

IN THE SUPREME COURT OHIO

ORIGINAL

State of Ohio	:	Case No. 14-2161
Plaintiff-Appellee	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
v.	:	
Carl A. Nelson Sr.	:	Court of Appeals Case No. 101228
Defendant-Appellant	:	Trial Court Case No. 212590

MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANT-APPELLANT CARL A. NELSON

Carl A. Nelson Sr., (Pro Se Counsel of Record)
Grafton Correctional Institution
2500 South Avon-Belden Road
Grafton, Ohio 44044

**COUNSEL FOR DEFENDANT-APPELLANT,
CARL A. NELSON SR., PRO SE**

Timothy J. McGinty
Cuyahoga County Prosecutor
Brett Hammond, Assistant Prosecuting Attorney
Justice Center
1200 Ontario Street, 9th Floor
Cleveland, Ohio 44113-1604

**ATTORNEYS FOR PLAINTIFF-APPELLEES STATE OF OHIO,
CUYAHOGA COUNTY, OHIO**

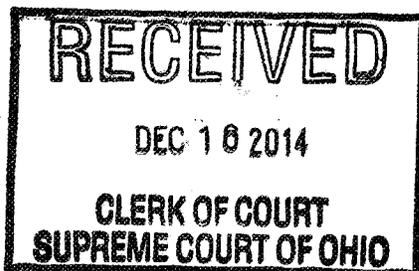
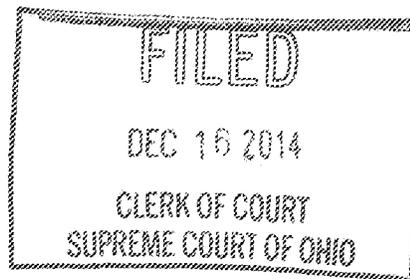


TABLE OF CONTENTS

	Page
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
STATEMENT OF THE CASE AND FACTS.....	4
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW.....	5-10

Proposition of Law No.1

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT LABELED THE DEFENDANT-APPELLANT A SEXUAL PREDATOR WHEN THE FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE FINDING AND CLASSIFICATION AS A SEXUAL PREDATOR VIOLATED HIS DUE PROCESS RIGHT PURSUANT TO ARTICLE I SECTION 16 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION	5
CONCLUSION.....	11
CERTIFICATE OF SERVICE.....	11

APPENDICES

Appendix-A (copy of November 26, 2014 date-stamped judgment being appealed)

Appendix-B (copy of trial court's journal entry)

**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST AND INVOLVES
A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case is unique in that it presents several issues of public or great general interest involving substantial constitutional questions: (1), whether the Court of Appeals for the Eighth Appellate District lacked subject matter jurisdiction to consider the appeal when the November 2, 1987 sentencing judgment entry is void, and, (2), whether or not Defendant-Appellant (Nelson hereinafter) was denied due process by the trial court rushing to judgment without considering the evidence, and the trial court's decision was against the manifest weight of the evidence when it classified Nelson as a sexual predator on March 17, 2014, without first correcting the void sentencing judgment entry and re-sentencing Nelson. See *State v. Abner*, 2002-Ohio-6504, 2002 Ohio App. LEXIS 6362.

The case originates from a HB. 180 hearing held on March 17, 2014, and defended by Counsel Cullen Sweeney. Nelson filed a motion to dismiss the state's request for sexual predator classification on March 14, 2014, arguing that the trial court lacked subject matter jurisdiction to attach a sexual predator classification label to a sentencing journal entry that is void and sentence that has expired. At the hearing, the state erroneously maintained the position that Nelson's void judgment claim remained barred by res judicata. TR.9.

In the instant case, the Court of Appeals in its decision erroneously inferred that Nelson's sentence was consecutive instead of concurrent and alluded to citing *State v. Nelson*, 8th Dist. Cuyahoga No. 95420, 2010-Ohio-6032, where the court held: "this court affirmed the consecutive nature of the sentence based on res judicata." Nelson respectfully submits that res judicata does not apply to a void judgment.

