

ORIGINAL

IN THE SUPREME COURT OF OHIO

CR. 275560
CA. 90051

09-1551

STATE OF OHIO :

Plaintiff-Appellee :

-vs- :

ERIK WARE :

Defendant-Appellant :

MOTION FOR LEAVE TO FILE
DELAYED APPEAL IN CRIMINAL CASE
AND APPOINT COUNSEL AT
STATE'S EXPENSE

COUNSEL FOR APPELLEE:

WILLIAM D. MASON, ESQ.
Cuyahoga County Prosecutor
The Justice Center - 8th Floor
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COUNSEL FOR APPELLANT:

ERIK WARE
c/o MHS
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RECEIVED
JUL 31 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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AUG 14 2009
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FILED
AUG 27 2009
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SUPREME COURT OF OHIO

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Now comes the defendant-appellant, ERIK WARE pro se, and represents that he is without counsel, and being indigent cannot afford to obtain counsel and is unable to prepare the necessary legal papers without the aid of counsel. Defendant further says that he was unable to file a Notice of Appeal within the time allowed therefore, because he was never appointed an attorney for an appeal to the Supreme Court of Ohio, he/she had no knowledge of appellate rules. Defendant wishes to file a Motion for Leave to Appeal properly supported, but is unable to do so without aid of counsel. Defendant therefore moves the court to grant him leave to appeal from his conviction of CR. 275560 entered in May 24, 2007, in Cuyahoga County Court of Common Pleas, and affirmed in the Eighth District Court of Appeals on June 9, 2008, case number CA 90051, and further moves this Court for appointment of counsel to assist in perfecting said motion for leave to appeal.

Respectfully submitted,



ERIK WARE

Pro se

CERTIFICATE OF SERVICE

A copy of the foregoing Motion was served upon William D. Mason, Esq. Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, OH 44113, this __ day of July, 2009.

A handwritten signature in black ink, appearing to read "Erik Ware", written over a horizontal line.

ERIK WARE

Pro se

Attachment not scanned

JUN - 9 2008

Judge T. McMonagle

FILED Court of Appeals of Ohio

2008 JUN 17 P 1:47

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
No. 90051

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERIK WARE

DEFENDANT-APPELLANT

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TAXED

**JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-275560

BEFORE: Cooney, P.J., Rocco, J., and Celebrezze, J.

RELEASED: May 29, 2008

JOURNALIZED:

JUN - 9 2008

CA07090051

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VOL 659 #0079

ATTORNEYS FOR APPELLANT

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ATTORNEYS FOR APPELLEE

William Mason
Cuyahoga County Prosecutor

By: Pamela Bolton
Assistant County Prosecutor
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1200 Ontario Street
Cleveland, Ohio 44113

**FILED AND JOURNALIZED
PER APP. R. 22(E)**

JUN 9 - 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

MAY 29 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

COLLEEN CONWAY COONEY, P.J.:

Defendant-appellant, Erik Ware ("Ware"), appeals his sexual predator classification. Finding some merit to the appeal, we affirm in part, reverse in part and vacate that portion of his classification requirements related to residency.

In 1992, Ware pled guilty and was sentenced to eighteen months in prison for burglary to be served concurrently to four to fifteen years in prison for attempted rape.

In November 2006, approximately one month before Ware was released from prison, the State filed a request for a H.B. 180 sexual predator adjudication hearing. The trial court conducted the hearing in May 2007. At the hearing, the State presented Ware's prior criminal history and the court psychiatric clinic's report. The court classified him as a sexual predator and ordered him to register with the sheriff's office every 90 days for the remainder of his life.

Ware appeals, raising two assignments of error for our review. In the first assignment of error, Ware argues that R.C. 2950.031 violates the Due Process Clauses of the United States and Ohio Constitutions.

R.C. 2950.031 prohibits a person convicted of a sexually oriented offense from establishing a residence or occupying residential premises within 1,000 feet of any school premises.¹

Ware argues that: "R.C. 2950.031, both facially and as applied to him, violates the substantive component of the due process clause in the Fourteenth Amendment of the United States Constitution and in Section 16, Article I of the Ohio Constitution as well as the right to privacy guaranteed by Section 1, Article I of the Ohio Constitution." He claims that the residency restrictions "operate as a direct restraint on a person's liberty and infringe a citizen's fundamental right to live where they wish as well as his or her right to privacy."²

At oral argument, the State conceded that *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899, controls and that this court should vacate the residency restriction imposed on Ware because he committed his sexually oriented offense before the effective date of the statute.

¹In 2003, the General Assembly imposed residency restrictions on certain sexually oriented offenders through the enactment of R.C. 2950.031, later amended and recodified as R.C. 2950.034. We refer to the 2003 version of the statute in effect at the time of Ware's hearing.

²We note that Ware did not raise his constitutional challenge to the residency requirements, or to any of the other statutory requirements or restrictions imposed upon offenders classified as sexual predators, at the trial court level.

