

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**ANTHONY RUDINSKI,
Defendant**

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CR-2023-2013

POST SENTENCE MOTION

OPINION AND ORDER

Anthony Rudinski (Defendant) through Counsel filed Post Sentence Motions on October 10, 2016, with leave of Court to take additional time beyond the ten (10) day post sentence motion period. After a jury trial on April 21, 2016, and April 22, 2016, Defendant was found guilty by a jury on 17 counts of sexual abuse of children¹ and one count of criminal use of a communication facility². Defendant was sentenced on September 13, 2016, to an aggregate sentence of seven to 15 years imprisonment at a State Correctional Institution with a consecutive five (5) year period of probation.

Procedural History

Criminal proceedings were initiated against Defendant on September 19, 2013. Defense Counsel filed a motion to compel discovery on January 27, 2014, which was subsequently withdrawn by an Order of Court filed February 6, 2014, stating “based upon information from defense counsel that it will be receiving requested discovery....said motion to compel discovery is WITHDRAWN.” Trial was scheduled for October of 2015. The Honorable Richard A. Gray declared a mistrial stating

Upon motion of the Defense, a mistrial is declared. The Court believes that certain evidence in discovery was not provided to the Defense including photographs and surveillance information [To Wit: photographs that were taken of Defendant’s home when Special Agent Laudeman surveilled Defendant’s home at unknown date in August, N.T., 10/20/2015, at 75.] The Court thinks this is doubly prejudicial to the

¹ Count 1. 18 Pa.C.S. § 6312(c)(1).
Counts 2-17. 18 Pa.C.S. § 6312(d)(1).

² Count 18. 18 Pa.C.S. § 7512(a).

Defense in the view of the Court's previous ruling about the matter not being in the report about the recording of the interviews. The Court believes that, in general, a fair trial has been denied by lack of Government providing appropriate and complete information.

N.T., 10/20/2015, at 78.

Factual Background

During routine surveillance in her position as an investigator for the Pennsylvania Office of Attorney General Child Predator Section, Special Agent Nicole Laudeman was able to download child pornography from an IP address 174.60.104.48 that was later determined to be assigned to a computer in the home of the above named Defendant. Defendant's computer was sharing child pornography through a BitTorrent program. Normally, users of a BitTorrent program download bits of files from many different sources but for the purposes of law enforcement, government investigators download files of interest from one computer source. Laudeman applied for a search warrant to determine who in the household was sharing child pornography on the BitTorrent network and the warrant was issued and executed on September 19, 2013. Id. at 35 and 32. Eight (8) - ten (10) agents went to Defendant's home on the same date to execute the search warrant, including two computer forensics agents. Id. 32-33. They interviewed Defendant at home and he waived his Miranda rights. Id. at 50. At that time he admitted he had a BitTorrent client on his computer. Id. at 52. The computer forensics agents found the BitTorrent file sharing network and child pornography while doing an on-site search of electronic devices. Id. at 53. At that time, Defendant was transported to the South Williamsport police station where he told Laudeman:

that he accidentally has downloaded child pornography, he would view it and

then delete it right away. He admitted to using the search term PTHC, which stands for pre-teen hard core. He also stated he used Vuze BitTorrent client sharing program and I had showed him the video, the Baby J video that was downloaded, to which he recognized the file...

N.T., 4/21/2016, at 55-56.

He also admitted to knowing the child pornography was there, Id. at 57, and what PTHC was. Id. at 94.

The electronic devices collected from the home were a Toshiba laptop, a hard disc drive from the garage, and an Apple cell phone. Commonwealth's Exhibit #4 Receipt of Inventory. After a more thorough search of the electronic materials, investigators found additional investigative items of interest, however, only images viewed in the preview search at the home were charged in the criminal information. N.T., 4/21/2016, at 139. The images to be charged were shown to Defense Counsel at the Preliminary Hearing. Id. at 186. The Commonwealth filed its Criminal Information on May 6, 2014, alleging that between the dates of August 18, 2013, through September 19, 2013, Defendant distributed and viewed child pornography using an electronic device.

At trial, The Commonwealth submitted the following Exhibits, relevant to the post sentence motions:

Commonwealth's Exhibit #1 – CD with a log of the connection between Laudeman's computer and Defendant's computer. N.T., 4/21/2016, 11-12. The logs included a video that she downloaded from Defendant's IP address. Id. at 12. It is a CD Laudeman "made with the downloading log files generated from the BitTorrent Software". Id. at 13. It includes the logs that were kept as well as the video that Laudeman downloaded from Defendant's IP address on August 18 into August 19,

2013. Defense Counsel had no objection to the admission of the CD into the record.

Commonwealth's Exhibit #8 – CD containing all the exhibits for trial. Id. at 14.

Defense had no objection to the admission of the CD into the record.

