[Cite as *State v. Miller,* 2007-Ohio-6931.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NOS. 2006-T-0059 and 2006-T-0060**
WILLIAM R. MILLER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case Nos. 80 CR 639 and 80 CR 164.

Judgment: Reversed.

Dennis Watkins, Trumbull County Prosecutor and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Michael A. Partlow, 623 West St. Clair Avenue, N.W., Cleveland, OH 44113 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, William R. Miller, appeals from the April 28, 2006 judgment entry of the Trumbull County Court of Common Pleas. For the following limited reasons, we reverse.

{¶2} **Substantive and Procedural Facts**

{¶3} In 1980, appellant ("Mr. Miller") was indicted on two counts of rape and two counts of kidnapping in Trumbull County Court of Common Pleas Case Number 80

CR 639. That same year, in a separate case, he was indicted on two counts of rape, one count of kidnapping, and one count of aggravated burglary in Trumbull County Court of Common Pleas Case Number 80 CR 184. In the first case, Mr. Miller pled guilty to one count of rape and one count of kidnapping. In the second case, Mr. Miller pled guilty to one count of burglary. The court nolled the remaining counts in both cases.

{¶4} On December 18, 1980, Mr. Miller was sentenced to concurrent indefinite terms of six to twenty-five years for the counts of rape and kidnapping. These sentences were to run concurrent with his sentence of burglary in the second case.

{¶5} Mr. Miller was released from prison on July 28, 2003. Pursuant to R.C. 2950.09(C)(1), sexual predator classification proceedings against Mr. Miller were initiated. *State v. Miller*, 11th Dist. Nos. 2004-T-0019 and 2004-T-0020, 2005-Ohio-4780, ¶5 ("*Miller 1*"). Hearings were conducted on October 23, October 30, and November 14, 2003. Id. at ¶6. The court issued its judgment entry in the beginning of March 2004, adjudicating Mr. Miller as a sexual predator. Mr. Miller filed a timely appeal of this adjudication on March 12, 2004.

{¶6} On September 9, 2005, this court issued its opinion in *Miller 1*, where we determined that pursuant to R.C. 2950.09(C)(1)(a), notification to the sentencing court by the Ohio Department of Rehabilitation and Correction ("ODRC") of the release of an offender, who pleaded guilty to or was convicted of a violent sex offense (including rape) prior to January 1, 1997, was a jurisdictional prerequisite to that court holding a sexual predator hearing as mandated by R.C. 2950.09(C)(1)(a) and (C)(2)(a). *Miller 1* at ¶23-26. Since the record was devoid of any indication that the ODRC had notified

the trial court of Mr. Miller's release we held that the trial court lacked the jurisdiction to hold the sexual predator hearings, and further, that the hearings that were actually conducted were inadequate. Id. at ¶26, 27, 32-36. Accordingly, we reversed and remanded for "the [trial] court to conduct a proper sexual offender classification hearing after the ODRC has provided proper notice in accord with our opinion." Id. at ¶37.

{¶7} The trial court held another sexual predator classification hearing on March 2, 2006, after receiving notification from the ODRC. The court adjudicated Mr. Miller to be a sexual predator in a judgment entry filed April 28, 2006.

{¶8} Mr. Miller now timely appeals and raises four assignments of error:

{¶9} "[1.] The trial court erred in holding that the state can initiate a sexual predator hearing.

{¶10} "[2.] The trial court erred because the sexual hearing was not conducted within one year after appellant's release from incarceration as required by R.C. 2950.09.

{¶11} "[3.] The trial court erred in determining that appellant was a sexual predator because the crime of burglary is not a sexually oriented offense as required by R.C. 2950.01[.]

{¶12} "[4.] The trial court's adjudication of appellant as a sexual predator is against the manifest weight of the evidence."

{¶13} **Timeliness of the Sexual Predator Classification Hearing**

{¶14} We begin our analysis with the second assignment of error, deeming it dispositive of this appeal.

