

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1472-2009
vs. :
 :
DAVID R. PROBST, :
Defendant :

OPINION AND ORDER

This matter came before the Court on the Defendant's post sentence motion/motion to modify sentence. The relevant facts follow.

On June 3, 2010, a jury found the Defendant guilty of aggravated indecent assault of a child, a felony of the first degree; indecent assault of a child less than 13 years of age, a felony of the third degree; and corruption of a minor, a misdemeanor of the first degree.

On June 4, 2010, the Commonwealth gave the Defendant notice that it intended to seek a mandatory sentence under 42 Pa.C.S.A. §9718.2 (a)(1). The Defendant had a prior conviction for the Megan's Law offense of indecent assault of a child less than 13 years of age, which occurred under similar circumstances as the instant case.

On November 12, 2010, the Court sentenced the Defendant to concurrent terms of imprisonment in a state correctional institution of 25 to 50 years for aggravated indecent assault and indecent assault, with a consecutive 5 year probationary term for corruption of a minor.

On November 19, 2010, the Defendant filed the instant motion. The Court held a hearing and argument on the Defendant's motion on January 14, 2011. The sole issue

raised in the Defendant's motion is that the Court should not have imposed a 25-year minimum sentence, because the Commonwealth did not provide the Defendant with notice in accordance with 42 Pa.C.S.A. §9718.2(d); therefore, the Court should have sentenced the Defendant pursuant to the sentencing guidelines. The Commonwealth counters that the Court properly sentenced the Defendant to a 25-year minimum sentence, because the Defendant was aware that it withdrew its plea offer due to the mandatory and it gave notice in accordance with 42 Pa.C.S.A. §9718.2(c).

At the hearing, the Commonwealth presented three exhibits in support of its position. Commonwealth Exhibit 1 was a photocopy of the back of the Commonwealth's file. That exhibit showed in the "COURT ACTION" section that an assistant district attorney's offer for a 2 year mandatory minimum on the charge of failing to register and a concurrent sentence for indecent assault was nixed by the District Attorney, the case was continued to January 11, 2010, and the District Attorney was going to speak to defense counsel. Under the caption "MISCELLANEOUS" between entries dated November 6, 2009 and February 24, 2010, the District Attorney wrote a notation that this is a 25 yr. mandatory per 42 Pa.C.S. §9718.2 relating to a current conviction of a Megan's Law offense and being previously convicted of Megan's Law offense. Commonwealth Exhibit 2 was a copy of the Commonwealth's notice of mandatory sentence that was filed on June 4, 2010. Commonwealth Exhibit 3 was the face sheet dated December 7, 2009 of a guilty plea colloquy form, which showed the original plea offer of pleading guilty to a felony three failure to register and no contest plea an amended count of indecent assault graded as a

misdemeanor of the first degree for a mandatory minimum of 2 years on the registration offense and a concurrent sentence on the amended indecent assault.

In response to the prosecutor's arguments, defense counsel indicated that he was not told of a 25 year mandatory. Instead, the plea was nixed because the District Attorney wanted the Defendant to plead guilty to the aggravated indecent assault, which carried a five-year mandatory sentence. When the case was continued to January 11, 2010, the Defendant would not accept the offer to plead to a five year mandatory.

Defense counsel also called the Defendant as a witness. The Defendant testified that he was never informed of a 25-year mandatory minimum prior to trial; he did not hear about that until sentencing. He further stated that he only talked to his attorney about a two-year mandatory and a five-year mandatory. He confirmed his attorney's statement that he was not willing to plead to a five-year mandatory in January 2010, and further stated that he would now plead guilty to a five-year mandatory knowing that he was facing a 25-year mandatory minimum. Upon further questioning, however, the Defendant acknowledged that he denied the events underlying the aggravated indecent assault and the indecent assault ever occurred, and that the plea agreement for the amended indecent assault charge was for a no contest plea. There was no evidence presented that the Commonwealth was ever willing to offer the Defendant a five-year mandatory minimum sentence in exchange for a no contest plea to aggravated indecent assault. The Defendant also admitted that if he had been told there was a 25-year mandatory minimum that he would not plead guilty for that sentence.

The main issue of this case is what authority, if any, the Court had to impose a 25-year minimum sentence in this case. The Commonwealth contends the 25-year minimum was mandatory or, in the alternative, that the Court had discretion to impose a 25-year minimum. The Defendant asserts that since notice was not given in accordance with paragraph (d) of the statute, the Court cannot impose a 25-year minimum sentence or, in the alternative, the Court has discretion to refuse to impose that sentence and impose a sentence that is within the sentencing guidelines.