In *Hyle*, the Court held that “R.C. 2950.031 does not apply to an offender who bought his home and committed his offense before the effective date of the statute.” The court explained that “[t]he language in R.C. 2950.031 presents at best a suggestion of retroactivity, which is not sufficient to establish that a statute applies retroactively.” *Id.*

The State acknowledges that R.C. 2950.031 “does not proclaim its applicability to acts committed or facts in existence prior to the effective date of the statute or otherwise declare its retroactive application.” *Id.* at ¶19.

Accordingly, the portion of Ware’s classification requirements relating only to the residency restriction (1,000 feet of any school premises) is vacated.

Therefore, the first assignment of error is sustained.

In the second assignment of error, Ware argues that the State failed to prove “by clear and convincing evidence” that he is “likely to engage in the future in one or more sexually oriented offenses.”

In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court clarified the standard of review applicable to sex offender classifications. The Court held that: “[b]ecause sex-offender-classification proceedings under R.C. Chapter 2950 are civil in nature, a trial court’s determination in a sex-offender-classification hearing must be reviewed

under a civil manifest-weight-of-the-evidence standard and may not be disturbed when the trial judge's findings are supported by some competent, credible evidence." *Wilson*, at the syllabus.

The civil manifest-weight-of-the-evidence standard "affords the lower court more deference than does the criminal standard." *Id.*, citing *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 694 N.E.2d 989. "Thus, a judgment supported by 'some competent, credible evidence going to all the essential elements of the case' must be affirmed." *Id.*, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

A sexual predator is defined in R.C. 2950.01(E) as a person who has been convicted of or pled guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses. The State has the burden of proving that the offender is a sexual predator by clear and convincing evidence. *Wilson*; R.C. 2950.09(B)(4). "Clear and convincing evidence is evidence that 'will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.' (Internal citations omitted). To meet the clear-and-convincing standard requires a higher degree of proof than 'a preponderance of the evidence,' but less than 'evidence beyond

a reasonable doubt.' *State v. Ingram* (1992), 82 Ohio App.3d 341, 346, 612 N.E.2d 454." *Wilson*.

In order to satisfy this standard, "there must be something of substance from which one could draw a logical conclusion concerning the likelihood of recidivism to reach a firm belief or conviction that the defendant is likely to commit a sexually oriented offense in the future." *State v. Arthur* (Aug. 16, 2001), Cuyahoga App. No. 77770.

In making a determination as to whether an offender is a sexual predator pursuant to R.C. 2950.09(B)(3), the trial court must consider all relevant factors to determine whether the individual is likely to engage in future sex offenses. These factors include, but are not limited to: the offender's age and prior criminal record; the age of the victim; whether the sex offense involved multiple victims; whether the offender used drugs or alcohol to impair the victim of the sex offense; if the offender has previously been convicted of or pleaded guilty to any criminal offense; whether the offender completed a sentence for any conviction and, if a prior conviction was for a sex offense, whether the offender participated in any available program for sex offenders; whether the offender demonstrated a pattern of abuse or displayed cruelty toward the victim; any mental disease or disability of the offender; and any other behavioral

characteristics that contribute to the sex offender's conduct. R.C. 2950.09(B)(3)(a)-(j).

At the hearing, the trial court should discuss on the record the particular evidence and factors upon which it relies in making its determination regarding the likelihood of recidivism. *State v. Thompson*, 92 Ohio St.3d 584, 2001-Ohio-1288, 752 N.E.2d 276; *State v. Othberg*, Cuyahoga App. No. 83342, 2004-Ohio-6103.

The trial court, however, is not required to "tally up or list the statutory factors in any particular fashion." *State v. Ford*, Cuyahoga App. No. 83683, 2004-Ohio-3293, quoting *State v. Clayton*, Cuyahoga App. No. 81976, 2003-Ohio-3375. Moreover, R.C. 2950.09(B) does not require that each factor be met. *State v. Grimes* (2001), 143 Ohio App.3d 86, 757 N.E.2d 413. It simply requires the trial court to consider those factors that are relevant. *Id.*

Ware argues that the record in this case does not support a sexual predator classification. He states that this was the only sex offense he committed. He also claims that the court psychologist's determinations were inconclusive in determining whether he would be likely to reoffend in the

future. Ware also points out that the Static-99 rated him in the medium risk category for reoffending.³

Although Ware cites factors that may be in his favor, we nonetheless cannot ignore the other factors that are present and upon which the trial court relied in making its determination. As we stated in *State v. Butler*, Cuyahoga App. No. 86554, 2006-Ohio-4492, “[t]he trial court may place as much or as little weight on any of the factors as it chooses; the test is not a balancing one. Nor does the trial court have to find the majority of the factors to be applicable to the defendant in order to conclude the defendant is a sexual predator.”

