IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-939-2009**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
ROBERT WILLITS,	**:**	
Appellant	**:**	**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 entered September 12, 2011. The relevant facts follow.

In the summer of 1996 or 1997 when C.W. was 10 or 11 years old, she was staying overnight with her grandfather (Appellant) and his girlfriend on an extended visit. One night while Appellant's girlfriend was at work, C.W. and Appellant were sitting on the couch watching television when Appellant slid his hand underneath C.W.'s shorts and began touching her vagina. C.W. told Appellant to stop, got up and went into a bedroom and began playing a computer game. Shortly thereafter, Appellant came into the room, placed his hands on C.W.'s shoulders, and then put his hands under her shirt and began touching her breasts. C.W. asked Appellant to stop, and he left the room.

Later that night after C.W. had gone to bed and fallen asleep, Appellant came into the room and got into bed with C.W. Appellant began rubbing his penis on the outside of C.W.'s shorts, and then he slid her shorts and underwear down and rubbed his penis against her vagina. Appellant had an erection and his penis penetrated the lips of C.W.'s

vagina, but did not go all the way inside. C.W. told Appellant to stop, and he got up and left.

From 1996 to 2001, Appellant also sexually abused his girlfriend's granddaughter, R.D., who was five to ten years old during that time. Appellant would come into the room where R.D. was sleeping early in the morning before her grandmother came home from work. Appellant would pull down or take R.D.'s underwear off, and tell her if she was a good girl and counted to 100, she could go to Wal-Mart or the corner store and he would buy her something. Appellant then engaged in a variety of sexual contacts with R.D. He fondled her breasts, put his fingers in her vagina, rubbed his penis on her vagina so that his penis penetrated the lips of her vagina, put his mouth on her vagina and moved his tongue around and between the lips of her vagina.

Although R.D. did not know C.W., Appellant would say things to her like you do this better than C.W. He also told her that if she was good enough, then he would not need R.D.'s younger sister.

Appellant's sexual abuse of these children was not reported to the police until 2009, after R.D. was in counseling for another issue.

On May 18, 2009, the police filed a criminal complaint against Appellant charging him with two counts of attempted rape of a person less than 13 years of age, two counts of attempted statutory sexual assault, involuntary deviate sexual intercourse by forcible compulsion, involuntary deviate sexual intercourse with a person less than 13 years of age, aggravated indecent assault of a person less than 13 years of age, two counts of indecent assault of a person less than 13 years of age, two counts of endangering the welfare of children, two counts of corruption of minors, indecent assault by forcible compulsion, and attempted incest.

On April 9, 2010, Appellant tendered a no contest plea to two counts of indecent assault and the Court ordered a sexual offender assessment. When Appellant appeared for sentencing on July 21, 2010, the Court informed the parties that it would not sentence Appellant in accordance with the plea agreement. Appellant's attorney then made an oral motion to withdraw the plea, which the Court granted.

On January 10, 2011, Appellant filed a motion to dismiss pursuant to Rule 600 of the Pennsylvania Rules of Criminal Procedure, which the Court denied.

A jury trial was held on January 24, 2011. The jury found Appellant guilty of all the charges.

On September 12, 2011, the Court found Appellant was a sexually violent predator and sentenced him to serve 30 to 60 years incarceration in a state correctional institution.

Appellant filed a timely notice of appeal.

The first issue raised by Appellant is that the Court erred in denying the motion to dismiss that was filed pursuant to Rule 600. The Court cannot agree.

Rule 600(D)(1) states:

> When a trial court has granted a new trial and no appeal has been perfected, the new trial shall commence within 120 days after the date of the order granting a new trial if the defendant is incarcerated on that case. If the defendant has been released on bail, trial shall commence within 365 days of the trial court's order.

Pa.R.Cr.P. 600(D)(1). "The withdrawal of, rejection of, or successful challenge to a guilty plea should be considered the granting of a new trial for purposes of this rule." Pa.R.Cr.P. 600, comment; see also Commonwealth v. Bowes, 839 A.2d 422, 435-36 (Pa. Super. 2003); Commonwealth v. Betz, 444 Pa. Super. 607, 664 A.2d 600, 603 (1995).

The criminal complaint was filed in this case on May 18, 2009 and Appellant was released on bail two days later. He tendered a no contest plea on April 9, 2010. Although there are periods of excludable time between the filing of the complaint and the tender of the plea, the Court need not calculate the amount of excludable time because Appellant was released on bail and tendered his plea within 365 days of the filing of the complaint.

The Court rejected the plea and it was withdrawn on July 21, 2010. Pursuant to Rule 600(D)(1) and the comment thereto, the rejection or withdrawal of a plea is considered a grant of a new trial. Since Appellant was released on bail, trial was required to commence within 365 days of July 21, 2010. The jury trial was conducted on January 24, 2011, well within 365 days of July 21, 2010. Therefore, the Court did not err in denying Appellant's motion to dismiss.

Appellant next asserts that the sentence of the Court was excessive in that it failed to adequately consider the Appellant's health, age, the age of the case, and Appellant's lack of criminal activity during the time between the offenses and sentencing. Again, the Court cannot agree.

In determining the sentence to be imposed and selecting among the alternatives available for sentencing, the court "shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim an on the community, and the rehabilitative needs of the defendant." 42 Pa.C.S. §9721(b); see also Commonwealth v. Walls, 592 Pa. 557, 926 A.2d 957, 962-63 (2007).