Commonwealth's Exhibit #1-A – After the Commonwealth sought to publish the contents of Commonwealth's Exhibit #1 i.e. the logs described above, it was determined by the Court that a copy of the log would be provided to each juror. The log was also projected onto the courtroom screen. Laudeman explained to the jurors how each bit of babyj-rca-2.mpg was downloaded from Defendant' computer. Id. at 21. She was able to download one, and only one complete video, from Defendant's computer during her investigation on August 18, 2013, into August 19, 2013. Id. at 17.

Commonwealth's Exhibit #2 – A print out from the American Registry for Internet Numbers website showing that IP address 174.60.104.48 was registered to Comcast Cable Communications. Id. at 27.

Commonwealth's Exhibit #3 – The response from Comcast Cable Communications as to who the subscriber to that IP address on the date and times that Laudeman downloaded the offending video. Id. at 29.

Commonwealth's Exhibit #6 – CD of images uncovered from Toshiba laptop found in bedroom of household on the day the search warrant was executed. Each image was published to the jury. Id. at 184.

Count 2 6ddcee Id. at 47.

Count 3 9f988b[1] Id. at 48.

Count 4 210ab4[1] Id.

Count 5 252[1]1 Id.

Count 6	721[1]	Id.
Count 7	855[1]	Id.
Count 8	991_1sucking[1]1	Id.
Count 9	1850c0e83b14ea5[1]1	Id.
Count 10	b17f5d[1]	Id.
Count 11	cec949f443c497e03e127b51b5aa8077[1]	Id.
Count 12	f00dbe[1]	Id.
Count 13	iEiC[1]	Id.
Count 14	p14[1]	Id.
Count 15	th_168125845_044_123_344lo[1]	Id. at 49.
Count 16	th_168251186_078_123_169lo[1]	Id.
Count 17	Zlsx9[1]	Id.

Commonwealth's Exhibit #7 – Special Agent Robert Soop's summary report that was prepared on April 9, 2014, based on the images he found during the on site search on September 19, 2013. It is not the full report. Id. at 122. But it does contain data recovered from the electronic devices at the forensics lab as described below. Soop's report, Commonwealth's Exhibit #7, was published to the jury. Id. at 126.

Attachment #1 to Soop's summary report is documentation that when searching the hard drive back at the computer forensics lab, in Lemoyne, PA, the hard drive that was copied and searched is an exact duplicate of the hard drive seized. Id. at 131.

Attachment #2 Soop's report lists twenty-one (21) images of investigative interest. Id. at 133. Soop testified that there are additional images in Attachment #2

that were not in the preview report and that the preview report dictates what charges are filed. Id. at 439. There is apparent pornography in Attachment #2 from 9/9/2013, through 9/11/2013. Id. at 154. Attachment #2 was published to the jury as part as Commonwealth's Exhibit #7. Id. at 126. The data in Attachment #2 tells Soop

that someone on that device, on that hard drive under the name, the user name of Tony was on the Internet and had viewed that image on the internet and it was captured and saved to the computer because it was viewed there and it tells me that the file was created, written, and accessed all at the same time, meaning it was brought up, viewed and moved on from images....[the date range that these images had been accessed is] 8/18 to 9/11 of the year 2013.

N.T., 4/21/2016, 158-159.

Attachment #1 and Attachment #2 were not provided to Defense Counsel prior to trial. N.T., 4/21/2016, at 182.

The Court described Attachment #2 as

the actual photographs, the still photographs that were taken; but sort of an internet or a search history or an investigative history of the photograph, which is where the different dates appear.

N.T., 4/21/2016, at 182.

The Commonwealth described Attachment #2 as "the apparent child pornography that was actually found on the computer. Id. at 183.

Attachment #4 – Soop uses a program called Magnet Forensics that is "able to recover key words, internet history on a specific device and it's able to go in and actually recover some deleted things as well". Id. At 139. Soop testified as to how the data collected from Magnet Forensics shows that the someone searched for PTHC and viewed child pornography that was not ultimately charged but was circumstantial evidence to support that Defendant was guilty of the crimes charged. Id. 143-146, 157. Attachment #4 "is titled internet evidence finder report and what that was those

were dates and times that someone would have been conducting searches, specifically, for the term PTHC, babyj, there were a couple of them.” Id. at 183.

Discussion

I. Whether the Commonwealth’s failure to produce discovery from the dates of September 9, 2013, through September 11, 2013, warrants the Court “to dismiss the charges in regards to those photographs” or to grant a new trial excluding evidence from those dates as they failed to disclose until trial.

The Commonwealth’s duty to provide discovery is governed by Pa.R.Crim.P. 573. Part(B)(e) requires that on request by the Defendant the Commonwealth permit the defendant’s attorney to inspect and copy or photograph “any results or reports of scientific tests, expert opinions....that are within the possession or control of the attorney for the Commonwealth.” Defense Counsel stipulated to Soop being an expert at trial. Id. at 105. Defense Counsel was on notice regarding the dates in question as the Criminal Information charged that between the dates of 8/18/2013, and 9/19/2013, Defendant had disseminated and viewed child pornography.

