

STATE OF OHIO, COLUMBIANA COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 06 CO 6
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
JOSHUA ARCHER,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 05CR21.

JUDGMENT: Sexual Predator Designation Affirmed; Sentence Vacated; Case Remanded.

APPEARANCES:
For Plaintiff-Appellee:

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For Defendant-Appellant:

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JUDGES:
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro
Hon. Gene Donofrio

Dated: March 30, 2007

VUKOVICH, J.

{¶1} Defendant-appellant Joshua Archer appeals from the decision of the Columbiana County Common Pleas Court that sentenced him to the maximum sentence on his rape conviction and designated him a sexual predator. Two issues are raised in this appeal. The first issue is whether the maximum sentence given by the trial court violated *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. The second issue is whether the record contains clear and convincing evidence to support the sexual predator designation. For the reasons stated below, the sexual predator designation is affirmed, however, in accordance with *Foster*, the sentence is vacated and the case is remanded for resentencing.

STATEMENT OF FACTS

{¶2} On January 27, 2005, Archer was indicted on one count of rape in violation of R.C. 2907.02(A)(1)(b). The indictment contained a force specification and an age specification that indicated that the victim was less than 10 years old at the time of the rape. This charge, with the specifications, carried a mandatory life imprisonment sentence if the offender was found guilty.

{¶3} On March 11, 2005, Archer pled not guilty. On September 30, 2005, Archer withdrew his not guilty plea and entered a guilty plea. As part of a plea agreement, the state dismissed the age and force specifications. Thus, the offense carried a minimum sentence of three years, but a maximum sentence of 10 years.

{¶4} On December 9, 2005 a joint sentencing hearing and a sexual predator determination hearing was held. Archer was sentenced to the maximum sentence, 10 years. The trial court made findings in accordance with the felony sentencing statute. The trial court also determined that Archer should be designated a sexual predator pursuant to R.C. 2950.01. Archer appeals the sentence and sexual predator designation.

FIRST ASSIGNMENT OF ERROR

{¶5} "THE SENTENCE IN THIS MATTER MUST BE VACATED AND REMANDED FOR NEW HEARING IN ACCORDANCE WITH STATE VS. FOSTER, -- N.E.2D ---, 2006 WL 509549 (OHIO), 20006-OHIO-856 (2006)."

{¶6} The Ohio Supreme Court in *Foster* declared portions of Ohio’s felony sentencing statute unconstitutional. For instance, it held that the R.C. 2929.14(C) requirement that, in order to sentence an offender to the maximum possible prison term, particular findings must first be made by the trial court, violated the offender’s right to a jury trial. *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, citing *Blakely v. Washington* (2004), 542 U.S. 296. Thus, it declared R.C. 2929.14(C) unconstitutional and severed it from the statute. *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. The Ohio Supreme Court then mandated that all cases “pending on direct review must be remanded to trial courts for new sentencing hearings not inconsistent with this opinion.” *Id.* at ¶104.

{¶7} Here, Archer was sentenced to the maximum sentence and when ordering that sentence the trial court made findings in accordance with R.C. 2929.14(C). As that section has been rendered unconstitutional, pursuant to *Foster*, the sentence must be vacated and the cause remanded for resentencing. This assignment of error has merit.

SECOND ASSIGNMENT OF ERROR

{¶8} “APPELLANT’S DESIGNATION AS A SEXUAL PREDATOR MUST BE VACATED AND MODIFIED TO A DESIGNATION AS A SEXUALLY ORIENTATED OFFENDER.”

{¶9} Under this assignment, Archer argues that the record does not contain clear and convincing evidence demonstrating that he is likely to commit one or more sexually oriented offenses in the future.

{¶10} R.C. 2950.01(E)(1) defines a sexual predator as a person who “has been convicted of or pleaded guilty to committing a sexually oriented offense that is not a registration-exempt sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses.” Here, Archer pled guilty to a sexually oriented offense that is not a registration-exempt sexually oriented offense; thus, the remaining criteria for the trial court to determine at the sexual predator hearing was whether or not Archer was “likely to engage in the future in one or more sexually oriented offenses.”