The issue in this case arises due to apparent inconsistencies or conflicts in the statute. Section 9718.2 states:

(a) Mandatory sentence. –

(1) Any person who is convicted in any court of the Commonwealth of an offense set forth in section 9795.1(a) or (b)(relating to registration) shall, if at the time of the commission of the current offense the person had previously been convicted of an offense set forth in section 9795.1 (a) or (b) or an equivalent crime under the laws of this Commonwealth in effect at the time of the commission of that offense or an equivalent crime in another jurisdiction, be sentenced to a minimum sentence of at least 25 years of total confinement, notwithstanding any other provision of this title or other statute to the contrary. Upon such conviction, the court shall give the person oral and written notice of the penalties under paragraph (2) for a third conviction. Failure to provide such notice shall not render the offender ineligible to be sentenced under paragraph (2).

(2) Where the person had at the time of the commission of the current offense previously been convicted of two or more offenses arising from separate criminal transactions set forth in section 9795.1(a) or (b) or equivalent crimes under the laws of this Commonwealth in effect at the time of the commission of the offense or equivalent crimes in another jurisdiction, the person shall be sentenced to a term of life imprisonment, notwithstanding any other provision of this title or other statute to the contrary. Proof that the offender received notice of or otherwise knew or should have known of the penalties under this paragraph shall not be

required.

(b) Mandatory maximum.—An offender sentenced to a mandatory minimum sentence under this section shall be sentenced to a maximum sentence equal to twice the mandatory minimum sentence, notwithstanding 18 Pa.C.S. §1103 (relating to sentence of imprisonment for felony) or any other provision of this title or other statute to the contrary.

(c) Proof at sentencing.—The provisions of this section shall not be an element of the crime, and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The sentencing court, prior to imposing sentence on an offender under subsection (a), shall have a complete record of the previous convictions of the offender, copies of which shall be furnished to the offender. If the offender or the attorney for the Commonwealth contests the accuracy of the record, the court shall schedule a hearing and direct the offender and the attorney for the Commonwealth to submit evidence regarding the previous convictions of the offender. The court shall then determine, by a preponderance of the evidence, the previous convictions of the offender and, if this section is applicable, shall impose sentence in accordance with this section.....

(d) Authority of the court in sentencing.—Notice of the application of this section shall be provided to the defendant before trial. If the notice is given, there shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in subsection (a) and (b) or to place the offender on probation or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than that provided in this section. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory sentences provided in this section.

(e) Appeal by Commonwealth.—If a sentencing court shall refuse to apply this section where applicable, the Commonwealth shall have the right to appellate review of the action of the sentencing court. The appellate court shall vacate the sentence and remand the case to the sentencing court for the imposition of a sentence in accordance with this section if it finds that the sentence was imposed in violation of this section.

It is clear that the Commonwealth gave notice in accordance with paragraph (c). On June 4, 2010, the day after the jury rendered its verdict, the Commonwealth notified the Defendant that it intended to seek a mandatory sentence under section 9718.2. The sentencing hearing was not held in this case until November 12, 2010. Therefore, the Defendant had over five months notice that the Commonwealth intended to seek a 25-year mandatory in this case. This much advance notice was more than reasonable; it was ample.

The Commonwealth contends that its Exhibit 1 shows that the Defendant had notice before trial of the 25-year mandatory minimum applicable to this case. Although the exhibit shows that the District Attorney noted the 25-year mandatory minimum on the file jacket so that any attorney from his office handling the case would be aware of it, the Court cannot conclude that this evidence shows the information was communicated to the Defendant or his attorney. In light of the defense testimony that neither the Defendant nor his attorney were informed or made aware of this mandatory prior to the Commonwealth filing its written notice, the Court cannot conclude that the notice requirements of paragraph (d) were met in this case.

Reading this statute and attempting to give meaning to all its provisions, the Court finds that it had the authority to impose a 25-year minimum sentence in this case. It is clear that the Commonwealth complied with the notice requirements contained in subsection (c). There also was no dispute in this case

that the Defendant had a prior conviction for indecent assault that was graded as a misdemeanor of the first degree or higher. In fact, the Court presided over the Defendant's previous trial where a jury found the Defendant guilty of committing an indecent assault where the complainant was less than 13 years old, in violation of 18 Pa.C.S.A. §3126 (a)(7), which at that time was graded a misdemeanor of the first degree, but currently would be a felony of the third degree.¹ Therefore, a 25-year minimum sentence was required through the combination of paragraphs (a)(1), (c) and (e).

