

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
HENRY COUNTY**

**STATE OF OHIO**

**PLAINTIFF-APPELLEE**

**CASE NUMBER 7-2000-06**

**v.**

**RUSSELL VAN METER**

**OPINION**

**DEFENDANT-APPELLANT**

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**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.**

**JUDGMENT: Judgment affirmed.**

**DATE OF JUDGMENT ENTRY: October 31, 2000**

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**ATTORNEYS:**

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For Appellant.**

**JOHN HANNA  
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For Appellee.**

**BRYANT, J.** This appeal is taken by Defendant-Appellant Russell Van Meter from the judgment entered by the Court of Common Pleas of Henry County determining that Van Meter was a sexual predator and fining him \$7,500.00.

On June 25, 1997, Van Meter was indicted on one count of rape and three counts of gross sexual imposition. A jury trial was held and December 30, 1997, the jury returned a verdict of guilty on all four counts. On March 2, 1998 the trial court sentenced Van Meter to life in prison. Van Meter appealed the judgment entry and sentencing.

On November 25, 1998, this court reversed Van Meter's conviction for violations of due process. *State v. Van Meter* (1998), 130 Ohio App.3d 592, 720 N.E.2d 934. A discretionary appeal to the Supreme Court of Ohio was not allowed. *State v. Van Meter* 85 Ohio St.3d 1443, 708 N.E.2d 209. On March 2, 2000, Van Meter entered a plea of no contest to one count of rape; the remaining charges were dismissed by the State. On April 14, 2000, the trial court held a combined sexual predator and sentencing hearing wherein it determined that Van Meter was a sexual predator, sentenced him to five years in prison and fined him \$7,500.00.

On appeal from that judgment Van Meter asserts the following two assignments of error:

- 1. The trial court erred when it determined that Mr. Van Meter was a sexual predator.**
- 2. The trial court erred when it imposed a fine in the amount of \$7,500.00.**

In his first assignment of error Van Meter claims that the trial court erred when it determined that he was a sexual predator because only two of the ten enumerated statutory factors indicating a likelihood of recidivism implicated Van Meter as a sexual predator. Furthermore, Dr. Gregory Forgac, a clinical and forensic psychologist, testified that Van Meter had a low likelihood of recidivism.

In opposition the State maintains that the trial court's determination that Van Meter was a sexual predator is valid and Van Meter's argument has no merit. Specifically, the State argues that the determination of whether an individual is a sexual predator is highly "subjective and fact specific" and it is not simply a "matter of adding up points and the defendants with the lowest scores win the classification game".

In determining whether the offender is a sexual predator, the court must consider all the relevant factors, including, but not limited to, all of the factors specified in R.C. 2950.09(B)(2). R.C. 2950.09(C)(2). The statutory criteria in R.C. 2950.09(B)(2)(a) through (j) include: the offender's age; prior criminal record; the age of the victim of the sexually oriented offense; whether the sexually oriented offense involved multiple victims; whether the offender used drugs or

alcohol to impair the victim or prevent the victim from resisting; if the offender previously has been convicted of or pleaded guilty to any criminal offense, whether the offender completed any sentence imposed for the prior offense, and if the prior offense was a sex offense or a sexually oriented offense, whether the offender participated in available programs for sex offenders; any mental illness or mental disability of the offender; the nature of the offender's sexual conduct with the victim and whether that contact was part of a demonstrated pattern of abuse; whether the offender, during commission of the offense, displayed cruelty or threatened cruelty; and any additional behavioral characteristics that contribute to the offender's conduct. Finally, after reviewing all of the testimony and evidence presented at a hearing and taking into consideration the statutory factors, the trial court must determine by clear and convincing evidence whether the offender is a sexual predator. R.C. 2950.09(C)(2).

In *State v. Smith* (Aug. 18, 1999), Shelby App. No. 17-99-1, unreported, when discussing a trial court's consideration of the statutory factors, this court concurred with the opinion of the Ninth District when it stated:

**“The enumerated criteria are simply guidelines for a court to consider, and there is no requisite number of factors that must be applicable before a defendant can be considered a sexual predator. Simply because certain factors may not apply to a particular defendant does not mean he or she cannot be adjudicated a sexual predator.”**

*State v. Gropp* (Apr. 8, 1998), Lorain App.No. 97CA006744, unreported at \*9.