{¶15} Pursuant to R.C. 2950.09(C)(2)(a), the sentencing court is required to conduct a sexual predator classification hearing for persons who pled guilty to or were

convicted of sexually oriented offenses prior to January 1, 1997. R.C. 2950.09(C)(2)(a) further provides: "[t]he court may *hold the hearing and make the determination* prior to the offender's release from imprisonment or at any time *within one year following the offender's release from that imprisonment*." (Emphasis added.)

{¶16} When construing a statute, courts must look to the plain language used by the legislature. *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶9. If the language is plain and unambiguous, courts must apply the statute as written. Id. at ¶15. A plain reading of R.C. 2950.09(C)(2)(a) reveals that the trial court classifying a pre-1997 offender as a sexual predator must both hold the requisite hearing, and make its determination of the offender's status, within one year of the offender's release from prison. This, however, did not occur in Mr. Miller's case.

{¶17} Mr. Miller was released from prison on July 28, 2003. Applying the normal rules for determination of time limits as required by law, the one year period for both holding Mr. Miller's sexual predator classification hearing, and determining his status as such, commenced the following day, July 29, 2003. Even if we deem the one year period tolled when Mr. Miller filed his first notice of appeal on March 12, 2004,[1] the sexual predator hearing was not held within the required time limits. Two hundred and seventeen days had elapsed from his release from prison when his first notice of appeal was filed. Further assuming the original appeal tolled the one year time limit, the filing of our judgment entry in *Miller 1* on September 12, 2005, would have caused the one year period to commence running September 13, 2005. The trial court held the hearing

1. We do not believe the hearings or determination of sex predator status subject of appeal in *Miller 1* tolled the one year period set forth in R.C. 2950.09(C)(2)(a), because we held that the trial court lacked jurisdiction to conduct those proceedings, thus, we are bound by our previous holding in this case.

resulting in this appeal on March 2, 2006 – three hundred and eighty-seven days following Mr. Miller's release from prison. The court filed its judgment entry classifying Mr. Miller as a sexual predator on April 28, 2006, four hundred and forty-four days following his release.

{¶18} Thus, we must find that the trial court did not hold the sexual predator classification hearing, nor make its determination of Mr. Miller's status as a sexual predator within the proscribed time limits of R.C. 2950.09(C)(2)(a). This is so because we are bound by the law of the case in *Miller 1*.

{¶19} "The 'law of the case' doctrine was described by the Supreme Court of Ohio in *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3-4. 'The doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *** Thus, where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law. *** Moreover, the trial court is without authority to extend or vary the mandate given.'" *Weller v. Weller*, 11th Dist. No. 2004-G-2599, 2005-Ohio-6892, ¶14-15. (Citations omitted.) Thus, "absent extraordinary circumstances, legal determinations made by this court must be followed by inferior courts in subsequent proceedings of that particular case." Id. at 16, citing *Lapping v. HM Health Services*, 11th Dist. No. 2004-T-0011, 2005-Ohio-699, ¶18. Although we disagree with the rationale espoused in *Miller 1,* we are bound to follow our previous determination.

{¶20} In *Miller 1,* we held "the trial court obtains jurisdiction to hold sexual offender hearing only after the ODRC has provided the court with proper notification." Id. at ¶25. See, e.g., R.C. 2950.09(C)(1)(a); R.C. 2950.09(C)(2)(a). Thus, in the case of Mr. Miller, we must reverse his classification as a sexual predator because we determined the court conducted the first sexual predator hearing without the jurisdiction to do so since the ODRC failed to provide the court with a recommendation.

