COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2008 CR 00557**
vs.	:	**Judge McBride**
ALFRED L. BROWN	:	**DECISION/ENTRY**
Defendant	:	

Jason Nagel, assistant prosecuting attorney for the State of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Christopher J. Feldhaus, assistant public defender for the defendant Alfred L. Brown, 302 East Main Street, Batavia, Ohio 45103.

This cause came before the court for an evidentiary hearing for classification under Megan's Law on March 2, 2015. At the conclusion of that hearing, the court gave counsel time to submit memoranda on any legal issues. The final memorandum was submitted on March 26, 2015 and the matter was taken under advisement the following day.

Upon consideration of the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On October 17, 2008, the defendant Alfred L. Brown entered a plea of guilty to one count of Attempted Gross Sexual Imposition in violation of Sections 2923.02(A)/2907.05(A)(4) of the Revised Code, a felony of the fourth degree.[1]

The offense in the present case was committed sometime in 2002 when the defendant approached his granddaughter A.B., placed his hand in her underwear, and touched her vagina.[2] At his interview as part of the pre-sentence investigation, the defendant initially denied touching A.B. inappropriately but ultimately "admitted that the way he touched her was inappropriate."[3]

On November 19, 2008, the court sentenced the defendant to a five-year term of community control.[4] At that same time, the court classified the defendant as a Tier II sex offender under the Adam Walsh Act.[5]

In August 2014, it was brought to this court's attention that the defendant had been sentenced in Clermont County Common Pleas Court Case No. 2014 CR 00042 by Judge Thomas Herman and had been classified in that case under Megan's Law as

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[1] Judgment Entry on Finding of Guilty and Ordering Pre-Sentence Investigation, filed October 24, 2008.
[2] State's Exhibit 1.
[3] Id. at pg. 2.
[4] Judgment Entry Sentencing Defendant to Community Control, filed November 21, 2008.
[5] Id.

opposed to the Adam Walsh Act.[6] In the case before Judge Herman, the defendant was convicted of five counts of Gross Sexual Imposition in violation of R.C. 2907.05(A)(4), felonies of the third degree, for the following conduct: (1) in 2003, putting his hand down the shirt of his granddaughter M.B. and fondling her breast; (2) in 2005, putting his hand underneath the bathing suit of M.B. and fondling her breast; (3) in 1997, approaching his granddaughter Al.B., putting his hand beneath her clothing, and rubbing her breast; (4) in 1998-1999, approaching Al.B. while she was sleeping and rubbing her vagina and breast; and (5) in 2003, approaching Al.B. when she was asleep, unzipping his pants, and forcing her to touch his penis.[7] The defendant began crying during his PSI interview for the 2014 case and admitted that he was in sex offender treatment with Dr. Bassman "to address the sexual offenses and his denial regarding [M.B. and Al.B.][;]" but he continued to deny that he committed the conduct alleged.[8]

On September 10, 2014, the court scheduled and held a telephone status conference with counsel in the case at bar at which time it was agreed that the defendant had been improperly classified under the Adam Walsh Act in the present case. A classification hearing was scheduled and ultimately went forward on March 2, 2015.

At that classification hearing, the defendant presented the testimony of Dr. Stuart Bassman, a psychologist who helped to develop the AWARE program in Ohio which deals with sexual abuse and sexual trauma for both victims and perpetrators. The

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[6] State's Exhibit 3.
[7] State's Exhibit 2.
[8] Id. at pg. 3.

defendant was referred to Dr. Bassman by his attorney in the 2014 case, and Dr. Bassman completed a psychological treatment assessment for the defendant.[9]

Dr. Bassman acknowledged during his testimony that this was a treatment assessment, not a risk assessment, and that his bias therefore in completing the assessment was toward treatment. It should also be noted that when Dr. Bassman completed this assessment, the defendant had been charged but not convicted with the offenses in the 2014 case.

During the assessment, the defendant continued to deny that he had inappropriately touched the two granddaughters involved in the 2014 case.[10] The defendant further denied any sexual attraction to prepubescent children.[11] He also reported the facts of the conviction in this case to Dr. Bassman much as he did to the probation officer during his PSI interview in 2008 when he initially denied any wrongdoing, which was to say that he happened upon A.B. while she was masturbating and that he simply grabbed her hand and told her to stop.[12]

Dr. Bassman testified that his recommendation for treatment for the defendant is a combination of individual and group psychotherapy. Dr. Bassman testified that he believes that the defendant is amenable to being treated in the community and that he believes he could help the defendant despite his continued denials regarding his actions. He noted that a key component to a risk assessment for a sex offender is whether that person reoffends while they are on community control, which did not occur in this case.

