

Children's Law Center of Indiana



Delinquency

07/14/2009

In **B.W. v. State**, 909 N.E.2d 471 (Ind. Ct. App. 2009), the Court affirmed the trial court's order requiring the juvenile to register as a sex offender. In October 2006, the juvenile, at the age of fifteen, was charged with four acts of child molesting, two of which would be Class B felonies and two of which would be Class C felonies if committed by an adult. The juvenile admitted he was a delinquent child for committing one of the Class B felony acts, and the State dismissed the three remaining allegations. The trial court ordered the juvenile to have a psychological evaluation by a licensed psychologist who evaluated the juvenile in October 2006 and issued a report in which he opined that the juvenile had a "moderate to high" risk to reoffend. In November 2006, the trial court awarded wardship to the DOC, suspended the commitment to probation, and placed the juvenile at Wernle Children's Home, where he was to serve his probation until he successfully completed a Sexual Offender Residential Treatment Program. While at Wernle, the juvenile was given multiple polygraph examinations during which he admitted to prior sexual encounters, including both "hands on" and "hands off" contact, with forty-seven humans and seven animals. In March 2008, revocation of the juvenile's probation was considered because he allegedly had committed delinquent acts and failed to follow the rules at Wernle by leaving the grounds for about twenty hours without permission and by threatening and fighting with another Wernle resident. The juvenile admitted the allegations, and the trial court eventually ordered him to return to Wernle to finish his treatment program. On August 29, 2008, the trial court held a review hearing during which the juvenile's probation officer informed the court that the juvenile had successfully complete his treatment program at Wernle and the permanency plan for him was to place him with his grandparents in Ohio. On September 12, 2008, the State filed a Motion for Sex Offender Registration requesting that the trial court find the juvenile to be a sex offender required to register on the sex offender registry. The trial court held a hearing on the motion at which the juvenile, who was eighteen at the time, testified that he understood what his triggers to reoffending were and stated he would avoid reoffending "because of [his] age now [he'd] go straight to prison" and "wouldn't get a second chance to try to live life to the fullest." The State's expert witness, a counselor who supervised the juvenile's treatment and worked with him on a daily basis during his two years at Wernle, testified, without defense objection, to disclosures made in some of the juvenile's polygraph examinations, that the juvenile had started offending when he was nine years old and had a peak of activity between ages thirteen to fifteen, that some of his contacts with his victims had been predatory in nature and involved clear premeditation planning in the process to avoid detection by others, that for the most part they involved some form of grooming process where he ingratiated himself with the potential victim in order to get them to go along with what he wanted them to do sexually with him, and that he purchased surveillance equipment, "which was a strong indication that someone is pretty motivated in this compulsive behavior." The counselor also testified that when the juvenile entered Wernle, his risk for reoffending was assessed at a high risk or very high risk, that he had come a long way with treatment and had been able to develop internal controls that

would help him make good choices, that he was pleased with the support from the juvenile's family, that the juvenile had displayed appropriate behavior while in the community attending the local public high school during the Summer and Fall of 2008, that he had no indication the juvenile had engaged in any reoffending or inappropriate behavior while off-campus at school or while at Wernle, that after completion of the Wernle program, the juvenile had been tested and evaluated to be at "moderate" risk for reoffending, that the juvenile's sex drive and preoccupation with sex were "excessively high" and "abnormal" for a typical seventeen-year-old male, and that it was his opinion that the juvenile did not belong on the sex offender registry. The trial court required the juvenile to register as a sex offender. The juvenile appealed.

The Court concluded that there was clear and convincing evidence finding that the juvenile was likely to repeat an act that would be a sex offense if committed by an adult, and thus, affirmed. *Id* at 473. On appeal, the juvenile argued that there was insufficient evidence to support the order to register as a sex offender because the State's expert witness did not recommend placing him on the sex offender registry; the court erroneously relied on the 2006 assessment conducted prior to his placement at Wernle; and there was evidence he successfully completed his treatment program, and conversely, no evidence his treatment was not successful. The State acknowledged that the evidence showed the juvenile's chances of recidivism were reduced through treatment but contended the trial court properly ordered registration as a sex offender because, despite this treatment, the evidence showed that the juvenile remained at a moderate risk to reoffend, had merely a fear of punishment as his motivation for refraining from reoffending, and was "a sexual predator with a long and troubling sexual history, which involved premeditated acts and numerous sexual contacts." The Court opined that (1) before a juvenile may be ordered to register as a sex offender, the trial court must hold an evidentiary hearing and find by clear and convincing evidence that the juvenile is likely to commit another sex offense; (2) the Legislature has dictated this heightened burden of proof in recognition of the serious social consequences of sex offender registration; (3) when a juvenile is placed in a secure private facility, a sex offender registry hearing can be conducted only after the juvenile has been released from the facility; (4) the legislative intent behind holding a hearing upon the juvenile's release is to hold the sex offender registration determination in abeyance so that the juvenile has the opportunity to be rehabilitated during detention; (5) The sex offender registry hearing needs to include an evaluation of whether that period of treatment sufficiently rehabilitated the juvenile and whether he was likely to commit another sex offense; and (6) the Indiana Supreme Court has held that an evaluation of whether a juvenile has been rehabilitated while in detention is a prerequisite to finding clear and convincing evidence that the juvenile is likely to repeat. *Id* at 477 (citations omitted). The Court observed that (1) the juvenile's completion of the Wernle treatment program did not automatically equate to the requisite level of rehabilitation that would preclude the trial court from determining there was clear and convincing evidence he was likely to reoffend; (2) at most, completion of a treatment program is a factor in the prerequisite rehabilitation evaluation discussed by the Indiana Supreme Court; and (3) there may be situations, as was the case here, where the trial court may determine a juvenile is not sufficiently rehabilitated despite completing a treatment program. *Id* at 478. The Court held that, (1) although the trial court made no explicit finding that the juvenile had not been sufficiently rehabilitated, it did determine that the juvenile's almost two years of treatment did result in some progress but did not sufficiently rehabilitate him; (2) the trial court's order was not erroneous because it referenced the 2006 assessment that was made prior to the juvenile's placement at Wernle, in that instead of inappropriately relying solely on such a pre-treatment assessment,

here, the trial court referred to the pre-treatment assessment, which indicated a moderate to high risk level of reoffending, as a guidepost for comparison to the juvenile's post-treatment assessment, which indicated a moderate risk of offending; and (3) the trial court's order was not erroneous because it did not follow the counselor's recommendation that the juvenile not be placed on the registry, in that such a recommendation is a conclusion of law to which an expert witness may not testify, and which can only be made by the trial court after finding there is clear and convincing evidence the juvenile is likely to reoffend. Id at 478-79.