IN THE COURT OF COMMON PLEAS OF
LYCOMING COUNTY, PA

COMMONWEALTH OF PENNSYLVANIA	:	NO: CR 671-2008
vs.	:	
JAMES BRICKER	:	

O P I N I O N

Background:

On February 28, 2008 the Defendant was charged with solicitation of rape of a child, solicitation of involuntary deviate sexual intercourse with a child, solicitation of indecent assault, endangering the welfare of children, corruption of minors and solicitation of aggravated sexual assault. The Defendant filed a Motion to Dismiss all the solicitation charges on September 11, 2008. On December 15, 2008 the Commonwealth filed a Motion to Amend the information to include one count of rape, two counts of involuntary deviate sexual intercourse, two counts of indecent assault and two counts of aggravated assault.

On May 14, 2009 the Honorable Kenneth D. Brown denied the Defendant's Motion to Dismiss, but granted the Commonwealth's Motion to Amend.

On May 5-6, 2010, following a jury trial before the undersigned Judge, the Defendant was convicted of six (6) counts of Criminal Solicitation, two (2) counts of Endangering the Welfare of a Child, two (2) Counts of Corruption of Minors and one (1) count of Indecent Assault.

The Defendant was sentenced on February 4, 2011 to an aggregate term of a minimum of thirty (30) years and three (3) months to a maximum of sixty (60) years and six (6) months.

The Defendant's Post-Trial Motion raises four (4) issues: that the sentence imposed was manifestly excessive; the Court erred in denying the Defendant's Motion to Dismiss; the Court erred in granting the Commonwealth's Motion to Amend the Information; and, the Court erred in charging the jury under Jury Instruction 12.902(A), Criminal Solicitation.

Discussion:

Issue # 1: The Sentence Imposed Was Not Manifestly Excessive.

The Defendant asserts that the sentence imposed by this Court was manifestly excessive pursuant to Commonwealth v. Simpson, 510 A.2d 760 (Pa.Super. 1996), and requests this Court reconsider the sentence imposed. In Commonwealth v. Simpson, *supra*, the defendant was involved in six (6) robberies between December of 1981 and April of 1982. The defendant was sentenced to an aggregate of thirty (30) to sixty (60) years. In evaluating whether the sentence at issue was excessive, the Superior Court held:

> What we find objectionable is the total length of the minimum sentence. Although none of the individual sentences is excessive, the cumulative sentence is….A sentence must be based on the minimum amount of confinement that is consistent with the gravity of the offense, **the need of the public for protection** and the rehabilitative needs of the defendant…Although we agree with the trial court that the offenses are serious in nature, we do not think the protection of the public and the rehabilitative needs of appellant mandate such a sentence. Id. at 762.
>
> (Emphasis added).

In the case at bar, the Defendant was convicted not of robbery, but of multiple counts of solicitation of sexual offenses involving two juvenile males. In imposing the sentence, the Court considered many factors which included the PSI performed of the Defendant, the Megan's Law Assessment, and the predatory nature of the Defendant's conduct. Following a review of all factors, this Court concluded that the Defendant is a danger to the public, particularly pre-pubescent children, and accordingly, this Court sentenced the Defendant at the top of the standard range and ran counts consecutively.

In Commonwealth v. Prisk, 2011 Pa.Super. LEXIS 23, the Defendant was convicted, following a jury trial, for multiple counts of rape, involuntary deviate sexual intercourse, and indecent assault of his stepdaughter. The question raised on appeal was whether the court's aggregate sentence of 633 years to 1500 years incarceration constituted a manifestly excessive sentence. As the minimum sentence was roughly twelve (12) times longer than necessary for the court to impose a life sentence, the defendant asserted that imposing consecutive sentences for some of the convictions was not appropriate. Id. at 9. In upholding the sentence, the Superior Court held that the aggregate sentence was not excessive in light of the criminal conduct at issue and the systematic sexual abuse which he perpetrated.

As this court finds that the sentence imposed was appropriate in light of the predatory nature of the Defendant's conduct, the sentence was not manifestly excessive, and the Defendant's request for reconsideration of his sentence is denied.

Issue # 2: The Court Did Not Err in Denying the Defendant's Motion to Dismiss.

