

[Cite as *State v. Mandolesi*, 2004-Ohio-6361.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
Plaintiff-Appellee	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
	:	Hon. John F. Boggins, J.
	:	
-vs-	:	
	:	Case No. 2004-CA-00092
MICHAEL G. MANDOLESI	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas, Case No. 2003-CR-1476

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: NOVEMBER 22, 2004

APPEARANCES:

For Plaintiff-Appellee

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Boggins, J.

{¶ 1} Defendant-appellant Michael G. Mandolesi appeals the March 5, 2004, Judgment Entry entered by the Stark 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 October 27, 2003, Appellant was indicted by the Stark County Grand Jury on one count of forcible rape, in violation of R.C. 2907.02(A)(1), two counts of gross sexual imposition, in violation of R.C. 2907.05(A)(5), and one count of patient abuse, in violation of R.C. 2903.34(A)(1).

{¶ 4} These charges involved the sexual abuse of two elderly nursing home patients, one in his 80's and one in his 90's, living at different nursing homes.

{¶ 5} On November 14, 2003, Appellant was arraigned on the above charges and entered pleas of not guilty.

{¶ 6} January 13, 2004, Appellant entered guilty pleas the charges as contained in the indictment and the trial court deferred sentencing and the sexual offender classification pending a pre-sentence investigation.

{¶ 7} On March 2, 2004, subsequent to receipt and review of the pre-sentence investigation report, Appellant was sentenced to an aggregate prison sentence of three years. A sexual predator hearing was also conducted.

{¶ 8} By Judgment Entry dated March 5, 2004, the trial court designated Appellant as a sexual predator.

{¶ 9} It is from this sexual predator classification appellant now appeals, raising the following sole assignment of error:

ASSIGNMENT OF ERROR

{¶ 10} I. THERE WAS NO CLEAR AND CONVINCING EVIDENCE TO REQUIRE THE CLASSIFICATION OF THE APPELLANT AS A SEXUAL PREDATOR.”

I.

{¶ 11} In appellant’s sole 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.

{¶ 12} 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.

{¶ 13} 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.

{¶ 14} 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.

{¶ 15} 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).

{¶ 16} 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.

{¶ 17} 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:

{¶ 18} (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 one or more threats of cruelty; (j) Any additional behavioral characteristics that contribute to the offender's conduct.

{¶ 19} 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.

{¶ 20} Appellant maintains there is not clear and convincing evidence to support a finding that he is likely to engage in future sexually oriented offenses. He argues that the trial court should have given greater consideration to the report of Dr. Thomas Anuszkiewicz wherein Dr. Anuszkiewicz indicated that all the incidents occurred in the nursing home setting and that if Appellant was not in such setting, then the likelihood of re-offending was less. (T. at 24-25).

{¶ 21} 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:

{¶ 22} a pre-sentence investigation report;

{¶ 23} the seriousness of the offense: forcible rape;

{¶ 24} the advanced age and relative defenselessness of the victims;

{¶ 25} the disparity in age between appellant and his victims;

{¶ 26} the fact that the abuse was repeated;

{¶ 27} the fact that there were multiple victims;

{¶ 28} Appellant's apparent lack of remorse for his misconduct and lack of insight into his misconduct;

{¶ 29} Based on the above, we find the record provides sufficient, competent credible evidence to support the trial court's determination that Appellant is likely to reoffend.

{¶ 30} 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.

{¶ 31} Accordingly, appellant's sole assignment of error is overruled.

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For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellant.

JUDGES