In *State v. Abner* 2002-Ohio-6504, 2002 Ohio App. LEXIS 6362, this court remanded *Abner I* for resentencing and then conducted a HB.180 sexual predator classification hearing classifying *Abner* as a sexual predator. In *Abner I*, the court of appeals found that the trial court's ordering count one to be served consecutively to count two, which was a nolle count, constituted an illegal sentence because it is impossible to serve a sentence consecutive to a count that has been nolle, therefore making the judgment void. The court of appeals further held that the trial court should have conducted a resentencing hearing with *Abner* present, then reversed, and remanded *Abner's* case for that purpose. Because the void judgment was vacated and *Abner* was resentenced, the trial court was properly able to conduct a HB.180 hearing and further had the authority to determine *Abner's* sexual predator classification pursuant to R.C. 2950.09(B) (1).

Subsequently, in *State v. Abner II*, 2004-Ohio-2017, 2004 Ohio App. LEXIS 1749 April, 2004, this court found that when *Abner* was originally brought before the trial court in *Abner I*, 2002-Ohio-6504, to determine whether he qualified as a sexual predator, *Abner's* sentence had already been served; the court ordered *Abner* discharged. Because the facts and circumstances of Nelson's criminal case and sentencing are analogous to those in *Abner I*, the trial court should have determined Nelson's sentence void and resentenced him to time served. Nelson's case is distinguishable from *Abner I* because Nelson's November 2, 1987 journalized sentence was void ab initio and to date Nelson has not been resentenced, yet classified as a sexual predator.

It is clearly established that a court lacks authority in a felony case to impose a sentence outside the presence of the defendant; any attempt to do so renders the sentence void. The Eight Appellate District Court held in *State v. Sweeney*, 1982 Ohio App. LEXIS 15360, and reaffirmed in *Bentleyville v. Pisani*, 1996 Ohio App. LEXIS 3565, that: "The journal entry was a

modification of the sentence pronounced in court. Appellant was not present for the modification of sentence, so the journal entry was in violation of Crim.R. 43(A), and is void." Citing *State v. Bell* (1990), 70 Ohio App. 3d 765, 592 N.E.2d 848. (Emphasis added). See also *State v. McGee*, 1998 Ohio App. LEXIS 984. See also *U.S. v. Williams*, 641 F.3d 758, 2011 U.S. App. LEXIS 9550, HN.1, (6th Cir. 2011), holding that criminal defendants have a constitutional right to be present at sentencing. Because the right to be present at sentencing is a fundamental constitutional right, a waiver cannot be presumed from a silent record, Nelson never abandoned his right to be present at the resentencing hearing on November 2, 1987 increase of his sentence from concurrently to consecutively.

Clearly established federal law as determined by the United States Supreme Court in *Hill v. Wampler*, (1936), 298 U.S. 460, 56 S.Ct. 760, held that: the oral sentence pronounced by the sentencing judge constitutes the judgment, and anything inconsistent with the judgment, which is included in the commitment order, is a nullity. See also *State v. Manns*, 2012 Ohio 234, HN2. Moreover, the United States Supreme Court in *Bartone v. United States*, 375 U.S. 52, 84 S. Ct. 21, 11 L. Ed. 2d 11 (1963), indicated, in enlarging the sentence in the absence of a defendant, Courts of Appeals under their broad supervisory powers should correct such errors even if they have not been alleged on appeal, 375 U.S. at 53-54, 84 S. Ct. at 22. Only the judgment of a court, as expressed through the sentence imposed by a judge, has the power to constrain a person's liberty. *State v. Derov*, (7th App. Dist.), 2009-Ohio-5513, holding that: "The court of appeals pursuant to App. R. 12(A) had discretion to sua sponte recognize plain error." See also *State v. Zasov*, (8th App. Dist.), 2009-Ohio-3734.

Appellate counsel abandoned the aforementioned claim, which Nelson is presenting in a timely App.R. 26(B) application to reopen Nelson's direct appeal.

