

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : No. 96-11,755
:
vs. :
:
HARRY CLARK, :
Defendant : 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this Court's Judgment of Sentence dated August 2, 2000 and docketed August 7, 2000. The relevant facts are as follows:

Defendant was arrested and charged with aggravated indecent assault, statutory sexual assault, indecent assault and corruption of minors. These charges arose out of Defendant's relationship with his girlfriend's thirteen (13) year old daughter, A.V.

A jury trial was held on June 11-12, 1998. At trial, A.V. testified that defendant Harry Clark had sexual relations with her two to three times per week from in September 1995 through July 1996. During that time, she was thirteen (13) years old and Clark was sixty-one (61) years old. A.V.'s mother and Clark had her watch them engage in sexual intercourse so that when she went to have sex with Clark so she "did it right." N.T., 6/11/98, at 25. A.V. also testified that Clark engaged in oral sex with her. She stated that Clark placed his mouth in her vagina and he also put his penis in her mouth. Id. at 27. These sexual activities occurred on one occasion.

In exchange for engaging in sexual acts with A.V., Clark would give A.V.'s mother money. He also would give A.V. money, candy, and/or similar items.

A.V.'s mother did not have a problem with Clark engaging in sexual acts with her daughter, providing he took precautions so that she did not pregnant. To that end, Clark used his fingers to insert suppositories into child's vaginal. The jury convicted Defendant of all the charges.

On September 10, 1998, the Court sentenced Clark to six and one-half (6 ½) years to life sentence plus six (6) years. Defendant received the life sentence under Pennsylvania's Megan's Law. Defendant appealed his conviction and sentence. On March 20, 2000, the Pennsylvania Superior Court affirmed Clark's conviction, but ordered the trial court to re-sentence him because Megan's Law was unconstitutional. The Court scheduled Clark's re-sentencing for May 10, 2000. On April 26, 2000, the Court Scheduling Technician sent a letter to all counsel notifying them of the re-sentencing date. In the letter, the Court Scheduling Technician asked defense counsel to provide information regarding the state correctional institution in which Clark was incarcerated, so a transportation order could be prepared. On May 9, 2000, the Court was notified that Defendant was not transported from the state correctional institution to Lycoming County for re-sentencing. Therefore, the Court continued the case until August 2, 2000.

The Court also notes that the Pennsylvania Superior Court remanded the record to Lycoming County on May 16, 2000. The Lycoming County Prothonotary received the record on May 18, 2000.

On August 2, 2000, when Clark appeared for sentencing, he asked for dismissal of the charges because he was not sentenced within ninety (90) days of the Superior Court's March 20 decision. The Court denied Defendant's motion and sentenced him to incarceration in a state correctional institution for a minimum of six (6) years and a maximum of twenty-seven

(27) years. It is from this sentence that the defendant is now appealing.

The first issue Clark raises on appeal is whether the Court stated sufficient reasons on the record for sentencing outside the guidelines for aggravated assault and corruption of minors. The Court believes there are ample reasons in the record for sentencing Defendant outside the guidelines. Initially, the Court notes the guidelines apply only to the minimum sentence to be imposed. Clark received the same minimum sentence as he did at his original sentencing hearing. At the re-sentencing hearing, the Court stated that it imposed the same minimum sentence because, it saw the same factors as before. The Court then briefly mentioned the factors which justified a sentence beyond the guidelines for aggravated assault and corruptions of minors and a sentence in the aggravated range for statutory sexual assault and indecent assault. Those factors included: 1) the age of the victim in contrast to the age of Defendant; 2) the duration of the sexual contact, including testimony that it occurred two to three per week for a ten (10) month period; 3) the various forms of sexual contact; 4) the lack of remorse, including Clark referring to the victim as a prostitute; and 5) the danger of Clark re-offending. *Id.* at 22-23. These reasons are also set forth and explained in the sentencing Order dated September 10, 1998 and the Court's Opinion dated May 5, 1999 on pages six through eight.

The next issued raised by Clark is whether the Court stated sufficient reasons on the record for sentencing him in the aggravated ranged for statutory sexual assault and indecent assault. The same factors which justified a sentence outside guidelines for aggravated indecent assault and corruption of minors, also support the Court imposing a sentencing in the aggravated range for statutory sexual assault and indecent assault.

Next, Clark asserts his sentence was manifestly excessive. He argued that since

he was age sixty-six at the time of the re-sentencing and the Court imposed an aggregate sentence of six (6) to twenty-seven (27) years, that it in affect it was imposing a death sentence. The Court does not agree with Clark's contention that the sentence was excessive. Given the age of the victim, the duration of sexual contact over a ten (10) month period, and the exploitive and demeaning manner in which Clark treated the victim, the sentence was appropriate. See also Opinion of May 5, 1999, at pp. 6-8; Commonwealth v. Clark, 517 Harrisburg 1998 (Pa.Super. 3/20/00).

The final issued raised by Clark on appeal is whether the Court erred in denying his Motion for Extraordinary Relief because he was sentenced more than ninety (90) days after the case was remanded from the Superior Court. There are several reasons why Defendant was not entitled to a dismissal. First, Rule 1405(a)(1) states that "sentence in a court case should ordinary be imposed within ninety (90) days of the conviction or the entry of plea of guilty or nolo contentre." This rule does not speak sentence after a remand from the appellate courts. Assuming a ninety (90) day time limit would apply, it would not begin until the case is remanded by the Superior Court. See Commonwealth v. Marconi, 523 Pa. 342, 567 A.2d 628 (1989); Commonwealth v. Hall, 352 Pa.Super. 569, 508 A.2d 1216 (1986). Although the Superior Court filed its decision on March 20, 2000, it did not remand the record until May 16, 2000. The Court held Defendant's re-sentencing hearing on August 2, 2000, approximately seventy-eight (78) days after the record was remanded. Therefore, Rule 1405 was not violated and the defendant was not entitled to dismissal of the charges.

Even if the ninety (90) day time limited had expired, there was good cause for the delay. The Court originally scheduled the defendant for sentencing on May 10, 2000. However, Defendant was not transported to Lycoming County for his sentencing hearing and it could not

be held. Therefore, the Court continued the sentencing hearing until August 2, 2000 for good cause shown.

For the foregoing reasons, the Court found Defendant's sentence appropriate for the circumstances of this case and held that the defendant was not entitled to dismissal of the charges against him.

DATE: _____

By The Court,

Kenneth D. Brown, J.

cc: Roan Confer, Esq. (ADA)
Kyle Rude, Esq.
Work File
Gary Weber, Esquire (Lycoming Reporter)