{¶11} R.C. 2950.09(B)(3) sets forth factors a trial court must look at when making that determination. These include: the offender’s age; the age of the victim;

whether or not there were multiple victims; the offender's entire prior criminal record, which includes and is not limited to sexual offenses; if the offender had previously been convicted of or pleaded guilty to a criminal offense and if that prior offense was a sex offense or a sexually oriented offense; whether the offender participated in any available programs for sexual offenders; whether the offender used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting; any mental illness or mental disability of the offender; 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 that sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse; 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; and any additional behavioral characteristics that contribute to the offender's conduct.

{¶12} The trial court has significant discretion in evaluating factors that may be relevant to its recidivism determination and such determinations are to be afforded great deference. *State v. Robertson*, 147 Ohio App.3d 94, 2002-Ohio-494. The statute does not direct the court on what weight, if any, a judge must assign to each factor. *State v. Thompson*, 92 Ohio St.3d 584, 588, 2001-Ohio-1288.

{¶13} After considering all of the evidence and applying the statutory factors of R.C. 2950.09(B)(3), the court must make a determination of whether the sexual predator classification is supported 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. While clear and convincing evidence is "more than a mere preponderance" of the evidence, it is less than that which constitutes "beyond a reasonable doubt." *State v. Danby* (1983), 11 Ohio App.3d 38, 41, citing *Cross v. Ledford* (1954), 161 Ohio St. 469, 477.

{¶14} In making its determination of whether an offender is a sexual predator, the trial court need only consider the relevant factors in R.C. 2950.09(B)(3). *State v. Cook*, 83 Ohio St.3d 404, 426, 1998-Ohio-0291. R.C. 2950.09(B)(3) does not require that each factor be met; rather, it simply requires the trial court to consider the relevant factors. *State v. Grimes* (2001), 143 Ohio App.3d 86, 89. In a sexual predator

hearing, the Rules of Evidence are not strictly applied and the court can look to reliable hearsay, such as a presentence investigation report. *Id.* at 425. “Once it is established that the offender has committed a sexually oriented offense, the key to any sexual-offender classification hearing is determining whether the offender is likely to reoffend in the future.” *State v. Hunter* (2001), 144 Ohio App.3d 116, 122. However, the trial court must discuss in the record the particular evidence and factors upon which it relies in making its determination regarding the likelihood of committing a future sexually oriented offense. *State v. Eppinger*, 91 Ohio St.3d 158, 166, 1998-Ohio-247.

{¶15} We review the trial court’s sexual predator determination under the following standard of review:

{¶16} “To determine whether the trial court’s finding of the offender’s likelihood of re-offending is supported by clear and convincing evidence, an appellate court must conduct its own review of ‘the evidence in the transcripts, victim impact statements, pre-sentence investigation reports, prior history of arrests and convictions, age, etc., presented at the sexual offender classification hearing with respect to R.C. 2950.09(B)(2) factors.’ *State v. Crooks* (2003), 152 Ohio App.3d 294, 303, 2003-Ohio-1546 at ¶27 [quoting *State v. Eppinger*, 91 Ohio St.3d at 162]; *State v. Sharp*, 10th Dist. No. 05 AP-809, 2006-Ohio-3448 at ¶13.” *State v. Haddox*, 5th Dist. No. 2006-CA-00063, 2006-Ohio-6140, at ¶46.

{¶17} Here, the trial court relied on “the nature of the offense * * * as well as the presentence report and the other evidentiary material filed with the court” to find that Archer was a sexual predator. Our review of the record indicates that this finding was supported by clear and convincing evidence.

{¶18} We acknowledge that a defendant’s commission of a sexually oriented offense is not proof in and of itself that he is likely to engage in future sexually oriented offenses. *Eppinger*, 91 Ohio St.3d at 165-166, 2001-Ohio-247; *State v. Ward* (1999), 130 Ohio App.3d 551, 558. However, the trial court did not rely solely on the fact that the rape occurred, but rather looked at the nature of the offense and the expert’s report. This was an anal rape of a five year old child. It occurred in the child’s home with the mother downstairs. Archer knew the family and had prior contact with them and the child. He was an invited guest into the victim’s home. As the Supreme Court

has stated, it is possible that one sexually oriented conviction alone can support a sexual predator adjudication (e.g. “an offender who preys on children”). *Eppinger*, 91 Ohio St.3d at 162, 167, 2001-Ohio-247.