In summary, the issues in this case are whether the trial court's decision classifying Nelson as a sexual predator denied Nelson due process, whether the Court of Appeals for the Eighth Appellate District lacked subject matter jurisdiction to consider the appeal when the original November 2, 1987 sentencing judgment entry is void, and whether or not Nelson was denied due process by the trial court rushing to judgment without considering the evidence and the court's decision was against the manifest weight of the evidence when it classified Nelson as a sexual predator on March 17, 2014 without first correcting the void sentencing judgment entry and re-sentencing Nelson.

STATEMENT OF THE CASE AND FACTS

This case is a HB.180 classification hearing. The hearing was held on March 17, 2014. The State requested that Mr. Nelson be classified under Ohio's Megan law as a habitual sex offender, TR. 5, 6, as a result of an alleged rape and kidnapping conviction occurring in 1978, TR.6, and the herein case of alleged rape, which occurred in July of 1985, conviction of which was in 1987, TR. 6. The state also requested that Mr. Nelson be classified a sexual predator. TR.10.

A House Bill 180 evaluation was done by the court's psychiatric clinic. TR.10.

In 1997, after the Megan's law was enacted, the DRC requested that Nelson be classified as a sexual predator; the trial court declared House Bill 180 unconstitutional and denied the request. A journal entry was generated to confirm the ruling. TR.11. Accordingly, Mr. Nelson was not classified in 1997. TR.11. In 1999, the state again moved to have Nelson classified but the motion was withdrawn. TR.12. Although preserved in the record, appellate counsel ignored any res judicata claims on appeal. TR.12,13.

Public Defender Mr. Cullen Sweeney defended the se offender classification, TR.10-26, explaining why Nelson will not re offend, and that the aforementioned alleged crime is almost 30 years old. TR. 17. Counsel spoke of the current risk score, which concluded that Mr. Nelson is in a low risk category, by the Ohio Parole Board. TR.21. Per the Parole Board, Mr. Nelson had superior programming. TR.22. Mr. Sweeney also referenced State v. Philpott, 147 Ohio App. 3d 505, 2002-Ohio-808, 2002 Ohio App. LEXIS 853, and State v. Lucerno, 2007-Ohio-5537, 2007 Ohio App. LEXIS 4870 in defense that the HB.180 was barred. TR.12, 13.

Defense counsel recommended to the court a habitual sex offender classification. TR.25. The court depended in its decision on facts from the 1987 alleged crime, TR.28, and it measured the classification hearing by facts of approximately 27 years ago. TR.28. The court classified Nelson as a habitual offender and sexual predator. TR.30.

The court declared Mr. Nelson indigent, TR.29, and appointed Counsel Ruth R. Fischbein-Cohen to timely perfect a direct appeal. TR.32. The transcript was ordered to be taxed at state's expense, TR. 30, costs were waived. TR.33.

This discretionary appeal is now before this Court for consideration and acceptance of jurisdiction.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW NO. I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT LABELED THE DEFENDANT-APPELLANT A SEXUAL PREDATOR WHEN THE FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE FINDING AND CLASSIFICATION AS A SEXUAL PREDATOR VIOLATED HIS DUE PROCESS RIGHT PURSUANT TO ARTICLE I SECTION 16 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This court in *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, 2007 Ohio LEXIS 1266, set forth the proper standard of review in determining a civil manifest-weight-of-the-evidence standard.

In the instant case, Nelson submits that the court of appeals erred when it failed to apply the "clearly erroneous" standard of review. Nelson asserts that a judge's determination is clearly erroneous if it is "totally lacking in any competent and credible supportive evidence." Two Ninth District Court of Appeals cases hold that the "clearly erroneous" standard is the proper standard to apply in this case: *State v. Unrue*, 2002 Ohio 7002, P6; and *Spinetti v. Spinetti*, 2001 Ohio App. LEXIS 1134, 2001 WL 251348. The court in *Unrue* stated, "The appropriate standard of review to be applied in sexual predator adjudications is the clearly erroneous standard. That is, sexual predator adjudication will not be reversed if there is 'some competent, credible evidence' to support the trial court's determination." (Emphasis added.) *Unrue*, 2002 Ohio 7002, P6. The language "some competent, credible evidence" is the same language this court used in *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 8 Ohio Op. 3d 261, 376 N.E.2d 578, syllabus, to explain the civil manifest-weight-of-the-evidence standard. In fact, the court in *Unrue* later makes clear that the Ninth District merely refers to the "some competent, credible evidence" standard of review as the "clearly erroneous" standard of review. *Id.* The "clearly erroneous" standard of review espoused by Nelson as adopted by the Ninth District Court of Appeals equates to the civil manifest-weight-of-the-evidence standard defined in *C.E. Morris Co.*, *supra*.

