

G. Weber

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

: No. CR-799-2022

v.

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Omnibus Motion

DAVID DYER

Defendant

FILED
LYCOMING COUNTY
2023 NOV 16 PM 4:23
THOMAS D. HEAR
CLERK OF COURTS

OPINION AND ORDER

David Dyer, Defendant, was charged with Unlawful Contact with a Minor¹, Corruption of Minors², Indecent Assault – Person less than 13 years of age³, and Indecent Assault – without consent⁴. These charges arise from allegations made by the Defendant's minor children. Defendant filed this Omnibus Motion on December 19th, 2023. This Court held a hearing on May 30th, 2023.

In his Omnibus motion the Defendant argues that there is insufficient evidence to support the above charges. Additionally, he argues that Count 1 should be dismissed because the two (2) year statute of limitations has ran.

Background and Testimony

The relevant background and testimony at Defendant's preliminary hearing is as follows: The criminal complaint in the case was filed on March 25th, 2022. The preliminary hearing was held on June 2nd, 2022. At the preliminary hearing the minor victim R.L. testified. R.L. testified that at the time of the incidents at issue her father had visitation/contact of her and her sister.

¹ 18 Pa. C.S.A. § 6318 (A)(1)

² 18 Pa. C.S.A. § 6301 (A)(1)(ii)

³ 18 Pa. C.S.A. § 3126 (A)(7)

⁴ 18 Pa. C.S.A. § 3126 (A)(1)

During those times of visitation, she testified there was contact with her father that made her uncomfortable. Specifically, she testified that her father would touch her chest, kiss and grope her neck, and touched over her clothes in inappropriate places, including her groin area. The alleged inappropriate contact happened in the living room, the minor's bedroom, and the kitchen. The minor testified that the Defendant would move his hands slowly around her face or down. Also, that the Defendant would kiss down her neck. The kissing would happen for more than a second. She testified that this happened, "basically like every time I was over there"⁵.

It is noted that the Defendant's other daughter, AL, testified, but the Magistrate Judge ruled that the Commonwealth did not meet the prima facie case regarding those allegations.

Discussion

Motion to Dismiss Count 1

The first argument the Defendant raises is that the statute of limitation (SOL) has run as to count 1, unlawful contact with a minor. The SOL for count 1 is two years. The Commonwealth's position is that the SOL is tolled because the offense falls under 42 Pa. C.S.A. 5554(3), which states that the period of limitation does not run during anytime when the child is under 18 and the crime involves injury to the person of the child by the wrongful act of the child's parents.

The Defendant argues first that the accusatory instrument must allege facts that bring it within one of the exceptions to the SOL. Here the complaint was filed on March 3rd, 2022 and the alleged crimes happened between January 2017 and January 2020. The information listed that the allegation took place on January 1, 2017. This, the Defendant argues, is not enough and therefore the charge should be dismissed.

The Court finds this argument unpersuasive. The alleged victim in the case is a minor. In

⁵ Transcript pg. 5 line 15

the Affidavit of Probable Cause the affiant identifies the alleged victim as a minor. For the exception in this case to be applicable the victim has to be a minor and the allegations have to be committed by a parent or a person responsible for the child's welfare, or any individual residing in the same home as the child, or a paramour of the child's parent. The Affidavit in this case both identifies the alleged victim as a minor and that the alleged perpetrator was the minor's Father, the Defendant.

Secondly, the Defendant argues that when an allegation's SOL time has been tolled the exception must be made in either the complaint itself or a reasonable time before trial. The Defendant cites to *Commonwealth v. Morrow*, 682 A.2d 347, to support this argument. In that case the Court concluded that there was sufficient notice when the Commonwealth responded to the Defendant's omnibus motion to dismiss the charges for lack of notice of a SOL exception. Additionally, this Court cannot find any case that requires there to be written notice of an SOL exception.

Here the Defendant was given notice of the Commonwealth's intention to toll the SOL in this case at the hearing for this omnibus motion.

Lastly, the Defendant argues that the SOL tolling statute does not apply because there was no injury alleged by the minor child. In *Commonwealth v. Perry*, 588 A.2d 917, the Superior Court ruled that there is not a requirement to make a pre-trial showing of physical or emotion injury.

For the above reasons, count 1 is not dismissed based on the Defendant's SOL arguments.

Motion for Habeas Corpus

When challenging a sufficiency of the evidence presented at a preliminary hearing a

Defendant may file a writ of Habeas Corpus. At a preliminary hearing the Commonwealth “bears the burden of establishing at least a prima facie case that the crime was committed”.

