

[Cite as *State v. Beal*, 2004-Ohio-5364.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
	:	
STATE OF OHIO	:	Hon. John W. Wise, P.J.
	:	Hon. Julie A. Edwards, J.
Plaintiff-Appellee	:	Hon. John F. Boggins, J.
	:	
-vs-	:	
	:	Case No. 04-CA-24
MICHAEL W. BEAL	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Richland County Court of Common Pleas, Case No. 03-CR-386H

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: OCTOBER 1, 2004

APPEARANCES:

For Plaintiff-Appellee

BAMBI S. COUCH PAGE
Assistant Prosecutor
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For Defendant-Appellant

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Boggins, J.

{¶1} Defendant-appellant Michael W. Beal appeals the January 27, 2004, Judgment Entry entered by the Richland County Court of Common Pleas, which classified him a sexual predator.

{¶2} Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} On July 10, 2003, Appellant was indicted by the Richland County Grand Jury on two counts of Menacing by Stalking.

{¶4} These charges stemmed from wherein Appellant was leaving notes for a ten (10) year old child in an attempt to lure that child to his residence. One of the notes contained a map from the child's house to his, "marked secret". Another note stated "he doesn't know what to do to make you feel good all over inside and out like I can. I thought you liked me. I have always liked you I haven't changed."

{¶5} On October 26, 2003, Appellant entered a guilty plea to one count of Menacing by Stalking, a violation of R.C. 2903.211(A)(2)(d), a fourth degree felony.

{¶6} On December 11, 2003, Appellant was sentenced to three years of community control. A sexual predator hearing was scheduled for December 31, 2003.

{¶7} On December 31, 2003, the trial court conducted a two hour hearing to determine Appellant's status. At said hearing, the trial court heard testimony from State of Ohio Parol Officer Kim Marcelli and Detective Jeff Shook of the Mansfield Police Department.

{¶8} On January 2, 2004, the trial court filed a Judgment Entry designating Appellant as a sexual predator and ordering him to appear on January 22, 2004, to be

informed as to the registration and notification requirements.

{¶9} On January 27, 2004, the trial court filed a Judgment Entry and Notice of Duties to Register as an Offender of a Sexually Oriented Offense, therein designating Appellant as a sexual predator.

{¶10} It is from this judgment entry appellant appeals, raising the following error:

ASSIGNMENT OF ERROR

{¶11} AI. THE TRIAL COURT ERRED IN DESIGNATING APPELLANT A SEXUAL PREDATOR BECAUSE MENACING BY STALKING WAS NOT A SEXUALLY ORIENTED OFFENSE DURING THE TIME PERIOD ALLEGED IN THE INDICTMENT.

{¶12} “II. THE TRIAL COURT ERRED IN DESIGNATING APPELLANT AS A SEXUAL PREDATOR IN THAT THE STATE OF OHIO FAILED TO PROVE THAT APPELLANT IS LIKELY TO ENGAGE IN THE FUTURE IN ONE OR MORE SEXUALLY ORIENTED OFFENSE.@

I.

{¶13} In appellant=s first assignment of error, he maintains the trial court erred in classifying him as a sexual predator because menacing by stalking was not a sexually oriented offense during the period of his indictment. We disagree.

{¶14} Appellant was indicted on two counts of Menacing by Stalking on July 10, 2003, for conduct occurring between May 1, 2003 and May 29, 2003. Senate Bill 5, which included Menacing by Stalking to the list of sexually oriented offenses when it involves a minor, a child under the age of 18 and is committed for sexual motivation, became effective on July 31, 2003. Appellant was sentenced on December 11, 2003.

{¶15} We find that at the time Appellant was sentenced as well as when he entered

his plea of guilty to the crime of Menacing by Stalking, such crime was a sexually oriented offense.

{¶16} Furthermore, in *State v. Cook* (1998), 83 Ohio St.3d 404, the Supreme Court of Ohio determined that the registration and verification provisions of R.C. Chapter 2950 as applied to conduct prior to the effective date of the statute, were remedial in nature and not punitive and therefore did not violate the retroactivity clause of Section 28, Article 2, of the Ohio Constitution. *State v. Albaugh* (February 1, 1999), Stark App. Nos.1997CA00167, 1997CA00222.

{¶17} Based on the above, we find Appellant's first assignment of error not well-taken and overrule same.

II.

{¶18} In appellant's second assignment of error, he maintains the trial court erred in classifying him as a sexual predator because the State failed to prove that he was likely to engage in the future in one or more sexually oriented offenses. We disagree.