To the extent that prior court of appeals decisions applied a more deferential "civil" manifest weight standard, the Ohio Supreme Court's 2007 decision in *Wilson*, *supra*, appeared to sanction such a standard. In *Wilson*, the court clearly distinguished between a civil and a

criminal manifest weight of the evidence standard and stated that the civil standard is more deferential. *Id.* at ¶¶24-26. Accord *In re M.H.*, 9th Dist. No. 09CA28, 2009 Ohio 6911, ¶¶11-13. After , *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012 Ohio 2179, 972 N.E.2d 517, ¶12, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997 Ohio 52, 678 N.E.2d 541 (1997) quoting Black's Law Dictionary 1594 (6th ed. 1990), however, *Wilson's* distinction between civil and criminal manifest weight standards appears to have limited or no validity.

Despite *Eastley's* supra attempt to clarify the manifest weight standard of review, cause for confusion persists. *Eastley* appears to endorse the "some competent, credible evidence" standard, yet it also states that the same standard applies in criminal cases. In criminal cases, however, this court, and others have framed the issue as whether the record contains "substantial competent, credible evidence. *E.g.*, *State v. Stallings*, 89 Ohio St.3d 280, 289, 2000 Ohio 164, 731 N.E.2d 159 (2000); *State v. Getsy*, 84 Ohio St.3d 180, 193-194, 1998 Ohio 533, 702 N.E.2d 866 (1998); *State v. Davis*, 4th Dist. No. 12CA3336, 2013 Ohio 1504, ¶15; *State v. Miles*, 8th Dist. No. 81480, 2003 Ohio 2651, ¶33.

Furthermore, in *In re Mullen*, 129 Ohio St.3d 417, 2011 Ohio 3361, 953 N.E.2d 302, ¶15, *Masitto v. Masitto*, 22 Ohio St.3d 63, 22 Ohio B. 81, 488 N.E.2d 857 (1986); and *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 550 N.E.2d 178 (1990), syllabus. In *Masitto*, the court used the *C.E. Morris's* "some [competent], credible evidence" standard to review the trial court's factual finding. *Id.* at 66 (emphasis added). In *Bechtol*, the court stated: "Where an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing court."5 *Id.* at syllabus (emphasis added).

Nelson submits that a difference exists between "some" evidence and "substantial" evidence. The Ohio Supreme Court, however, seems to use the terms interchangeably. Perhaps this Court will now have an opportunity to clarify whether a manifest weight standard of review involves a consideration of whether the record contains "some" or "substantial" competent, credible evidence.

Certain factors are set forth in former R.C. 2950.09(B)(3)(a)-(j), that the trial court shall consider when classifying an individual. These factors include the age of the offender and criminal record; the victim's age; whether the offense involved multiple victims; whether the offender used drugs or alcohol to impair the victim; if the offender has previously been convicted of any criminal 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 illness or disability of the offender; and any other behavioral characteristics that contribute to the sex offender's conduct. (Emphasis added).

In the instant case the court of appeals found that the trial court is not required to individually assess each of these statutory factors as listed in former R.C. 2950.09(B)(3)(a)-(j), nor is it required to find a specific number of these factors before it can adjudicate an offender a sexual predator so long as its determination is grounded upon clear and convincing evidence. This finding in itself is contrary to this court's interpretation of the word shall when used in a statute. This court held in *Department of Liquor Control v. Sons of Italy lodge* (1992), 65 Ohio St.3d 532, 605 N.E.2d 368, that: "When used in a statute, word "shall" denotes compliance with commands of that statute is mandatory." (Emphasis added). Therefore, the court of appeals reliance on *State v. Bidinost*, 8th Dist. Cuyahoga No. 100466, 2014-Ohio-3136, *State v.*

Caraballo, 8th Dist. Cuyahoga No. 89757, 2008-Ohio-2046, ¶ 8, citing *State v. Ferguson*, 8th Dist. Cuyahoga No. 88450, 2007-Ohio-2777, is misplaced.