On May 14, 2009 the Honorable Kenneth Brown issued an order denying the Defendant's Motion to Dismiss. The Defendant sought to dismiss all solicitation charges on the basis that consensual sexual activity between minors under the age of 13 is not a criminal defense under In re B.A.M., 806 A.2d 893 (Pa.Super. 2002). The Defendant asserted that as it is not a criminal offense for minors under the age of 13 to engage in sex, the Defendant cannot be prosecuting for soliciting such activity.

In re B.A.M., *supra*, the eleven-year-old appellant and his friend, J., also an eleven-year-old boy, performed anal sex on one another. J. somehow got chewing gum on his penis. Later that night, while attempting to remove the gum, he was discovered by his grandmother. J. told his grandmother that B.A.M. forced him to participate in sexual activity. B.A.M. was charged with rape by forcible compulsion, rape of a victim under 13, involuntary deviate sexual intercourse by forcible compulsion, involuntary deviate sexual intercourse of a victim under 13 and sexual assault based on lack of consent. After a hearing, the trial court concluded there had been no forcible compulsion or lack of consent and only adjudicated B.A.M. delinquent of rape of a victim under 13 and involuntary deviate sexual intercourse of a victim under 13. The Superior Court reversed the adjudication and found that the Legislature did not intend to criminalize consensual sexual activity between peers, but rather these statutes were designed "to protect from older predators children who, by virtue of their immaturity, lack of information, and uninformed judgment, were unable to consent to sexual relations." Id. at 897. This verdict vindicates the legislative intent of protecting children from predators.

In the case at bar, the mother of an eleven-year-old male child, T.H., came to the police station and reported that she found a back pack at her residence belonging to the Defendant which contained pornographic magazines and DVDs. T.H. reported that Defendant had he and his friends disrobe under a blanket in front of the Defendant and in return they would be given nude adult magazines. The next day, the police spoke to T.H.'s friends, B.K. and L.F. B.K. told the police that Defendant asked B.K. and L.F. if they wanted to do something to watch a movie. Defendant then directed B.K. and L.F. to take off their clothes. Defendant then had them touch each other's penises and insert their penis into the other person's buttocks as Defendant watched. Defendant then let them watch a Girls Gone Wild movie. L.F. told the police that Defendant gave B.K. $20 and L.F. $10 to touch each other's penises, masturbating each other while Defendant watched. Then Defendant had them insert their penis into the other's buttocks. L.F. reported that while Defendant watched them do this, Defendant had his penis out of his pants with his hand on it. L.F. also stated that Defendant fondled L.F.'s penis. L.F. said for doing all these things, Defendant played a nude DVD that they all watched. While these were not the precise facts elicited at trial, in all relevant respects, these facts were supported by the trial testimony.

Although the Defendant avers that solicitation charges should have been dismissed pursuant to In re B.A.M., *supra*, as the actions of the victims were consensual in nature, this Court disagrees, and wholeheartedly embraces the reasoning of the Honorable Kenneth Brown set forth in his Opinion and Order of May 14, 2009 in which he states:

> This Court believes that ***In Re B.A.M.*** only applies to situations where children engage in consensual sexual activity without the involvement of adults and older teenagers. Even after ***In Re B.A.M.,*** the Court believes it would be a crime in this Commonwealth for one child under the age of 13 to engage in **nonconsensual** sexual activity with another child under the age of 13, because the Superior Court noted there had been no forcible compulsion or lack of consent. 806 A.2d at 894. Furthermore, the ***B.A.M.*** Court specifically noted that, "[i]n order to remove as a defense the assertion by an adult or older teen that a child willingly participated in sexual activity, the Legislature enacted into law the principle that any child under 13 is incapable of consent, i.e., incapable of understanding the implications and consequences of the act." 806 A.2d at 897. Clearly, consent is not a defense if Defendant had performed the sexual acts on the children or asked the children to perform the sexual acts on him. Similarly, consent also would not be a defense for Defendant, who asks a child to perform the sexual acts on another child, as Defendant is engaging in similar predatory behavior. Since the children engaged in sexual activity at the request and direction of Defendant, who is an adult, and a child under 13 is incapable of giving consent to an adult or older teenager, the sexual activity cannot be considered consensual and Defendant is not entitled to dismissal of the charges against him. (Order Denying Mot. To Dismiss, May 14, 2009, p. 3-4).