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[9] Defendant's Exhibit 1.
[10] Id. at pgs. 3-4.
[11] Id. at pg. 7.
[12] Id. at pg. 4.

Dr. Bassman found that the defendant had two specific risk factors which are that (1) he needs to develop compassion and empathy for his victims and (2) he made a suicide attempt, which shows he is still impulsive and that impulsivity needs to be monitored. However, Dr. Bassman also testified that the defendant has more protective factors than risk factors, with some of those protective factors being (1) the defendant's long-term, stable marriage to his wife; (2) his social support system; (3) the fact that he does not have an alcohol or drug problem; and (4) his long-term employment.

It should be noted that Dr. Bassman did not have a copy of the defendant's criminal record when he performed his assessment of the defendant. It appears from reading Dr. Bassman's report, and from his testimony at the hearing, that Dr. Bassman was under the impression that the offenses committed in the two cases were all committed around the same time. When it was explained that the offenses in the two cases were committed over a span of eight years, he testified that he did not consider this to be the same general time frame. However, he maintained at the end of his questioning that the key factor to assessing the defendant's risk is that he did not reoffend while on community control or while in the course of treatment.

There was a great deal of focus, particularly on cross examination, on Dr. Bassman's assessment of the defendant pursuant to the Static-99R. Dr. Bassman acknowledged that one is supposed to have a copy of the offender's criminal record when completing the Static-99R and that he did not have that information for the defendant. However, while the defendant's score in Box #5 (prior sex offenses) may have changed, Dr. Bassman also noted on redirect examination that the defendant is

eligible to receive a negative-points score in Box #1 due to his advanced age.[13] Therefore, it appears that the defendant would still fall in the low or low-moderate risk category under the Static-99R.

LEGAL ANALYSIS

(A) RES JUDICATA AND EVIDENTIARY ISSUE

The court *sua sponte* raised the issue at the hearing on this matter as to whether Judge Herman's determination in case 2014 CR 42 operated to bar this court's determination of the defendant's classification in the case at bar. The evidence presented was essentially the same in both cases and the conviction in the present case would have been part of the record for Judge Herman's consideration in 2014.

The " '[p]rinciple of *res judicata* provides that a valid final judgment rendered upon the merits and without fraud or collusion bars all subsequent claims arising out of the same transaction between the same parties or those in privity with them.' "[14]

This court did not find a case directly on point with the issue presented in the case at bar. However, the Twelfth District Court of Appeals has held that "[w]here an individual is sentenced by two different courts for sexually oriented offenses committed by the offender in two different counties, R.C. 2950.09 lodges jurisdiction to hold the sexual offender hearing in any court that has sentenced the offender for a sexually

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[13] Defendant's Exhibit 2.
[14] *State v. Lucerno*, 8th Dist. Cuyahoga No. 89039, 2007-Ohio-5537, ¶ 9, quoting *State v. Simmons*, 8th Dist. Cuyahoga No. 87125, 2006-Ohio-5006, citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 1995-Ohio-331, 653 N.E.2d 226.

oriented offense."[15] That court also found that issue preclusion did not apply when the issue of the defendant's status as a habitual sexual offender was never determined by the prior court.[16]

It should also be noted that the factors set forth in R.C. 2950.09 specifically reference biographical information about the victim of the subject offense and whether the defendant engaged in certain conduct to facilitate the subject offense. Furthermore, R.C. 2950.09 orders that the judge imposing the sentence *shall* conduct a hearing to determine if the offender is a sexual predator. Each of these statutory provisions suggest that any court in which the defendant has been convicted of a sexually oriented offense retains jurisdiction, and in fact, is required to hold a classification hearing and to examine the specific facts of the offense committed in that case.

As such, the court finds that the doctrine of *res judicata* does not bar this court's consideration as to whether the defendant should be classified as a sexual predator.

At the hearing on this matter, this court also raised the issue of whether it was proper to receive evidence and testimony regarding things that have happened since the defendant's original sentencing. It directed either party to brief the issue or submit relevant case law if there was an objection to the court hearing such evidence. Neither party raised any such objection. Furthermore, it should be noted that the state submitted evidence of the defendant's conviction in the 2014 case, which would not have been available at the time of the original sentencing, and did not object to Dr. Bassman's testimony. As such, the court finds that the defendant's likelihood to commit another

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[15] *State v. Baird*, 12th Dist. Clermont No. CA2001-03-043, 2002-Ohio-1913, * 2.
[16] Id.

sexually oriented offense is properly determined as of the date of the hearing in this matter.

