

[Cite as *State v. Varner*, 2004-Ohio-5565.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

CHAD VARNER

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Julie A. Edwards, J.

Case No. CA-0018

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Morrow County Court of
Common Pleas, Case No. 02CR4576

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

10/14/2004

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, P.J.

{¶1} Defendant-appellant Chad Varner appeals the June 18, 2003 Judgment Entry of the Morrow County Court of Common Pleas finding him to be a sexual predator. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On June 13, 2002, appellant was indicted on five counts of unlawful sexual conduct with a minor. Appellant entered pleas of guilty to the first, third and fifth counts. The second and fourth counts were dismissed. The trial court convicted appellant of unlawful sexual conduct with a minor for engaging in oral sex and/or vaginal intercourse with Alexandra Doe, age 14 years, at some time between June 1, 2001 and June 30, 2001; engaging in such conduct with Kalen Doe, age 14 years, on or about August 25, 2001; and engaging in such conduct with Kayla Doe, age 14 years, at some time between January 25, 2001 and December 31, 2001. At the time of the offenses, appellant was 20 years old.

{¶3} On June 4, 2003, the trial court conducted a hearing to determine appellant's status as a sexual predator. On June 18, 2003, the trial court, via Judgment Entry, found appellant to be a sexual predator, and sentenced him to five years community control sanctions.

{¶4} It is from the June 18, 2003 Judgment Entry appellant now appeals raising the following assignment of error:

{¶5} "I. IT IS ERROR TO FIND A DEFENDANT A SEXUAL PREDATOR ABSENT ANY EVIDENCE BY THE STATE THAT THE DEFENDANT IS LIKELY TO RE-OFFEND."

{¶6} Appellant maintains the trial court erred in finding him to be a sexual predator absent any evidence he is likely to reoffend. He argues the forensic report found he only had an alcohol problem and recommended treatment, but did not make any finding he was likely to reoffend. He further asserts he had no prior felony record; his misdemeanor record reflected several traffic offenses and minor criminal offenses; he did not inflict cruelty on the victims; there was no evidence of mental, emotional or behavioral problems; and the court considered community control sanctions, rather than incarceration.

{¶7} R.C. 2950.01(G) defines a sexual predator as:

{¶8} “(G) An offender or delinquent child is ‘adjudicated as being a sexual predator’ or ‘adjudicated a sexual predator’ if any of the following applies and if, regarding a delinquent child, that status has not been removed pursuant to section 2152.84, 2152.85, or 2950.09 of the Revised Code:

{¶9} “(1) The offender is convicted of or pleads guilty to committing, on or after January 1, 1997, a sexually oriented offense that is a sexually violent offense and that is not a registration-exempt sexually oriented offense and also is convicted of or pleads guilty to a sexually violent predator specification that was included in the indictment, count in the indictment, or information that charged the sexually violent offense.

{¶10} “(2) Regardless of when the sexually oriented offense was committed, on or after January 1, 1997, the offender is sentenced for a sexually oriented offense that is not a registration-exempt sexually oriented offense, and the sentencing judge determines pursuant to division (B) of section 2950.09 of the Revised Code that the offender is a sexual predator.”

{¶11} Appellant was not convicted of a sexually violent offense; therefore, the trial court conducted its determination pursuant to subsection B above. Pursuant to the section, the trial court determined, according to division (B) of section 2950.09 of the Revised Code, appellant is a sexual predator. Section 2950.09(B) (3) states:

{¶12} “(3) In making a determination under divisions (B)(1) and (4) of this section as to whether an offender or delinquent child is a sexual predator, the judge shall consider all relevant factors, including, but not limited to, all of the following:

{¶13} “(a) The offender's or delinquent child's age;

{¶14} “(b) The offender's or delinquent child's prior criminal or delinquency record regarding all offenses, including, but not limited to, all sexual offenses;

{¶15} “(c) The age of the victim of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made;

{¶16} “(d) Whether the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made involved multiple victims;

{¶17} “(e) Whether the offender or delinquent child used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;

{¶18} “(f) If the offender or delinquent child previously has been convicted of or pleaded guilty to, or been adjudicated a delinquent child for committing an act that if committed by an adult would be, a criminal offense, whether the offender or delinquent child completed any sentence or dispositional order imposed for the prior offense or act and, if the prior offense or act was a sex offense or a sexually oriented offense, whether the offender or delinquent child participated in available programs for sexual offenders;

{¶19} “(g) Any mental illness or mental disability of the offender or delinquent child;

{¶20} “(h) The nature of the offender's or delinquent child'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;

{¶21} “(i) Whether the offender or delinquent child, during the commission of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made, displayed cruelty or made one or more threats of cruelty;

{¶22} “(j) Any additional behavioral characteristics that contribute to the offender's or delinquent child's conduct.” (Emphasis added).