{¶19} As stated above, in *State v. Cook* (1998), 83 Ohio St.3d 404, the Supreme Court of Ohio determined R.C. Chapter 2950 is remedial in nature and not punitive. As such, we will review this assignment of error under the standard of review contained in *C.E. Morris Co. v. Foley Construction* (1978), 54 Ohio St.2d 279. We find this to be the applicable standard as the *Cook* court addressed a similar challenge under a manifest weight standard of review. See, *Cook* at 426.

{¶20} R.C. §2950.01(E) defines 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."

{¶21} Pursuant to R.C. 2950.01(E), for an offender to be adjudicated a sexual predator, the trial court must find, by clear and convincing evidence, that the offender has been convicted of a sexually oriented offense and that the offender is likely to engage in the future in one or more sexually oriented offenses. *State v. Eppinger*, 91 Ohio St.3d 158, 163, 2001- Ohio-247.

{¶22} Appellant contends the trial court did not have clear and convincing evidence to classify him as a sexual predator pursuant to the second prong of R.C. §2950.01(E).

{¶23} When reviewing a sexual predator adjudication we must examine the record and determine whether the trier of fact had before it sufficient evidence to satisfy the burden of proof. *State v. Stillman* (Dec. 22, 2000), 11th Dist. No.2000-L-015, 2000 WL 1876573, at 1, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54.

{¶24} R.C. §2950.09(B)(2) sets forth the factors a trial court must consider when making a determination as to whether an offender is a sexual predator:

{¶25} A(2) In * * * the judge shall consider all relevant factors, including, but not limited to, all of the following: (a) The offender=s age; (b) The offender=s prior criminal record regarding all offenses, including, but not limited to, all sexual offenses; (c) The age of the victim of the sexually oriented offense for which sentence is to be imposed; (d) Whether the sexually oriented offense for which sentence is to be imposed involved multiple victims; (e) Whether the offender used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting; (f) If the offender previously has been convicted of or pleaded guilty to any criminal offense, whether the offender completed any sentence imposed for the prior offense and, if the prior offense was a sex offense or a sexually oriented offense, whether the offender participated in

available programs for sexual offenders; (g) Any mental illness or mental disability of the offender; (h) The nature of the offender=s sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse; (i) Whether the offender, during the commission of the sexually oriented offense for which sentence is to be imposed, displayed cruelty or made on or more threats of cruelty; (j) Any additional behavioral characteristics that contribute to the offender=s conduct.@

{¶26} The trial court shall determine an offender to be a sexual predator only if the evidence presented convinces the trial court by clear and convincing evidence. R.C. § 2950.09(C)(2)(b). Clear and convincing evidence is evidence "which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *State v. Garcia* (1998), 126 Ohio App.3d 485, 487, 710 N.E.2d 783.

{¶27} Appellant maintains there is not clear and convincing evidence to support a finding that he is likely to engage in future sexually oriented offenses.

{¶28} Upon review of the record, we find that the trial court considered the following factors when making its decision to classify Appellant as a sexual predator:

{¶29} testimony of State of Ohio Parol Officer Kim Marcelli;

{¶30} testimony of Detective Jeff Shook of the Mansfield Police Department that based upon Appellant's past history and his unwillingness to get help, that he is likely to re-offend. (T. at 44)

{¶31} a presentence investigation report;

{¶32} the age of Appellant, that being fifty-three years of age and the age of the

victim, that being ten years old;

{¶33} evidence that several parents have reported unwanted and improper contact by defendant with the other young girl;

{¶34} reports by Dr. James Subury of The Forensic Diagnostic Center indicating that Appellant had been ordered to get counseling, but failed to follow through, that he has poor judgment in regard to young girls, and that he “appears to have a sexual attraction toward ten to twelve year old girls”. Dr. Sunbury’s appraisal of Appellant included a finding that he is at risk to continue attempting to make contact with young girls unless his proclivities and fixations are dealt with;

{¶35} appellant’s apparent refusal or inability to accept that his behavior is inappropriate, instead holding onto the belief that he acts only out of a good motive to help young girls and keep them out of trouble;

{¶36} evidence of Appellant’s fixation on young girls which he has demonstrated several times over the past ten (10) years.

{¶37} Based on the above, we find the record provides sufficient, competent credible evidence to support the trial court’s determination appellant is likely to reoffend.

{¶38} Based on the foregoing, we find clear and convincing evidence in the record to support the trial court's classification of Appellant as a sexual predator. *State v. Nye*, 1st Dist.App. No. C-020640, 2003-Ohio-4961.

{¶39} Accordingly, appellant’s second assignment of error is overruled.

{¶40} The decision of the Richland County Court of Common Pleas is affirmed.

By: Boggins, J.

Wise, P.J. and

Edwards, J. concur

JUDGES