Further we noted that the Second District Court of Appeals in *State v. Bradley* (June 19, 1998), Montgomery App. No. 16662, unreported at \*5, had similarly stated:

**“Courts need some flexibility, since the inquiry in sexual predator cases is very fact-sensitive. For example, in some situations, the victim’s age may be completely irrelevant and other facts like the offender’s prior criminal record take on greater significance. In other cases, like the present the victim’s age will be significant. Generally, if a very young child is molested, age is a strong factor because our society has taboos against sexual contact between adults and young children.”**

In its April 19, 2000, judgment entry, the trial court did state that based upon the evidence presented, which consisted of testimony presented at the first trial, the psychological evidence presented by Van Meter, as well as having reviewed the statutory criteria, it found Van Meter to be a sexual predator by clear and convincing evidence. The record also reveals that the trial court considered factors (h) and (i) to be extremely significant. Specifically, the trial court reasoned that the offender had ingratiated himself with the victim by buying him gifts, giving him money, and giving him a job; Van Meter’s relationship with the victim was important to the victim because the victim only had one other close familial relationship; further the testimony at the previous trial indicated that Van Meter had committed some sort of sexual act with the victim numerous times; finally, the trial court considered the fact that despite eye-witness testimony of one of the

sexual acts, Van Meter refused to admit to the crimes and continued to deny any sexual contact with the victim at all.

After our review of the record, we are convinced that the trial court did consider the criteria under R.C. 2950.09(B)(2). As for the trial court's consideration of the psychological testimony, the trial court did indeed consider it. Further it noted that the Dr. Forgac could not be positive about the recidivism of Van Meter and Dr. Forgac, in fact, agreed with the trial court concerning Van Meter's continued denial of the crime and how it related to his recidivism. Further it should be noted that Van Meter argues that denial of the crime is not a factor however Van Meter forgets that R.C. 2950.09(B)(2)(j) allows for the consideration of any other behavioral characteristics. Accordingly we hold that the defendant was properly adjudicated a sexual predator by clear and convincing evidence. No error having been shown Van Meter's first assignment of error is overruled.

In his second assignment of error Van Meter argues that the trial court erred by imposing a \$7,500.00 fine because Van Meter is indigent and unable to afford the fine. In support of this argument Van Meter claims the trial court erred by failing to hold a hearing on his indigency or in the alternative his trial counsel was ineffective for failing to raise his indigent status.

A hearing to determine the indigent status of a defendant for purposes of imposing a fine is controlled by R.C. 2929.18. R.C.2929.18(E) states that a "court

that imposes a financial sanction upon an offender may hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it.” Thus the decision on whether or not to hold a hearing lies within the sound discretion of the trial court.

Further should the defendant fail to request a hearing to determine his status as an indigent he has waived any error. Appellate courts of Ohio have consistently held that errors which could have been called to the trial court’s attention at the time when such errors are were made and could have been avoided but were not will not be heard on appeal. *State v. Williams* (1977), 51 Ohio St.2d 112, 364 N.E.2d 1364.

This prohibition is not absolute. The reviewing court may overturn an unpreserved issue for plain error. *State v. Craft* (1977), 52 Ohio App.2d 1, 367 N.E.2d 1221. “A ‘plain error’ committed by a trial court and reviewable on appeal, is an obvious error shown by the record which is prejudicial to an accused, although neither objected to nor affirmatively waived, which, if allowed to stand would have substantial adverse impact on the integrity of and public confidence in the judicial proceedings.” *Id* at paragraph one of the syllabus.

Therefore, in order to show that the trial court erred by imposing the \$7,500.00 fine Van Meter must show that the error was prejudicial. Van Meter fails to do so. He does not offer any proof of indigency rather he claims that he

would not be able to prove prejudice without a hearing below. That reasoning is circular and ineffective.

In the alternative, Van Meter argues that he received ineffective assistance of counsel because counsel failed to object to the \$7,500.00 fine or move for a hearing. However, when considering an allegation of ineffective assistance of counsel, there must be a determination that the defense was prejudiced by counsel's ineffectiveness. *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819. Van Meter fails to show how he would be prejudiced by the failure to hold a hearing. Once again he offers no evidence that he is indigent. Absent this showing, there can be no finding of prejudice to Van Meter. No error having been shown Van Meter's second assignment of error is overruled and the judgment of the Court of Common Pleas of Henry County is affirmed.

***Judgment affirmed.***

**HADLEY, P.J., and WALTERS, J., concur.**

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