{¶21} In *Miller 1*, we found the notification from the ODRC to be the grant of jurisdiction that allows the court to proceed with a sexual predator hearing. However, since *Miller 1*, better arguments have been made that persuade us to believe our interpretation of R.C. 2950.09(C)(1) was unduly narrow. The passage of time and the rationale applied by other districts has convinced us that the better interpretation was expressed in the concurrence of *Miller 1*, where the Honorable Judge Rice had the foresight to state: "[I]t is apparent that R.C. 2950.09(C)(1) does not address the trial court's jurisdiction. Rather, the provisions simply act as procedural instruments by which the trial court receives a sexual predator case. 'In matters of jurisdiction, the General Assembly intended that R.C. 2950.01(G) control.' Accordingly, the notification of the ODRC is merely advisory and not a mandatory jurisdictional prerequisite." Id. at ¶48, citing *State v. Clark* (Mar. 29, 1999), 12th Dist. No. CA98-11-103, 1999 Ohio App. LEXIS 1371, 9. See, also, *State v. Schoolcraft* (Apr. 24, 2002), 9th Dist. No. 01CA007892, 2002 Ohio App. LEXIS 1925.

{¶22} The Seventh District Court of Appeals concisely explained the rationale for this interpretation in *State v. Brown*, 151 Ohio App. 3d 36, 2002-Ohio-5207: "Simply stated, R.C. 2950.09(C)(1) is mandatory rather than directory, and, thus, not

jurisdictional in nature, because 'the legislature did not indicate that the department's recommendation was 'essential to the validity of the *** proceeding.'" Id. at ¶13, citing *Clark* at 11. "Because the department's recommendation is merely a reasonable mechanism of triggering the sexual predator proceeding, 'the department's recommendation does not provide procedural protection to the offender.'" Id. "The offender is instead given the requisite procedural protections by the trial court" as notice of the hearing is required pursuant to R.C. 2950.09(C)(2), and further, at the hearing the offender is entitled to be appointed counsel and to present and cross-examine witnesses. Id. at ¶14.

{¶23} Whether the recommendation of the ODRC for a violent sex crime, such as rape, was meant to be merely a procedural mechanism of notification to the trial court to conduct a sexual predator hearing is further bolstered by the current version of R.C. 2950.09(C)(1)(a), which now reads:

{¶24} "If the sexually oriented offense *** was a violent sex offense, the department shall *notify* the court that sentenced the offender of this fact, and the court shall conduct a hearing to determine whether the offender is a sexual offender." (Emphasis added.)

{¶25} Thus, the General Assembly has since clarified that for a violent sex offender, the department's recommendation serves merely as a notice. See, also, *State v. Shields*, 8th Dist. No. 85998, 2006-Ohio-1536, interpreting R.C. 2950.09(C)(1)(a) where the appellant lacked a recommendation of the ORDC in his case file: "[T]he crime perpetrated upon the victim was clearly a violent sex offense, subjecting the appellant to

a mandatory sexual predator hearing, with or without a recommendation from the Department of Rehabilitation and Correction." Id. at ¶46.

{¶26} We reverse for the limited purpose of the instant case since we previously determined in *Miller 1* the court was without jurisdiction to hold the first sexual predator hearing. In hindsight, we cannot agree with the rationale espoused in *Miller 1,* and we would overrule that decision today, and interpret the version of R.C. 2950.09(C)(1)(a) at issue in *Miller 1* as merely a mechanism that provides notice to the court to hold a sexual predator hearing.

{¶27} For the following reasons, Mr. Miller's second assignment of error has merit.

{¶28} We reverse the judgment of the Trumbull County Court of Common Pleas.

JUDITH A. CHRISTLEY, J., Ret.,
Eleventh Appellate District,
sitting by assignment, concurs.

COLLEEN MARY O'TOOLE, J., concurs in judgment only with Concurring Opinion.

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{¶29} I respectfully acknowledge the position of the majority that the rationale in *Miller* I (that compliance with R.C. 2950.09(C)(1)(a) is jurisdictional) is incorrect. The majority relies on the interpretation that former R.C. 2950.01(G)(3) – present R.C. 2950.01(G)(4) – confers jurisdiction on the trial courts over sexual predator classification hearings, while R.C. 2950.09(C) merely provides the mechanism for exercising that

jurisdiction. I believe this view ignores the language of the statutes involved, and precedent from the Supreme Court of Ohio.