In Commonwealth v. Hacker, 2011 Pa. LEXIS 161 (Pa. 2011), the defendant dared NA, a 12-year-old female to perform oral sex on the defendant's 13-year-old nephew, CG. When NA refused, the defendant threatened to inform NA's mother than she had misbehaved. The defendant then took NA by the hand, walked her across the bedroom, and sat her down next to CG. NA then performed oral sex on CG. A jury convicted the defendant of solicitation to commit the rape of a child, and the trial court sentenced the defendant accordingly. In post-trial motions, the defendant argued that she could not be convicted of solicitation because the Commonwealth failed to prove she knew NA was under the age of 13. The trial court, noting mistake of age is not a defense to the underlying crime, found the Commonwealth did not need to prove the defendant knew NA was under the age of

13. Although the Superior Court reversed the appellee's solicitation conviction, the Supreme Court reversed the Superior Court and held as follows:

> The purpose of the solicitation statute is to hold accountable those who would command, encourage, or request the commission of crimes by others. Clearly, without appellee's commands, encouragements and requests there would never have been a crime against NA. Id. at 6.

In the case at bar, the evidence at trial did not point to consensual sexual contact between 2 juvenile participants. Rather, it was nonconsensual due to the fact that the Defendant encouraged the behavior, and bribed children to perform sex acts while he watched. These statutes were designed to protect the children of this Commonwealth from predators like the Defendant. Accordingly, the Court did not err in denying the Defendant's Motion to Dismiss.

Issue # 3: The Court Did Not Erroneously Grant the Commonwealth's Motion to Amend.

On December 15, 2008 the Commonwealth filed a pre-trial Motion to Amend the Information to include a theory of accomplice liability. The Commonwealth indicated that, should the lower court amend the information to include the substantive charges associated with the solicitation charges previously mentioned, the Commonwealth would proceed under a theory of accomplice liability.

To convict on the basis of accomplice liability the Commonwealth had to be able to prove the intent of promoting or facilitating the commission of an offense, and that the Defendant aided or agreed or attempted to aid another in planning or committing the offense. 18 Pa.C.S.A § 306.

Defendant asserts that as In re B.A.M., *supra*, holds that children under the age of thirteen cannot be held criminally liable for consensual sexual activity, neither

child could legally be held as principal, nor could the Defendant have aided either in the commission of any of the substantive offenses.

For the reasons set forth above, this Court rejects the Defendant's argument, and finds that the Court did not err in granting the Commonwealth's Motion to Amend. Moreover, as set forth in the Commonwealth's Brief in Opposition to Defendant's Post-Sentence Motion, while the Court permitted the Commonwealth to amend to add Counts 15, 16, 17, 18, 19, 20 and 21, upon the close of the Commonwealth's case, and upon agreement of the parties, counts 15, 16, 17, 18, 19 and 21 were dismissed for lack of evidence. Any error was harmless. The remaining charge, Count 20, Indecent Assault, was not charged as a solicitation offense, but as a substantive offense, and was supported by the trial testimony.

Issue # 4: The Inclusion of Jury Instruction 12.902(A) Did Not Constitute Error.

As set forth above, this Court does not believe that the sexual contact between the two (2) victims in this case was consensual. As the Defendant encouraged the behavior and paid the children to perform sexual acts while he watched, the inclusion of a jury charge regarding solicitation did not constitute error.

Conclusion:

Based upon the foregoing, the Court finds no reason upon which to grant Defendant's Post-Sentence Motion. Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4)(a), Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty (30) days of the date of this Order to the Pennsylvania Superior Court; "(b) the right to assistance of counsel in the preparation of the appeal; (c) the rights, if the defendant is indigent, to appeal in forma pauperis

and to proceed with assigned counsel as provided in Rule 122; and (d) the qualified right to bail under Rule 521(B)."

O R D E R

AND NOW, this 10th day of May, 2011, it is ORDERED and DIRECTED that for the reasons stated above, the Defendant's Post-Sentence Motion is hereby DENIED.

BY THE COURT,

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Richard A. Gray, J.

cc: DA (Melissa Kalaus, Esquire)
PD (William Miele, Esquire)
Gary Weber, Esquire