{¶23} We note, the State bears the burden of proving by clear and convincing evidence the likelihood of recidivism to support a sexual predator finding. *State v. Eppinger* (2001), 91 Ohio St.3d 158.

{¶24} The transcript of the June 4, 2003 hearing reflects the following exchange:

{¶25} “So with respect to the sexual predator aspect of this start with the State. I want to note, also, that there aren't any victims here or representatives of the victims, although I believe they have been notified and I don't know if you can help me in that regard or not, Mr. Yager.

{¶26} “MR. YAGER: Just from my file, your Honor, it indicates that letters were sent to the victims through the Victim Assistance Program and I believe on all letters they stated they were not sure if they were going to show up today.

{¶27} “THE COURT: Okay. That being the case then, again, pursuing [sic] the matter with respect to sexual predator status, what is your position on that? Do you wish to present evidence?

{¶28} “MR. YAGER: No, your Honor, we have no evidence to present to the Court.

{¶29} “THE COURT: Submitted then on the presentence investigation report and the record otherwise?

* * *

{¶30} “THE COURT: Okay. The definition as I read the statute and refresh my memory under 2950.01(B) of the Ohio Revised Code is the sexual predator means that a person to whom the following applies. The person 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. 2950.09 indicates what the Court is to look at to determine likelihood of future involvement and some do not apply as you indicated on behalf of your client, Mr. Anderson, but some of them do.

{¶31} “By definition this is a sexually oriented offense or he is a sexual offender, I should say, by operation of the law, but to go that next step up to a sexual predator the Court would have to find that certain factors are there. I have to consider all relevant factors including but not limited to this. The age of the victim is important in this case. They were all young girls close to the age of being, the offenses being much more serious as what we used to call the statutory rape charges under age 13. The fact that there are more than -- there is more than one victim involved here is another thing that I'm looking at.

{¶32} “So that's the section that says the sexually oriented offense for which the sentence is to be imposed or the order of disposition is to be made involves multiple victims. The next thing is whether the offender used drugs or alcohol to impair the victim of a sexually oriented offense or to prevent the victim from resisting. I don't have any evidence

to that effect. But there is evidence from the Defendant's own admission that he himself was a heavy user of drugs and/or alcohol at the time of these offenses.

{¶33} “I don't know of any prior convictions that Mr. Varner has for these types of offenses. I don't know of any mental illness or mental disability of the offender that comes into play here. The nature of the sexual conduct, however, is another thing that I can take into play or take into consideration.

{¶34} “Although, it, doesn't demonstrate a pattern of necessarily of abuse. So it wasn't forced necessarily on these young girls. And then there wasn't any cruelty either involved that I'm aware of, but any additional behavioral characteristics that contribute to the offender or the delinquent child's conduct. In this case, we are talking only the offender is an adult.

{¶35} “In reviewing the presentence investigation report he was charged with a limited amount, five counts, but it appears as though there were multiple counts. It appears further as though there has been somewhat of a fixation, in that even despite the Court's orders that he have no contact with at least one of these young girls, he continued to persist to have contacts with her. She initiated or not, he had contact and he was ordered not to. All of this adds up to me to be such that the Defendant, I believe, has a fixation towards young girls, girls of fairly young years. We are talking about I guess early puberty for girls.

{¶36} “Certainly not as bad as cases that we receive or that we deal with in this case where they are prepuberty type girls and very young sometimes. Therefore, I believe that this is serious enough to put it in the sexual predator status. I'm making that finding. I believe there is clear and convincing evidence to that effect. Now, I will say this, I know the

law dealing with this matter allows for a modification of that. And depending upon where things go here in the future I will certainly consider some type of modification if the Defendant demonstrates over a period of time that the fixation is either not there or he has it turned around. In other words, if he can demonstrate to this Court that it has not happened. It is not a fixation or if it was, it is no longer a fixation.”

{¶37} Tr. at 4, 8-11.

{¶38} Pursuant to the statute, the trial court specifically considered the age of the victims, the number of victims, appellant’s prior record, appellant’s involvement with alcohol, his “fixation” with young girls and his continued contact with one of the victims despite court orders to the contrary. Upon review and in consideration of the statutory factors set forth above, we find the trial court did not err in finding appellant to be a sexual predator.

{¶39} The assignment of error is overruled

{¶40} The June 18, 2003 Judgment Entry of the Morrow County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Edwards, J. concur

JUDGES

IN THE COURT OF APPEALS FOR MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

CHAD VARNER

Defendant-Appellant

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JUDGMENT ENTRY

Case No. CA-0018

For the reasons stated in our accompanying Memorandum-Opinion, the June 18, 2003 Judgment Entry of the Morrow County Court of Common Pleas is affirmed. Costs assessed to appellant.

JUDGES