The Court considered all of these factors, including those raised by Appellant

on this issue, before the Court imposed its sentence. A pre-sentence investigation was conducted in this case, and the Court reviewed it prior to imposing sentence. N.T. Sept 12, 2011, at pp.33-35. The Court was aware that Appellant was 77 years old at the time of sentencing. Appellant's counsel also argued for a lenient sentence based on Appellant's medical problems, which included lymphoma, a type of cancer. The Court was also aware that, apart from these convictions, Appellant's criminal history consisted of burglary and larceny convictions from the 1960s. The Court, however, did not find that these factors outweighed the seriousness of the charges, the affect on the victim and the community, and Appellant's lack of remorse.

One victim, C.W., was Appellant's ten or eleven year old granddaughter; the other, R.D., was the granddaughter of his paramour. These children trusted Appellant, and he took advantage of his role in their families. R.D. was only five years old when Appellant started to sexually abuse her, and he continued to sexually abuse her for five years. Appellant used manipulation and implied threats when he told R.D. she could go to Wal-Mart or the corner store if she was a "good girl" and when he told her if she was good enough, he wouldn't "need" her younger sister. Appellant's abuse of these children broke the most basic trust in any family unit and will impact the victims' relationships for the rest of their lives. It did not appear to the Court that Appellant showed any remorse, any compassion, or any emotion, let alone the slightest inkling of how his conduct permanently impacted these girls.

After considering all of the appropriate sentencing factors and the sentencing guidelines applicable to this case, the Court imposed a 30 to 60 year sentence. N.T., Sept. 12, 2011, at pp. 44-45, 50-55. This sentence is not excessive in light of other similar cases. See

Commonwealth v. Walls, 592 Pa. 557, 926 A.2d 957 (2007)(sentence of 21 to 50 years was not excessive for appellant's rape, involuntary deviate sexual intercourse and incest of his granddaughter); Commonwealth v. Prisk, 13 A.3d 526 (Pa. Super. 2011)(sentence of 633 to 1500 years for 314 offenses arising out of appellant's almost daily sexual abuse of his stepdaughter over the course of seven years was not unduly harsh or excessive).

Appellant next contends the Court erred in finding that he was a sexually violent predator in that: (1) there was no evidence that Appellant was ever violent or had any violent propensities, and the Appellant did not engage in any violent behavior toward any of the victims; (2) to the extent that the statute allows the Court to find a person to be a sexually violent predator based solely on the charges against him, Appellant contends the statute is unconstitutional and deprives him of his rights to due process and equal protection; and (3) the expert failed to adequately consider Appellant's age and health in making his determination that Appellant could reoffend. The Court cannot agree.

The term "sexually violent predator" is a term of art that does not require a showing of physical violence. To deem an individual a sexually violent predator, the Commonwealth must show that: (1) the individual has been convicted of a sexually violent offense as set forth in 42 Pa.C.S. §9795.1; and (2) the individual has a mental abnormality or personality disorder that makes him likely to engage in predatory sexually violent offenses. 42 Pa.C.S. §9792 (definition of "Sexually violent predator"); Commonwealth v. Askew, 907 A.2d 624, 629 (Pa. Super. 2006).

The Commonwealth proved both elements in this case. Appellant was convicted of numerous sexually violent offenses, including criminal attempt- rape, criminal attempt-incest, involuntary deviate sexual intercourse, aggravated indecent assault, and two

counts of indecent assault that were graded as misdemeanors of the first degree or higher. The Commonwealth also presented expert testimony that Appellant suffered a mental abnormality, specifically pedophilia. The Commonwealth's expert discussed the statutory factors, as well as behaviors that Appellant displayed that were predatory, such as approaching the victims while his girlfriend was at work, praising and complementing one of the victims for her level of cooperation, and promising to take the victim to Wal-Mart or the corner store and buying her something in exchange for her cooperation.. N.T., Sept. 12, 2011, at pp. 8-17. Since the Commonwealth presented clear and convincing evidence that satisfied the statutory definition of a sexually violent predator, the Court did not err in finding Appellant to be a sexually violent predator.

The Court also finds that the statute does not offend due process or equal protection. The Court notes that Appellant was not found to be a sexually violent predator based solely on the charges against him. This designation was based not only on Appellant's convictions for sexually violent offenses, but also the expert's testimony that Appellant met the diagnostic criteria for pedophilia and Appellant's predatory behaviors in the commission of the offenses that resulted in the Court's finding that Appellant meets the definition of a sexually violent predator. Moreover, the Pennsylvania appellate courts have repeatedly rejected the same or similar constitutional challenges to Megan's Law. Commonwealth v. Williams, 574 Pa. 987, 832 A.2d 962 (2003); Commonwealth v. Leddington, 908 A.2d 328, 332-335 (Pa. Super. 2006); Askew, supra at 628-29; Commonwealth v. Kopicz, 840 A.2d 342 (Pa. Super. 2003).

Finally, Appellant contends that the expert failed to adequately consider Appellant's age and health in making his determination that Appellant could reoffend. At

the time of the Megan's Law hearing Appellant was 77 years old and allegedly suffering from health conditions, including lymphoma. Appellant's counsel, however, cross-examined the Commonwealth's expert about Appellant's age and health, but these factors did not alter the expert's opinion that Appellant was a sexually violent predator. N.T., Sept. 12, 2011, at pp.17-19. The expert noted that, although a 77 year old was less likely to re-offend than an individual between the ages of 18 and 26, Appellant was in his sixties when he committed these offenses. Given his persistent interest in prepubescent children, the expert opined that if Appellant had access to victims again, and under the right circumstances, he still could engage in this sort of behavior. In light of this testimony, Appellant's assertion that the expert failed to adequately consider Appellant's age and health is not supported by the record.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: A. Melissa Kalaus, Esquire (ADA)
James Protasio, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)