The prerequisites of former R.C. 2950.09(B)(3)(a)-(j) are mandated by statute when weighing the evidence regarding the burden of proof by clear and convincing evidence at this time, in the here and now, 2014. The real issue before this court is whether Mr. Nelson will reoffend is resolved in Exhibit-H, which demonstrates that he is unlikely to reoffend. TR.21, 22. The trial court failed in this respect and so did the court of appeals. Now the question arises will this court fail Nelson by refusing to accept jurisdiction and hear this case on the merits.

In *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74-75, 564 N.E.2d 54, the stated: "Where the proof required must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof. *Ford v. Osborne* (1887), 45 Ohio St. 1, 12 N.E. 526, paragraph two of the syllabus. However, it is also firmly established that judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court. The appropriate inquiry by the appellate court should have been, is there sufficient evidence to support the trial judge's finding that by clear and convincing evidence Nelson was likely to commit another sex offense? Even if Nelson had posed a future threat at the time he committed the crimes, the trial court had substantial evidence in the record to rule that he no longer posed a threat and no longer fit the profile of a sexual predator.

In the instant case, the trial court classified Nelson without giving the matter a fair process as guaranteed by the Fourteenth Amendment to the United States Constitution and clearly established federal law. See *Washington v. Glucksberg*, 521 U.S. 719, (1997); *Reno v. Flores*, 507 U.S. 292, 304 (1993), and Article I Section 16 of the Ohio Constitution. It classified

Nelson as a sexual predator in a big hurry, not paying attention to the advances and changes he made toward rehabilitation in his life, as illuminated in the argument and proof set forth by defense counsel, during the hearing.

The trial court's only focus and determination in this case was based on past criminal history, which is 27 years old. Past criminal history is a static factor that will never change. Mr. Nelson respectfully submits that he has done everything possible to change and rehabilitate. In the instant case, the classification did not occur 27 years ago, it occurred in 2014, when the circumstances are different, however the court did not consider this fact. Whether Nelson is likely to reoffend sexually is not bound by or couched in terms of recidivism test results, but is instead defined by the application and examination of statutory factors and consideration of relevant circumstances and evidence on a case-by-case basis which the trial court failed to consider.

Despite of the outdated Static-99 results, the law should not rely solely on the psychiatric findings for a determination of recidivism. *State v. Robertson*, 147 Ohio App.3d 94, 2002-Ohio-494. Rigid rules generally have no place in the determination to designate someone a sexual predator, as courts should apply the enumerated factors and consider the relevance, application, and persuasiveness of individual circumstances on a case-by-case basis. It is evident from the record in this case that the trial court failed to examine all relevant evidence before making its determination classifying Nelson as a sexual predator.

In the instant case, the court of appeals erred when it found that the trial court is not required to individually assess each of these statutory factors as listed in former R.C. 2950.09(B)(3)(a)-(j) to find a specific number of these factors before it can adjudicate an offender a sexual predator so long as its determination is grounded upon clear and convincing

evidence. The court of appeals erred because the statute mandates that all factors listed in R.C. 2950.09(B)(3)(a)-(j) must be considered in the interest of justice prior to any court classifying a defendant a sexual predator for life.

CONCLUSION

For all the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. Nelson respectfully requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

Carl A. Nelson Sr.

Carl A. Nelson Sr., Pro se

#A 199-605

Grafton Correctional Institution

2500 S. Avon-Belden Road

Grafton, Ohio 44044

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. Mail to counsel of record for Plaintiff-Appellee, Timothy J. McGinty, Cuyahoga County Prosecutor, this 12th day of December, 2014, at the Justice Center, 1200 Ontario Street, 9th Floor Cleveland, Ohio 44113-1604.