(B) CLASSIFICATION ANALYSIS

A "sexual predator," as it is defined in relevant part to the case at bar, is a person who "has been convicted of or pleaded guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses."[17]

The offense of which the defendant was convicted in this case (attempted gross sexual imposition) is a sexually oriented offense.[18]

Pursuant to former R.C. 2950.09(B)(1)(a) [eff. January 1, 2002]:

> "The judge who is to impose sentence on a person who is convicted of or pleads guilty to a sexually oriented offense * * * shall conduct a hearing to determine whether the offender is a sexual predator if any of the following circumstances apply:
>
> (i) Regardless of when the sexually oriented offense was committed, the offender is to be sentenced on or after January 1, 1997, for a sexually oriented offense that is not a sexually violent offense."

Former R.C. 2950.09(B)(3), eff. January 1, 2002, provided in relevant part as follows:

> "In making a determination * * * as to whether an offender or delinquent child is a sexual predator, the judge shall consider all relevant factors, including, but not limited to, all of the following:
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> (a) The offender's or delinquent child's age;

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[17] R.C. 2950.01(E), eff. January 1, 2002.
[18] R.C. 2950.01(D)(1)(a), eff. January 1, 2002.

(b) The offender's or delinquent child's prior criminal or delinquency record regarding all offenses, including, but not limited to, all sexual offenses;

(c) The age of the victim of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made;

(d) Whether the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made involved multiple victims;

(e) Whether the offender or delinquent child used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;

(f) If the offender or delinquent child previously has been convicted of or pleaded guilty to, or been adjudicated a delinquent child for committing an act that if committed by an adult would be, a criminal offense, whether the offender or delinquent child completed any sentence or dispositional order imposed for the prior offense or act and, if the prior offense or act was a sex offense or a sexually oriented offense, whether the offender or delinquent child participated in available programs for sexual offenders;

(g) Any mental illness or mental disability of the offender or delinquent child;

(h) The nature of the offender's or delinquent child's sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;

(i) Whether the offender or delinquent child, during the commission of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made, displayed cruelty or made one or more threats of cruelty;

(j) Any additional behavioral characteristics that contribute to the offender's or delinquent child's conduct."

A court is under no obligation to "tally up" the R.C. § 2950.09(B)(3) factors, pro and con, and determine which group is larger.[19] "An offender could conceivably be classified as a sexual predator based on only one or two factors from R.C. § 2950.09(B)[(3)]."[20] "Courts must consider the particular facts of each case and look at the 'totality of the circumstances' rather than engage in a rote mathematical computation to determine a criminal defendant's sexual offender status."[21]

" * * * [T]he court shall determine by clear and convincing evidence whether the subject offender * * * is a sexual predator."[22]

"The standard of 'clear and convincing evidence' is defined as 'that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.' "[23]

"Sexual predator determination hearings are civil in nature."[24] The Rules of Evidence do not strictly apply to sexual predator determination hearings.[25] "Though the Rules of Evidence are not strictly in force at sexual-predator hearings, evidence presented at these hearings must have some indicia of reliability."[26] "In order to be reliable, there must be some reasonable probability that the evidence is true."[27]

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[19] *State v. Mollohan*, 4th Dist. Washington No. 98-CA-13, 1999 WL 671824, *8 (Aug. 19, 1999).
[20] Id.
[21] Id.
[22] R.C. § 2950.09(B)(4), eff. January 1, 2002.
[23] *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54, 60 (1990), quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.
[24] *State v. Cook*, 83 Ohio St.3d 404, 422, 700 N.E.2d 570, 585 (1998).
[25] Id. at 425.
[26] *State v. Hurst*, 7th Dist. Columbiana No. 97-CO-60, 2000 WL 459681, *2 (April 10, 2000), citing *State v. Lee*, 128 Ohio App.3d 710, 716 N.E.2d 751 (1st Dist.1998).
[27] *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571, 589 N.E.2d 1303, 1305 (1992).