{¶19} Moreover, the court in *Eppinger* noted that the recidivism rates for pedophiles is extremely high. *Id.* at 162. Likewise the Second Appellate District has stated:

{¶20} "The age of the victim is probative because it serves as a telling indicator of the depths of offender's inability to refrain from such illegal conduct. The sexual molestation of young children, aside from its categorization as criminal conduct in every civilized society with a cognizable criminal code, is widely viewed as one of the most, if not the most, reprehensible crimes in our society. Any offender disregarding this universal legal and moral reprobation demonstrates such a lack of restraint that the risk of recidivism must be viewed as considerable.' *State v. Collins* (June 29, 1999), 3d Dist. No. 14-99-05, 1999-Ohio-819, quoting *State v. Daniels* (Feb. 24, 1998), 10th Dist. No. 97APA06-830." *State v. Smith*, 2d Dist. No. 2005-CA-87, 2006-Ohio-3653, at ¶30.

{¶21} As stated above, the victim here was five years old and Archer was an adult. The facts surrounding the rape, including the type of rape and the ages of the victim and offender, provided the trial court with ample grounds to support its sexual predator finding. Consequently, this assignment of error has no merit.

{¶22} For the foregoing reasons, the sexual predator designation is affirmed. However, in accordance with *Foster*, the sentence is vacated and the case is remanded for resentencing.

DeGenaro, P.J., concurs in part; dissents in part; see concurring in part, dissenting in part opinion.
Donofrio, J., concurs.

DeGenaro, P.J., concurring in part and dissenting in part:

{¶23} In this appeal, Archer challenges both his sentence and designation as a sexual predator. The majority vacates Archer's sentence and remands this case for resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-0856. I concur

in this decision. However, the majority affirms Archer's designation as a sexual predator. I must respectfully disagree with this decision.

{¶24} A sexual predator is defined as "a person who has been convicted of or pleaded guilty to committing a sexually oriented offense that is not a registration-exempt sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses." R.C. 2950.01(E)(1). An offender is "likely" to engage in future sexually oriented offenses if there is "a high probability" that he will do so. Merriam-Webster Online Dictionary (February 20, 2007), <http://www.m-w.com/dictionary/likely>.

{¶25} In this case, the facts do not support a conclusion that there is a high probability that Archer will reoffend in the future. Archer pled guilty to rape and the victim of this crime was a small child. However, the fact that the victim of the sexually oriented offense is a child is not, in and of itself, sufficient to classify an offender as a sexual predator. See *State v. Hunter* (2001), 144 Ohio App.3d 116, 123 (Fact that victim of rape and gross sexual imposition was nine is not enough to support sexual predator designation.); *State v. Grimes* (2001), 143 Ohio App.3d 86. Indeed, in *Grimes*, the defendant was found guilty of the attempted rape of a four-year old and was adjudicated, while a juvenile, for gross sexual imposition, but was found not to be a sexual predator.

{¶26} Furthermore, the expert who examined Archer stated that Archer demonstrated no sexual interest in young children, that he could not diagnose him as a pedophile, and that offenders resembling him only recidivated at a 26-36% rate over fifteen years. Finally, Archer did not have any criminal history, let alone a history of sexual offenses, nor any substance abuse issues. These facts do not show that there is a high probability that Archer will recidivate in the future. Instead, they merely demonstrate that recidivism is a possibility, as it is in many cases.

{¶27} Rather than relying on these facts when reaching its conclusion, the majority cites to caselaw which states that pedophiles reoffend at a high rate. Opinion at ¶19, citing *Eppinger* at 162. However, this is completely improper for reasons best explained in *State v. Krueger* (Dec. 19, 2000), 8th Dist. No. 76624, a case involving a defendant who repeatedly raped a six year-old and a twelve year-old and had been diagnosed with pedophilia previously, but was held not to be a sexual predator.