Respectfully submitted,

Carl A. Nelson Sr.

Carl A. Nelson Sr., Pro se

#A 199-605

APPENDICES

NOV 26 2014

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101228

PROCESSED

NOV 26 2014

CUYAHOGA COUNTY CLERK
OF COURTS
IMAGING DEPARTMENT

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CARL A. NELSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

CA14101228
86913825

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-86-212590-B

BEFORE: Celebrezze, P.J., S. Gallagher, J., and Kilbane, J.

RELEASED AND JOURNALIZED: November 26, 2014

ATTORNEY FOR APPELLANT

Ruth R. Fischbein-Cohen
3552 Severn Road
Suite 613
Cleveland, Ohio 44118

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Brett Hammond
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

FILED AND JOURNALIZED
PER APP.R. 22(C)

NOV 26 2014

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By *[Signature]* Deputy

COPIES MAILED TO COUNSEL FOR
BY COURT CLERK

FRANK D. CELEBREZZE, JR., P.J.:

{¶1} Appellant, Carl A. Nelson, appeals his classification as a sexual predator imposed on him in 2014 as a result of the state's motion for a sexual classification hearing under Megan's Law, referred to as an "H.B. 180 classification" hearing by the trial court. Appellant argues the trial court erred in classifying him as a sexual predator (the most severe classification) rather than a sexually oriented offender (the least severe category). After a thorough review of the record and law, we affirm appellant's classification.

I. Factual and Procedural History

{¶2} In 1987, appellant was convicted, following a jury trial, of the kidnapping and rape of a 14-year-old girl, for which he received five 15-to-25-year prison sentences, ordered to be served consecutively.¹ The facts surrounding these convictions have previously been recounted in appellant's direct appeal, *State v. Nelson*, 8th Dist. Cuyahoga No. 54791, 1989 Ohio App. LEXIS 908 (Mar. 16, 1989). Appellant also has prior convictions for rape and kidnapping from a 1978 case that resulted from guilty pleas. In that case, the victim was 13 years old. He received two concurrent four-to-25-year-prison sentences as a result of that case.

¹ In *State v. Nelson*, 8th Dist. Cuyahoga No. 95420, 2010-Ohio-6032, this court affirmed the consecutive nature of the sentence based on *res judicata*.

{¶3} On February 20, 2014, the state filed a motion asking the trial court to hold a sexual classification hearing.² An evaluation was conducted by the court psychiatric clinic, and a classification report was generated. The report included results obtained from other reports generated in appellant's cases, including an outdated "Static-99" score placing him in the moderate to high risk category to commit another sexually oriented crime in the future. The results for older "Static-99" tests were adjusted to account for changes in the test and changes in appellant's circumstances, and appellant was again found to present a moderate-to-high risk of engaging in sexually oriented crimes in the future.

{¶4} On March 18, 2014, the trial court held a classification hearing. It heard arguments from the state and appellant. The court then classified appellant as a sexual predator under Megan's Law, finding:

The House Bill 180 evaluation³ does raise some interesting red flags in addition to going over possible reoffending. It discusses his diagnosis as an antisocial personality disorder.

This is of grave concern to the court. It states that he has failed to conform to social norms with respect to lawful behaviors as demonstrated by arrests. He was deceitful after he left the area after he found out about charges. He worked under an alias.

² This was not the first such motion filed in the case. At one point, the trial court declared these classification hearings unconstitutional. Another motion was withdrawn by the state.

³ Former R.C. 2950.09(B)(1) governs sexual classification hearings that take place when imposing designations on sexual offenders pursuant to now-repealed R.C. Chapter 2950, Ohio's version of "Megan's Law."

Disregarded the safety of others by engaging in aggressive sexual behavior as well as having juvenile issues.

The court does believe that the state has met its burden by clear and convincing evidence that the defendant should be classified as a sexual predator. There were two victims in the case, in unrelated cases. Both were fourteen. Use of force and threat of force in particular in the second case. Stuffing a rag in her mouth, tying her legs to the bedpost. There was an accomplice. There was a kidnapping. Further harm was threatened to the victim if she was — if she took it upon herself to report.