"Although certainly even one sexually oriented offense is reprehensible and does great damage to the life of the victim, R.C. Chapter 2950 is not meant to punish a defendant, but instead, 'to protect the safety and general welfare of the people of this state.' "[28] "Thus, if we were to adjudicate all sexual offenders as sexual predators, we run the risk of 'being flooded with a number of persons who may or may not deserve to be classified as high-risk individuals, with the consequence of diluting both the purpose behind and the credibility of the law."[29]

Applying the 2950.09(B)(3) factors in the case at bar, the defendant is now 78 years of age. The conviction in this case was his first criminal offense; he has since been convicted in Case No. 2014 CR 00042 of five additional gross sexual imposition offenses.[30] The victim in the present case was nine years old at the time of the offense.[31] The offense in this case did not involve multiple victims and the defendant did not use alcohol or drugs to impair the victim.

According to the Adult Probation Department, the defendant completed individual sex offender treatment while on community control in this case with Dr. Gary Key.[32] The court notes that the defendant's description of this treatment to Dr. Bassman was that he only saw Dr. Key for "several sessions."[33] Regardless, it is important to note that this treatment with Dr. Key occurred after the offenses in the 2014 case were committed.

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[28] *State v. Lee*, 8th Dist. Cuyahoga No. 78899, 2001 WL 1110299, *5 (Sept. 13, 2001).
[29] Id., quoting *State v. Thompson*, 140 Ohio App.3d 638, 647, 748 N.E.2d 1144, 1151 (8th Dist.1999).
[30] State's Exhibits 1 and 2.
[31] State's Exhibit 1.
[32] State's Exhibit 2.
[33] Defendant's Exhibit 1 at pg. 4.

There is no evidence that the defendant has a mental illness or mental disability. There is also no evidence that the defendant, during the commission of this offense, displayed cruelty or made any threats of cruelty.

The nature of the offense in this case is that the defendant placed his hand in his 9 year-old granddaughter's underwear and touched her vagina. This is the only offense toward A.B. of which the defendant has been convicted so there was no pattern of abuse as to A.B. specifically. The court does note that over the span of approximately eight years, the defendant did commit sex offenses against three of his granddaughters, A.B., M.B., and Al.B., which does show an overall pattern in which the defendant engaged, but it does not demonstrate a specific pattern of abuse in the case at bar.

Dr. Bassman's testimony at the hearing on this matter was of some help to the court but it was not without its problematic aspects. Dr. Bassman was not fully aware of the nature of all of the defendant's offenses at the time of his assessment. Furthermore, the assessment he performed was for treatment and was not specifically a risk assessment. Additionally, Dr. Bassman stated at the end of his testimony that he was not at the hearing to give testimony about the defendant's risk to reoffend.

However, Dr. Bassman did testify that he recognizes risk factors that the defendant has, which include his lack of compassion for his victims as evidenced by his continued denials of wrongdoing. He indicated that he took those risk factors into account when determining whether the defendant was amenable to treatment. He noted that the protective factors in the defendant's case, including his stable, long-term marriage and his social support system, outnumber his risk factors. Dr. Bassman stated that he felt the defendant was amenable to treatment and was able to be seen in the

community. He further testified that the defendant did not exhibit the most significant risk factor, which is reoffending while in treatment and/or on community control.

This court is concerned about the fact that the defendant is still denying culpability for his conduct. The court is further concerned about the pattern of prior conduct which occurred involving three different victims.

However, the court finds it likewise to be significant that the defendant has not reoffended since 2008 when he was placed on community control in this case, which was clearly a significant fact to Dr. Bassman. It is also significant that he appears to have responded affirmatively to the treatment that was provided him, that he successfully completed community control in this case, and that Dr. Bassman believes that he continues to be amenable to treatment.

While the court has concerns as outlined above, and while the defendant's actions in this case were reprehensible and likely had long-term negative effects on the victim, the same could be said of just about any sex offense adjudicated by this court. The issue before the court is not whether the court has concerns, or whether there is some risk, or even whether there is a significant amount of risk that the defendant may commit another sexually oriented offense. Instead, the discrete issue before the court at this time is whether it has been shown by clear and convincing evidence that the defendant is likely to engage in the future in one or more sexually oriented offenses- that is, whether it is more probable than not that the defendant will commit one or more sexually oriented offenses in the future..

Considering all of the facts of this case, the factors under R.C. 2950.09(B)(3), and the testimony presented, the court cannot find that it has been established by clear

and convincing evidence that the defendant is likely to engage in one or more sexually oriented offenses in the future. As a result, the defendant shall be classified as a sexually oriented offender.

CONCLUSION

The defendant is hereby classified in this case as a sexually oriented offender.

IT IS SO ORDERED.

DATED: 4-20-15

Judge Jerry R. McBride