After the close of testimony on Day 1 of the two-day April 2016 trial, Defense Counsel again moved for a mistrial arguing that he was not put on notice of specific date information regarding what apparent child pornography was found on the computer i.e. the information in Attachment #2. Though the Commonwealth had stated that Defense could have access to data that was used to building the case against his client³, the Commonwealth, did not provide the data to the Defense in the

³ During the October 2015 trial, Laudeman testified to having done surveillance that was not in her report. Id. at 75. The Honorable Richard A. Gray declared a mistrial for this reason and after such decision the Attorney General made the court and Defense Counsel aware that “[he] is given access to items that are placed in a database. From that database, that’s the discovery items that I have access to. So I in turn, provide everything that I have available to me to Defense Counsel.” N.T., 10/20/2015, at 81.

format that it would be published to the jury prior to trial. It is not clear why Defense Counsel did not request the expert report from the Commonwealth in total prior to trial. The Court finds no discovery violation as it was incumbent upon Defense Counsel to request Soop's report. Moreover, even if there were a discovery violation, a discovery violation does not automatically command a new trial, the Defendant still must establish that the introduction of the expert report caused him prejudice to the degree that it affected his trial strategy or likely affected the outcome of the proceedings. COMMONWEALTH V. ROLES, 2015 PA SUPER 115, 116 A.3D 122, 133 (PA. SUPER 2015).

The Court cannot find any prejudice to the Defendant because he was on notice about the time range he was there to defend and could have and indeed did provide an alternative explanation as to how someone other than Defendant could have downloaded child pornography during the dates he now contests. N.T., 4/22/2016, at 220. Additionally, the Defendant could have sought more specific date information than that provided in the Criminal Information by requesting a Bill of Particulars through Pa.R.Crim.P. 572, which he failed to do.

II. Whether the Court erred when it denied the Defendant's motion to preclude the photographs for the reason that they are inflammatory.

The decision complained of in Issue II was made by The Honorable Richard A. Gray, Order, 10/20/2015:

...after review of briefs and hearing oral argument, the Defense motion in limine to exclude the photographs of the pictures involved is DENIED. The Court believes that they are the essence of the case, the elements of what the Commonwealth is required to prove, and therefore need to be produced. This is not like certain criminal cases where blood is excluded from murder pictures because they were really not elements of the crime, but here the Court believes that it is necessary to introduce the elements

of the crime. The Court also believes that the photographs would most likely go to any issues of intent that are present in the case.

Order of Court, 10/20/2015.

Additionally, this Court will not and cannot overrule a ruling by another Common Pleas Judge, absent some new evidence. It is improper for a trial judge to overrule an interlocutory order by another judge of the same court in the same case as “there must be some degree of finality to determinations of all pre-trial applications so that judicial economy and efficiency can be maintained.” COMMONWEALTH V. BROWN, 485 PA. 368, 371, 402 A.2D 1007, 1008 (PA. 1979).

III. Whether the Attorney General investigation into inappropriate emails among its staff members warrants the grant of a new trial whereby Defense Counsel can question Agent Soop about the allegations against him.

Defendant seeks through post sentence motion a new trial based on after evidence discovered evidence that he seeks to use to impeach the character of the Commonwealth’s expert witness. Pa.R.E. 607 (evidence to impeach a witness). The four-prong test for awarding a new trial because of after-discovered evidence is well settled. The evidence: (1) could not have been obtained prior to trial by exercising reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach a witness's credibility; and (4) would likely result in a different verdict. COMMONWEALTH V. CASTRO, 625 PA. 582, 588 N.7, 93 A.3D 818, 821 (PA. 2014). In Castro, the Supreme Court of Pennsylvania declined to impose a strict requirement that the proponent of a Rule 720 motion attach affidavits or other offers of proof; as the rule does not contain express language requiring this, in contrast to the rules pertaining to PCRA petitions. However, Castro held a motion must, at the very least,

describe the evidence that will be presented at the hearing. Simply mentioning the PA Attorney General “Porngate” scandal is not sufficient. Absent identification of the actual testimony, physical evidence, documentation, or other type of evidence to support the allegations of Soop’s wrongdoing, the Court cannot conclude Defendant has evidence to offer, and to conclude otherwise would be speculation.

ORDER

AND NOW, this 9th day of February, 2017, Defendant’s Post Sentence Motion is DENIED.

Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4), the Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty (30) days of the date of entry of this Order; (b) the right to assistance of counsel in the preparation of the appeal; (c) if indigent, the right to appeal in forma pauperis and to proceed with assigned counsel as provided in Pennsylvania Rule of Criminal Procedure 122; and (d) the qualified right to bail under Pennsylvania Rule of Criminal Procedure 521(B).

BY THE COURT,

Nancy L. Butts, President Judge

cc: Michael Rudinski, Esq. Defendant’s Counsel
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Law clerk (work file)