{¶30} The majority position is derived from the decision of the Ohio Supreme Court in *State v. Brewer* (1999), 86 Ohio St.3d 160, which consolidated appeals from the Twelfth and Tenth Appellate Districts. In three of the appeals, the Supreme Court affirmed the decisions of the lower courts, that under former R.C. 2950.01(G)(3), for an offender sentenced or pleading guilty to a sex offense prior to January 1, 1997, a determination that the offender was a sexual predator had to be made prior to the offender's release from prison (the fourth appeal concerned proper notification to the offender). This provision was part of former R.C. 2950.01(G)(3). In *one* of the consolidated cases, *State v. Sowards* (Mar. 26, 1998), 10th Dist. No. 97APA07-907, 1998 Ohio App. LEXIS 1110, at 8, the Tenth District described its decision in another of the consolidated appeals, *State v. Rhodes* (Mar. 24, 1998), 10th Dist. No. 97APA06-793, 1998 Ohio App. LEXIS 1112, as determining that "the language of R.C. 2950.01(G)(3) was jurisdictional in providing only for pre-release classification."

{¶31} This language in *Sowards* appears to be the primary basis for the subsequent view that jurisdiction to hold sexual predator classification hearings regarding pre-1997 offenders springs from former R.C. 2950.01(G)(3), present R.C. 2950.01(G)(4). On the consolidated appeal, the Supreme Court effectively held that, reading former R.C. 2950.01(G)(3) and former R.C. 2950.09(C)(2) (concerning sexual predator classification hearings) together required that such hearings be held prior to an offender's release from prison – even though former R.C. 2950.09(C)(2) set no time limits for such hearings. In effect, the Supreme Court held that, due to the language in

former R.C. 2950.01(G)(3) mandating that pre-1997 offenders be adjudicated sexual predators prior to release, the R.C. 2950.09(C)(2) hearing had to be held prior to release. *Brewer*, supra, at 164-165. Nothing in the Supreme Court's decision indicates that jurisdiction in sexual predator classification hearings proceeds *solely* from former R.C. 2950.01(G)(3), present R.C. 2950.01(G)(4).

{¶32} The position of the majority, and that of similar appellate opinions, ignores the authority of *State ex rel. Bruggeman v. Ingraham* (1999), 87 Ohio St.3d 230, announced some four months following *Brewer*. In *Bruggeman*, the Ohio Supreme Court was presented with an appeal from a denial of a writ of prohibition by the Third Appellate District. Appellant's principal argument in support of his petition below was that the trial court lacked jurisdiction to hold a sexual predator classification hearing, since the ODRC had failed, pursuant to former R.C. 2950.09(C)(1), to submit to the trial court a recommendation that he be so classified. *Bruggeman* at 231-232. The Third District held that the trial court had jurisdiction to hold the hearing, and that Bruggeman could appeal from that determination. Id. at 230-231.

{¶33} Affirming the Third District, the Supreme Court held that a sexual predator hearing could *only* be held if the procedural requirements of R.C. 2950.09(C) were met. *Bruggeman* at 232. However, the court held that, "[n]evertheless, *** it is premature to presume that [the trial court] will proceed unlawfully. Therefore, [the trial court] does not *patently and unambiguously* lack jurisdiction so to proceed, and Bruggeman has an adequate remedy by appeal to contest any subsequent adverse judgment." Id. (Emphasis sic.)

{¶34} Under *Bruggeman*, compliance with R.C. 2950.09(C)'s notification requirements is jurisdictional. I believe the present form of R.C. Chapter 2950 emphasizes, rather than diminishes, the jurisdictional aspect of R.C. 2950.09(C). Under former R.C. 2950.01(G)(3), the time limits for holding a sexual predator classification hearing were contained, effectively, in that section (i.e., the adjudication had to occur prior to the offender's release from prison). Presently, the time limits for holding the hearing–*the principal basis for the determination that former R.C. 2950.01(G)(3) was jurisdictional*, *Sowards*, supra, at 8 – are now set forth at R.C. 2950.09(C)(2)(a).

{¶35} Consequently, I concur in judgment only.