* * *

And I have before me someone who self-reported that he didn't have an attraction to children, yet I have two separate cases within a relatively short period of time involving fourteen-year-old girls.

{¶5} Appellant filed the instant appeal assigning one error for review:

I. The trial court committed reversible error when it labeled the defendant-appellant a sexual predator.

II. Law and Analysis

{¶6} Prior to Ohio's enactment of its version of the Adam Walsh Act ("AWA"), R.C. Chapter 2950, sexually oriented offenders were classified according to Ohio's Version of Megan's Law, former R.C. Chapter 2950. After the Ohio Supreme Court found retroactive application of the AWA unconstitutional, it determined that Megan's Law governs classification and reporting requirements for offenders whose crime was committed prior to the enactment of the AWA. *State v. Howard*, 134 Ohio St.3d 467, 2012-Ohio- 5738, 983 N.E.2d 341.

{¶7} Pursuant to former R.C. 2950.09, a hearing is required to classify an individual convicted of a sexually oriented offense as a sexual predator.⁴ These designations determine the extent and duration of reporting requirements imposed on the offender after release from prison. At the hearing, if the state requests the court to impose the most severe classification of sexual predator, “the state must prove 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, 162, 743 N.E.2d 881 (2001), citing former R.C. 2950.01(E) and 2950.09(B)(3).

“At the hearing, the offender and the prosecutor shall have an opportunity to testify, present evidence, call and examine witnesses and expert witnesses, and cross-examine witnesses and expert witnesses regarding the determination as to whether the offender is a sexual predator. The offender shall have the right to be represented by counsel and, if indigent, the right to have counsel appointed to represent the offender.”

Id. at 161, quoting former R.C. 2950.09(B)(1).

{¶8} This court reviews these determinations under a civil manifest-weight-of-the-evidence standard. *State v. Bidinost*, 8th Dist. Cuyahoga No. 100466, 2014-Ohio-3136. This is because a sex offender classification under Megan’s Law is considered civil in nature. *State v. Wilson*, 113 Ohio St.3d 382,

⁴ Former R.C. 2950.09 defined three classifications of sex offenders in order of most to least severe: sexual predator, habitual sexual offender, and sexually oriented offender.

2007-Ohio-2202, 865 N.E.2d 1264, syllabus. The civil manifest weight of the evidence standard “affords the lower court more deference than the criminal standard.” *Id.* at ¶ 26. “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.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978).

{¶9} Certain factors are set forth in the statute that the trial court should consider when classifying an individual. These factors include the age of the offender and criminal record; the victim’s age; whether the offense involved multiple victims; whether the offender used drugs or alcohol to impair the victim; if the offender has previously been convicted of any criminal 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 illness or disability of the offender; and any other behavioral characteristics that contribute to the sex offender’s conduct. Former R.C. 2950.09(B)(3)(a)-(j).

{¶10} While these factors should be considered, a “trial court is not required to individually assess each of these statutory factors on the record nor is it required to find a specific number of these factors before it can adjudicate an offender a sexual predator so long as its determination is grounded upon clear and convincing evidence.” *State v. Caraballo*, 8th Dist. Cuyahoga No. 89757,

2008-Ohio-2046, ¶ 8, citing *State v. Ferguson*, 8th Dist. Cuyahoga No. 88450, 2007-Ohio-2777.

{¶11} In the present case, the court discussed several of the factors listed above and arrived at the conclusion that appellant's prior convictions for rape involving young girls of substantially similar ages were significant factors. The violence used by appellant was also significant. Appellant makes much of his behavior while in prison and his participation in several programs. He also asserts that he is older now and, statistically, less likely to engage in future crime. Appellant has also completed many courses while in prison, including counseling. These factor were considered in the court psychiatric assessment, and that analysis still found him to be at a moderate to high risk of committing a future sexually oriented offense. The fact that appellant raped a 14-year-old girl a little over a year after getting out of prison for raping another 13-year-old girl weighs heavily in favor of classifying him as a sexual predator.