Our review of the record, in the instant case, reveals that the trial court addressed and considered the factors in R.C. 2950.09(B)(3) in reaching its determination. The court considered the evidence and testimony presented as well as the arguments of counsel. The trial court found relevant to its determination the nature of the offense. Ware entered through the victim’s window while she was asleep in her bedroom. He attempted to rape the victim, who was a stranger. He claimed that he believed the victim was an “old friend”

³This court has previously noted that “[t]he utility of the Static-99 evaluation as a diagnostic tool for individual risk assessment is open to question. The evaluation merely performs an actuarial assessment of an offender’s chances of reoffending.” *State v. Pierce*, Cuyahoga App. No. 88470, 2007-Ohio-3665, citing *State v. Colpetzer*, Cuyahoga App. No. 79983, 2002-Ohio-967.

of his. The court also looked at Ware's history of drug and alcohol abuse and his prior criminal record, which included drug offenses. The court also considered Ware's age and his Static-99 evaluation placing him in the moderate-high risk category. Furthermore, the court's psychiatric report diagnosed Ware with antisocial personality disorder and a psychotic disorder, not otherwise specified. Also, the court noted that Ware failed to complete a sex offender treatment program. Thus, we find that the trial court was presented with clear and convincing evidence to support its adjudication that Ware is a sexual predator. Furthermore, our review reflects that the trial court's judgment is supported by "some competent, credible evidence" as required by *Wilson*.

Accordingly, the second assignment of error is overruled.

Judgment is affirmed in part, reversed in part, and the case is remanded for the trial court to vacate the residency restriction consistent with *Hyle*.

It is ordered that appellant and appellee share the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to
Rule 27 of the Rules of Appellate Procedure.

Colleen Conway Cooney
COLLEEN CONWAY COONEY, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

Your Honor,

I am submitting this letter to inform you of why I missed the deadline for filing my appeal.

In the month of July 2008, I had a payee "Alexis Lee" is her name. She was assigned to manage all my bills, etc.

I asked Alexis to buy a stamp to put on the envelope and mail my appeal form to the Ohio Supreme Court.

She claimed that she had forward it to the post office to be mailed.

During the 45 day deadline, I continuously contacted the Ohio Supreme Clerk of Court of Appeals to find out whether my appeal had been received and was it filed.

I came to find out that the Court of Appeals did not receive my appeal form before or after the deadline.

I constantly asked Alexis did she forward my appeal form to the post office and she claimed she did.

I had Alexis to call the post office on ~~several~~ several occasions.

She claimed that it was not enough postage to forward the appeal and she had to add more postage.

After about 2 weeks, I contacted the Ohio Supreme Court again.

to Findout whether the appeal form had been received, and it was not.

Alexis called the post office again to make me think she was managing my business accordingly to the way a responsible payee would manage a mental health clients business.

Then all of a sudden she came in the apartment with the appeal forms without the envelope that the forms was in.

So I knew at that point in time I had to try to become my own payee that way I would know my business would be taking care of.

Respectfully submitted,

Erick D. Ware

Erick D. Ware
2580 East 66th St. #A
Cleveland, Ohio 44104

Erick D. Ware

Sworn and subscribed before me, this 20th day of August 2009.

Christine M. Gary
Christine M. Gary
Attorney at Law

My Commission has no expiration pursuant to Ohio law.

The Appellant has plead guilty to committing the following Attempted Rape Offense as defined by R.C. 2923.02, 2907.02, specifically Sexually Oriented Offense.

Pursuant to R.C. Chapter 2923.02, 2907.02, this Court did not find that the Appellant, should be classified or adjudicated as followed:

Adjudication or Classification of Sexually Oriented Offenses

Pursuant to prior notice to the Appellant, this cause did not come before the Court to determine whether the Appellant, who has plead guilty to a Attempted Rape Offense that is a registration exempt Offense, is not a Sexual Predator. The Appellant were not afforded the opportunity to testify, present evidence, call and examine witnesses, and call and examine expert witnesses.

The Court did not consider all evidence and arguments presented by the Appellant, and all relevant factors, included, but limited to the factors listed in R.C. 2923.02, 2907.02.

Upon consideration of the foregoing, this Court did not find that the Appellant is, by clear and convincing evidence, likely to engage in one or more Attempted Rape Offenses in the future. It is hereby ordered and adjudged that the Appellant is not a Sexual Predator for the following reasons: see transcripts of Ruling CS/24/07. This determination is a final appealable order.

Appeal Rights Given. Transcribed order at State's expense.

This Court certified that the Appellant was ~~not~~ provided the notice of registration duties of his classification as a Sexual Predator, and that an explanation of the registration, notification and verification requirements was ~~not~~ provided to the Appellant.

Appellant found indigent. Public Defender's Office assigned to handle the appeal.

Respectfully submitted,
Annell M. Ware

Sworn and subscribed before me this 20th day of August 2009.

My commission has no expiration pursuant to Ohio law.

Christina M. Dany
Christina M. Gary
Attorney at Law