator.

APPEARANCES:

JACK W. BRADLEY, Attorney at Law, for appellant.

DENNIS WILL, Prosecuting Attorney and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for appellee.