{¶12} Appellant points to an addendum, dated November 22, 2010, to an earlier clinical risk assessment generated by a parole authority request.⁵ The addendum indicates that appellant's "risk score, as reported by the Parole Board

⁵ At oral arguments, appellant's counsel indicated the parole authority assessment found him to only present a ten percent chance of recidivism, but this court could find no such reference in this addendum, and the original report it modifies is not in the record.

is 4.”⁶ The addendum goes on to document the factors that are favorable to appellant, while only indirectly referring to the prior negative factors found in the prior report. Appellant’s risk assessment in this addendum was factored into the court psychiatric clinic evaluation prepared for the classification hearing, which found that appellant had a moderate to high risk of recidivism.

{¶13} The trial court’s decision to classify appellant as a sexual predator is not against the manifest weight of the evidence. The state provided clear and convincing evidence that appellant committed heinous sexually oriented crimes against two young victims of roughly the same age, and clinical examination found him to be at a moderate to high risk for recidivism. None of the other factors set forth by appellant sufficiently vitiate those factors to establish that the trial court lost its way in deciding appellant’s classification.

{¶14} Appellant’s attempts to better himself while in prison were not ignored by the court. These laudable actions, however, do not overcome the factors that weigh against a less severe classification.

III. Conclusion

{¶15} The trial court’s decision was not against the manifest weight of the evidence. Appellant’s classification as a sexual predator is supported by his prior criminal history and the psychological evaluation. Appellant’s repeated

⁶ The addendum did not indicate on which test this was based or at what level of risk of recidivism this would indicate, but at the hearing appellant’s attorney indicated this would put appellant in the low risk category.

history of violence and sexual assault against young women demands the most significant reporting requirements, should appellant ever leave prison.

{¶16} Judgment affirmed.

It is ordered that appellee recover from appellant 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.



FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
MARY EILEEN KILBANE, J., CONCUR



83454254

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

STATE OF OHIO
Plaintiff

CARL A NELSON
Defendant

Case No: CR-86-212590-B

Judge: NANCY MARGARET RUSSO

INDICT: 2907.02 RAPE WITH SPECIFICATIONS
2907.02 RAPE WITH SPECIFICATIONS
2907.02 RAPE WITH SPECIFICATIONS
ADDITIONAL COUNTS...

JOURNAL ENTRY

DEFENDANT IN COURT. COUNSEL CULLEN SWEENEY PRESENT.
PROSECUTOR(S) DANIEL VAN PRESENT.
COURT REPORTER PRESENT.

HEARING HELD ON STATE'S MOTION FOR SEXUAL PREDATOR CLASSIFICATION. THE COURT FINDS THE STATE HAS PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT DEFENDANT IS A SEXUAL PREDATOR. STATE'S MOTION FOR SEXUAL PREDATOR CLASSIFICATION IS GRANTED. THE COURT ALSO FIND THE DEFENDANT WOULD QUALIFY AS A HABITUAL SEX OFFENDER UNDER MEGAN'S LAW. DEFENDANT'S PRO SE MOTION TO DISMISS IS DENIED.

DEFENDANT FOUND INDIGENT; COURT APPOINTS ATTORNEY RUTH FISCHBEIN-COHEN APPELLATE COUNSEL. TRANSCRIPT ORDERED AT STATE'S EXPENSE.
COSTS WAIVED

SHERIFF ORDERED TO TRANSPORT DEFENDANT BACK TO THE INSTITUTION AND COURT LIFTS ITS HOLDER ON DEFENDANT AS THE HB 180 HEARING HAS BEEN HELD.
SHERIFF ORDERED TO TRANSPORT DEFENDANT CARL A NELSON, DOB: 01/28/1960, GENDER: MALE, RACE: WHITE.

03/17/2014
CPDL2 03/18/2014 09:05:00

Judge Signature

03/18/2014

HEAR
03/17/2014

RECEIVED FOR FILING
03/18/2014 11:05:15
ANDREA F. ROCCO, CLERK