If the Commonwealth had given notice prior to trial, it could have argued for a minimum sentence of more than 25 years under paragraph (d).

In the alternative, the Court finds that the conflicting provisions of paragraph (c), which states notice shall not be required prior to conviction, and paragraph (d) which states notice shall be provided before trial turns the mandatory minimum sentence into a discretionary minimum sentence.² The Court, however, finds that regardless whether the 25-year minimum was mandatory or discretionary, such a lengthy sentence was appropriate in this case.

First, the Defendant's conduct in this case was similar to his conduct in this case. The Defendant's modus operandi in both cases was to sexually assault a little girl, who came to his residence to have a sleep-over with

¹ The jury also found the Defendant guilty of corruption of a minor. Those convictions can be found in case number CP-41-CR-1801-2005.

² Although it seems somewhat contradictory to say that the Court has discretion to impose what otherwise would appear to be a mandatory minimum sentence, this would not be the first time the Legislature has created what,

the Defendant's step-daughter. The victims were 9 years old and 11 years old and either prepubescent or early pubescent females.

Second, the assessor who conducted an assessment of whether the Defendant was a sexually violent predator concluded to a reasonable degree of professional certainty that the Defendant meets the diagnostic criteria for pedophilia, which is a chronic and life-long condition.

Third, the Defendant's conduct had a devastating impact on the victim. The victim's mother wrote either a victim impact statement or a letter to the court indicating that: the victim is afraid and combative; she suffers from nightmares at least twice per week; she is confused and wonders why this occurred to her; and is undergoing sexual abuse counseling.

Fourth, the Defendant failed to complete sex offender treatment from his prior offense.

Fifth, the Defendant was still under supervision on his convictions in the prior case, and a condition of his supervision was that he avoid contact with minors.³

Finally, the Defendant is an opportunistic, sexually violent predator

for lack of a better term, would be a "discretionary mandatory." See 42 Pa.C.S.A. §9717(a)(relating to the crime of theft by deception).

³ The Defendant was serving a five-year consecutive term of probation for corruption of a minor in case number CP-41-CR-1801-2005.

who needs to be incarcerated for a lengthy period of time to protect the public, especially young girls.

The Court also notes that the Defendant was not prejudiced by the fact that he did not receive notice prior to trial. The Defendant candidly admitted in his testimony that if he had been advised that he was facing a 25-year mandatory minimum sentence, he would not have tendered a guilty plea in exchange for that sentence; he still would have proceeded to trial.

The Defendant attempts to claim that he was prejudiced because, if he had been aware of the potential for a 25-year sentence, he would have pleaded no contest or guilty to aggravated indecent assault for a five-year mandatory minimum sentence. The Court rejects this contention. Other than the Defendant's claim that he rejected an offer to plead guilty for a five-year mandatory minimum sentence, there is nothing in the record to indicate that the Commonwealth would have agreed to allow the Defendant to plead no contest or guilty to the aggravated indecent assault charge in exchange for a five-year minimum. While there is a notation on the District Attorney's file of the original offer made by an assistant district attorney that was nixed by the District Attorney, there isn't any notation on Commonwealth Exhibit 1 that the Commonwealth was ever willing to offer a plea agreement for a five-year mandatory minimum sentence. The only other notation, made by the District Attorney at a time presumably between November 6, 2009 and February 24, 2010

when plea discussion would have been occurring, was that the case involved a 25-year mandatory.

The Court does not find credible the Defendant's testimony that he rejected an offer for a five-year mandatory, but he would have accepted the offer and pled guilty if he had been aware of the potential for a 25-year minimum sentence. The Defendant has steadfastly denied that he sexually assaulted the victim in this case. The Court does not believe the Defendant would or could admit to sufficient facts to enter a plea of guilty in this case. This belief is further supported by the fact that the Defendant continues to deny that committed the prior indecent assault that makes section 9718.2 an issue in this case.

Since the Defendant has not been prejudiced by the lack of notice prior to trial and a lengthy sentence in this case was appropriate for the reasons set in this Opinion, the Court believes it had the authority to impose a 25-year minimum sentence pursuant to 42 Pa.C.S.A. §9718.2 and appropriately imposed such a sentence.

ORDER

AND NOW, this ____ day of March 2011, the Court DENIES the Defendant's

Post Sentence Motion

By The Court,

Kenneth D. Brown, Senior Judge

cc: Mary Kilgus, Esquire (ADA)
Michael Morrone, Esquire
Work File