IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. CR – 1314 – 2003
	:	
vs.	:	CRIMINAL DIVISION
	:	
DAYLE WHEELOCK,	:	
Defendant	:	Post-Sentence Motions

OPINION AND ORDER

Before the Court are the post-sentence motions filed by Defendant on June 13, 2008. Argument on the motions was heard August 27, 2008.

After a non-jury trial on March 13, 2008, Defendant was convicted of four counts of sexual abuse of children under Section 6312(d) of the Crimes Code based on his possession of child pornography. By Orders dated June 4, 2008, he was sentenced to three consecutive terms of incarceration of two to five years and a concurrent term of one to two years and fined $5000, and also found to be a sexually violent predator under Megan's Law. In the instant post-sentence motions, Defendant contends he is entitled to a new trial based on the admission of evidence relevant to his subjective intent concerning the images, that he is entitled to arrest of judgment as the evidence failed to establish that the images were nudity depicted for the purposes of sexual stimulation or gratification, that his sentence was improperly enhanced, that the Court applied incorrect sentencing guidelines, that the sentence is excessively harsh, and that the Court's determination that he is a sexually violent predator was in error. These issues will be addressed seriatim.

The relevant statute in this matter is 18 Pa.C.S. Section 6312(d), which provides as follows:

(d) POSSESSION OF CHILD PORNOGRAPHY.--

> (1) Any person who knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in

> a prohibited sexual act or in the simulation of such act commits an offense.

Sub-section (a) defines "prohibited sexual act" to include "nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction." 18 Pa.C.S. Section 6312(a).[1] Defendant argues that since this Court observed in rendering its verdict that it was clear that Defendant possessed the images for his sexual stimulation and gratification, the Court must have based its finding of guilt on Defendant's subjective intent, and that such was in error as the Supreme Court has held that an objective standard must be applied in determining a person's guilt under this section. The Court agrees that it is to apply an objective standard, more specifically outlined by the Supreme Court as an examination of the images' "content, focus and setting", Commonwealth v. Davidson, 938 A.2d 198, 213 (Pa. 2007), but, while this Court did make the observation regarding Defendant's intent, such was merely in addition to, and not instead of, this Court's finding, which was based on the images themselves, that such depicted nudity for the purpose of sexual stimulation or gratification. The Court did consider the content, focus and setting of the images and found them to clearly be child pornography. As the Court stated in Davidson, "common sense and human experience dictate that an individual of ordinary intelligence, not a mind reader or a genius, can identify whether a photograph of a nude child depicts "nudity" for the purpose of sexual stimulation or gratification." Id. at 214.

Next, Defendant contends the images presented at trial did not depict nudity for the purposes of sexual stimulation or gratification, and thus the evidence was insufficient to support his conviction. The Court does not agree, as stated above.

Next, with respect to his sentence, Defendant contends the enhancement provision of Section 6312(d)(2) should not have been applied to Counts 2, 3, and 4, arguing simply that the Superior Court's holding in Commonwealth v. Jarowecki, 923 A.2d 425 (Pa. Super. 2007), is in error. As this claim is obviously being made simply to preserve Defendant's appellate rights on the issue with the hope Jarowecki will be overturned, the Court will not address it further.

[1] While the statute also defines "prohibited sexual act" to include other acts in addition to nudity, as was explained by the Court on the record in rendering its verdict, the majority of the images in this case, and the basis for this Court's verdict, were images depicting nudity.

Next, Defendant contends this Court erred in imposing sentence under the current sentencing guidelines when, in fact, the offenses occurred in July 2003 and the prior sentencing guidelines should have been applied. The Court agrees it applied the current guidelines in imposing sentence and therefore the matter will be scheduled for resentencing.

Next, Defendant contends his sentence of seven to seventeen years and a $5000 fine is excessively harsh. In light of the fact that Defendant will be re-sentenced, the Court will not address this claim, without prejudice to Defendant's right to raise it again after resentencing.

Finally, Defendant contends the Court's finding that he is a sexually violent predator was in error, arguing that the Commonwealth failed to present clear and convincing evidence to support such a finding. The Commonwealth presented the testimony of Townsend Velkoff, a licensed psychologist who conducted an assessment on behalf of the Sexual Offender's Assessment Board,[2] and who offered the opinion that Defendant met the criteria for a sexually violent predator. Specifically, Mr. Velkoff found Defendant to have a mental abnormality, pedophilia, and that he engaged recently in blatantly predatory behavior. After a review of his report, the Court found such to be thorough, and his conclusions were supported by the information upon which they were based. Further review at this time convinces the Court that Defendant's classification as a sexually violent predator has been supported by clear and convincing evidence and was not in error.

ORDER

AND NOW, this 30th day of September 2008, for the foregoing reasons, Defendant's Post-Sentence Motions are hereby granted in part and denied in part. The sentence imposed by this Court on June 4, 2008, is hereby VACATED. The Court Scheduling Technician is requested to schedule a re-sentencing hearing at the next available time; it is anticipated that

[2] Mr. Velkoff's testimony was presented by way of a stipulation that were he called to testify, he would testify consistent with his report, and that report, dated May 21, 2008, was introduced into evidence at the hearing. Further, Mr. Velkoff had testified at a hearing held March 3, 2005, when the issue was addressed the first time in this matter, and a transcript of that testimony was also accepted into evidence based on a stipulation of counsel.

one hour will be sufficient. Defense counsel shall prepare a transportation order so that Defendant may attend the hearing in person.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
PD
Court Scheduling Technician
Gary Weber, Esq.
Hon. Dudley Anderson