{¶28} “In connection with our decision here, we must note our disagreement with an unfortunate quote that already has been cited without critique in many cases. Sexual predator determinations recently have been upheld with language suggesting that the age of the victim alone can sustain the determination. The ‘age of the victim’ factor of R.C. 2950.09(B)(2)(c) has been characterized as follows:

{¶29} “‘Related to the court's determination of the likelihood of a defendant committing future sexual offenses, the legislature specifically included the age of the victim of the sexually oriented offense for which defendant was convicted. The legislature thus acknowledged, as have a multitude of courts, the overwhelming statistical evidence supporting the high potential of recidivism among sex offenders whose crimes involve the exploitation of young children. (Emphasis added.)’

{¶30} “*State v. Daniels* (Feb. 24, 1998), Franklin App. No. 97APA06-830, unreported (citing *Kansas v. Hendricks* [1997], 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501).

{¶31} “The emphasized portion of the foregoing passage has been cited with approval by a number of courts in this state, including two panels of this district. *State v. Hlavsa* (May 18, 2000), Cuyahoga App. No. 76221, unreported; *State v. Nelson* (Dec. 23, 1999), Cuyahoga App. No. 73031, unreported. Owing, perhaps, to the reprehensible nature of sex crimes involving children, courts have quoted the passage uncritically, without stopping to determine whether the facts stated are supported by anything more than their assertion in the original quote. We trust that both professionals and the public will understand that our criticism is not motivated by our advocacy of pedophilia, but of fairness and reason. The statement is an assertion of fact, not a proposition of law; subsequent courts have adopted this assertion of fact without stopping to ask whether the facts were put in evidence in the cited case or any other.

{¶32} “The *Daniels* court states that the Ohio General Assembly, in enacting R.C. 2950.09(B)(2)(c), acknowledged ‘overwhelming statistical evidence’ of recidivism rates among sex offenders who commit crimes against children. However, the *Daniels* court (and all courts quoting or adopting the language since) failed to cite any evidence showing the Ohio legislature's consideration of this statistical evidence, much less acknowledgment of it, and failed to cite any of ‘the overwhelming statistical

evidence' itself. The only citation to either the evidence itself or to the 'multitude of courts' that have acknowledged the evidence is *Kansas v. Hendricks*, supra. However, *Hendricks* makes no reference to any statistical evidence concerning recidivism rates of sexual offenders who commit crimes against children; the case simply concerns a single offender who committed repeat sexual offenses against children. *Hendricks* is a single case. Not only is it not 'overwhelming,' it is not statistical evidence and it neither cites nor discusses statistical evidence. We are left with a runaway quote making unsupported, unchecked factual claims that are then adopted as 'facts' in subsequent cases. However, just as the judge here erred in citing her ex parte knowledge of psychiatric literature on pedophilia, it is improper to cite phantom statistical evidence, no matter how 'overwhelming' the apparition.

{¶33} "We express no opinion on whether the psychiatric community considers pedophilia a curable or treatable disorder, or whether statistical evidence shows that recidivism rates are higher for sexual offenders who victimize children than for other sexual offenders or offenders as a whole. Although such evidence may exist, it has not been offered or admitted in this case or in any other case of which we are aware. Because the evidence, even if it exists, has not been offered, admitted, or argued in Krueger's case, it, therefore, should not be considered." (Footnotes omitted).

{¶34} When deciding this case, we are under an obligation to consider the facts of *this* case when deciding whether the evidence supports a conclusion that *this* offender is likely to reoffend. If the experts in *this* case say that *this* offender falls with a class of offenders who only recidivated at a 26-36% rate over fifteen years, then there is not a high probability that *this* offender will reoffend.

{¶35} The majority repeatedly cites to pedophilic aspects of this case to justify Archer's classification as a sexual predator. However, the fact that someone may have sexually assaulted a minor of tender years does not mean that he or she is a sexual predator. The evidence does not show that Archer is likely to reoffend and the trial court's designation of Archer as a sexual predator should be reversed.