Commonwealth v. McBride, 528 Pa. 153, 591 (Pa. Super. 1991). Further, to prove its burden at this hearing, “the Commonwealth is required to present evidence with regard to each of the material elements of the charge and to establish sufficient probable cause to warrant the belief that the accused committed the offense”. *Id* The evidence presented at the preliminary hearing must be considered in the light most favorable to the Commonwealth. *Commonwealth v. Hilliard*, 172 A. 3d 5, 10 (Pa. Super. 2017).

A person is guilty of unlawful contact of a minor when:

(a) Offense defined - A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:

(1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses).

The Superior Court in *Commonwealth v. Velez*, 51 A.2d 260 (Pa. Super. 2015) quoting *Commonwealth v Rose*, 960 A.2d 149 (Pa. Super. 2008), explains that the unlawful contact of a minor is “best understood as unlawful communication with a minor”. Further, they state that the term contact requires a communicative message. *Id*. In *Velez* the minor victim was found in bed naked from the waist down with her knees up. *Id*. The Court concluded that despite the lack of oral communication it could be inferred that there was some sort of communication for the minor to assume that position.

In *Commonwealth v. Leatherby*, 116 A.3d 73 (Pa. Super. 2015), the Superior Court found

there to be insufficient evidence to support a conviction of unlawful contact of a minor. In this case it was testified to that the Defendant would go into the victim's room while they were sleeping and grope their chest and buttocks. *Id.* "Leatherby would not say anything, or communicate with her to assume any certain position, or to submit to any given act." *Id.*

Here, the minor testified that the Defendant did not say anything to her at the time of the alleged contact.⁶ She only testified that the Defendant would kiss her neck or touch her chest and groin area above her clothing. He never exposed himself to her or go under her clothing.⁷ She was not found to be in any position that would indicate communication. The Court finds that the Commonwealth did not meet its prima facie case for unlawful contact of a minor as there was no evidence presented of any communication.

Moving to counts 3 and 4 to a person is guilty of indecent assault if:

(a) Offense defined.- A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and:

(1) the person does so without the complainant's consent;

(7) the complainant is less than 13 years of age

Indecent contact is further defined as, "any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in any person."⁸

The Defendant argues that the testimony was too vague and broad. The minor testified

⁶ Transcript pg. 13

⁷ *Id.*

⁸ 18 Pa. C.S.A. § 3126 (A)(1); (A)(7)

that the defendant touched her “groin area”. This Court believes the groin area to be the area including the minor’s vagina.

Additionally, it is argued that the Defendant did not have skin contact. There was in fact skin contact as it was alleged that the Defendant kissed the neck and ear of the minor. “Due to the nature of the offenses sought to be proscribed by the indecent assault statute, and the range of conduct proscribed, the statutory language does not and could not specify each prohibited act.” *Commonwealth v. Hawkins*, 614 A.2d 1198 (Pa. Super. 1992). The Court finds that that a prima facia case for indecent assault for counts 3 and 4 has been met.

Lastly, as to count 2 corruption of minors a defendant is guilty if its proven that:

(ii) Whoever, being of the age of 18 years and upwards, by any course of conduct in violation of Chapter 31 (relating to sexual offenses) corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of an offense under Chapter 31 commits a felony of the third degree.

The Superior Court explains in *Commonwealth v Snyder*, 870 A.2d 336 (Pa. Super. 2005) that, “Actions that tend to corrupt the morals of a minor are those that “would offend the common sense of the community and the sense of decency, propriety and morality which most people entertain.”” (quoting *Commonwealth v. DeWalt*, 752 A.2d 915, 918 (Pa.Super.2000)).

Here, a Father allegedly touching his daughter’s groin area and continually kissing her neck could tend to offend common sense, morality, and decency. Looking at the testimony in a light most favorable to the Commonwealth, the Court finds that they have met their prima facia burden as to count 2.⁹ Accordingly, the following order is entered.

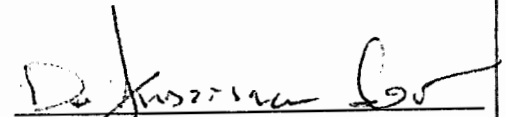
⁹ Child described touching of her chest, kissing and groping of her neck, and touching her in inappropriate places, specifically “down in my groin area”. This happened continually and she felt uncomfortable as a result of the

ORDER

AND NOW, this 16th day of **November, 2023**, the Court grants the Defendant's motion as to count 1, unlawful contact of a minor and count 1 is dismissed.

The court denies the Defendant's motion to all other counts.

By The Court,


Kenneth D. Brown, Senior Judge

KDB/kbc

cc:

Matthew Welickovtich, Esquire (ADA)
Ej Rymza, Esquire
Gary Weber, Esquire (Lycoming County Reporter)

conduct. See transcript pg. 5. See also pg. 6, lines 9-11. She also described the Defendant as moving his hands on her body, pg. 6 12-21.