

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-1357-2009
vs. :
TIM A. COPENHAVER, : CRIMINAL DIVISION
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 dated March 23, 2015, following the revocation of Appellant's probation. The relevant facts follow.

Appellant was charged with five (5) counts of sexual abuse of children (possession of child pornography).¹ On March 24, 2010, Appellant entered a plea agreement where he would plead guilty to all of the charges in exchange for a sentence of two (2) to five (5) years of incarceration in a state correctional institution followed by ten (10) years of probation. On July 24, 2010, Appellant was sentenced in accordance with the plea agreement.

On December 30, 2014, following an on the record colloquy, the court issued an order amending the conditions of Appellant's supervision to include the standard special

¹ 18 Pa.C.S.A. §6312(d).

conditions, supplemental special conditions and optional special conditions for sex offenders by the Pennsylvania Board of Probation and Parole (Board). Condition 4 prohibited Appellant from possessing, viewing, and reading any sexually explicit materials, including articles, literature, books, magazines, photographs, emails, websites, digital images, or animated photos or images. Appellant was orally informed of this condition during the colloquy. He signed a written copy of the conditions on January 21, 2015.

On March 23, 2015, the court held a probation violation hearing and found that Appellant violated the conditions of his probation by attempting to receive or possess sexually explicit materials while incarcerated. Appellant filed an appeal.

Appellant's sole contention on appeal is that the court erred in finding there was sufficient evidence that he violated the conditions of his supervision. The court cannot agree.

The Commonwealth establishes a probation violation meriting revocation when it shows, by a preponderance of the evidence, that the probationer's conduct violated the terms and conditions of his probation, and that probation has proven an ineffective rehabilitation tool incapable of deterring [the] probationer from future antisocial conduct.

Commonwealth v. A.R., 990 A.2d 1, 4 (Pa. Super. 2010)(quoting *Commonwealth v. Ahmad*, 961 A.2d 884, 889-90 (Pa. Super. 2008)(citations and quotation marks omitted)). "The 'preponderance of the evidence' is the lowest burden of proof in the administration of justice, and it is defined as 'the greater weight of the evidence, i.e., to tip a scale slightly [in one's favor].'" *Id.* (citing *Raker v. Raker*, 847 A.2d 720, 723 (Pa. Super. 2004)).

Three witnesses testified at the probation revocation hearing: Dawn Zimmerman, a corrections specialist at the Clinton County Correctional Facility (CCCF);

Scott Metzger, the assistant chief of the Lycoming County Adult Probation Office; and Appellant.

Dawn Zimmerman testified that Appellant was being housed at the CCCF, whose policies provided that all inmate mail would be opened and the inmates were prohibited from possessing anything of a pornographic nature or information regarding drugs, weapons, or prison disruptions. On January 26, 2015, an envelope addressed to Appellant containing a brochure from Branlette's Beauties was delivered to the CCCF. The brochure had pictures of women wearing little or no clothing and an order form.

Ms. Zimmerman spoke to Appellant about the brochure. Appellant admitted that he sent for the brochure. He told Ms. Zimmerman that his charges were kiddie porn, not adult porn. He further stated that it was a violation of his civil rights if he was not allowed to keep his mail and he was suing the State of Pennsylvania, the Department of Corrections and the Board.

On the same day, Appellant also received mail from Freebird Publishers. The envelope contained literature to buy anything from Valentine candy to sexy pictures of women. The envelope also contained a letter that the company had received Appellant's deposit, but it was unable to fill his order.

Ms. Zimmerman did not know when Appellant requested these materials but, as a stipulation of Appellant's state parole, he was not to have these materials.

Scott Metzger testified regarding the conditions of Appellant's parole and probation supervision. He stated that the Board was supervising Appellant as a special supervision case. The Board required that their conditions be imposed before a defendant

was released from a correctional facility. On January 21, 2015, Agent John Becker took the written conditions to the CCCF, he reviewed them with Appellant, and then Appellant and Agent Becker signed them. Mr. Metzger also testified that Appellant was still under parole supervision and he would not begin his ten-year period of probation supervision until July 2015.

Appellant contended he did not violate his conditions after they were signed. He testified that he learned about the brochure in an advertisement in the Prison Legal News, which he received two issues of when he was incarcerated at SCI-Camp Hill and SCI-Cresson. He was moved to CCCF on December 15, 2015. He ordered the brochure after he was incarcerated there, but he could not remember the exact date he requested these materials. He stated that he believed he was ordering “BOP friendly” or non-nude materials. He claimed he “didn’t have any idea it was sexually explicit or anything, and it was just a freak thing.” N.T., at 14-15. Appellant admitted that he made a statement to Ms. Zimmerman that he was charged with kiddie porn. He had no intention of sending for kiddie porn, as the advertisement specified adult, or of age. Appellant agreed he probably sent for the materials in January and his conditions were imposed on December 30, 2014, but he claimed he forgot about the conditions and he didn’t request any materials with nudity. N.T., at 21.

The court found that Appellant violated the conditions of his supervision. Although he probably sent for the materials before he signed the special conditions, he was aware of the conditions because they were discussed and imposed in open court on December 30, 2014. The court also found that Appellant expected to receive sexually

explicit materials, because he wasn't expecting portraits of people but rather something that was going to arouse him. N.T., at 34-35.

The evidence was sufficient to support the court's findings. Ms. Zimmerman credibly testified regarding her conversation with Appellant. From that conversation, one can conclude that Appellant knowingly requested adult pornographic material. The court only found parts of Appellant's testimony credible. The court accepted Appellant's statements that he had no intention of sending for child pornography and that the advertisement specified adult or of age. The court, however, did not find credible Appellant's assertion that he didn't have any idea that he was requesting sexually explicit materials.

The conditions of Appellant's probation and parole supervision prohibited Appellant from possessing any sexually explicit materials, not just child pornography.² This condition served the goal of preventing recidivism, as viewing any sexually explicit materials could make it more difficult for Appellant to resist the urge to possess or view child pornography. Just as a court can prohibit an individual who utilized a computer to download child pornography from using a computer or other Internet capable equipment while on probation, *Commonwealth v. Hartman*, 908 A.2d 316 (Pa. Super. 2006), so too can the court place a condition on Appellant's probation to preclude him from possessing or viewing any sexually explicit materials.

DATE: _____

By The Court,

² The court had the authority to revoke Appellant's probation despite the fact that he was on parole at the time and had not yet begun his probationary term. *Commonwealth v. Ware*, 737 A.2d 251, 253 (Pa. Super. 1999).

Marc F. Lovecchio, Judge

cc: Melissa Kalaus, Esquire (ADA)
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