

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
KENNETH F. McCUTCHEON,	:	
	:	
Appellant	:	No. 1113 WDA 2012

Appeal from the Judgment of Sentence entered on June 25, 2012
in the Court of Common Pleas of Mercer County,
Criminal Division, No. CP-43-CR-0001680-2010

BEFORE: BENDER, ALLEN and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

Filed: April 29, 2013

Kenneth F. McCutcheon ("McCutcheon") appeals from the judgment of sentence entered following his conviction of indecent assault.¹ Specifically, McCutcheon challenges his designation as a sexually violent predator pursuant to 42 Pa.C.S.A. § 9795.4. We affirm.

On September 3, 2010, McCutcheon (then 47 years old) exposed his penis to the twenty-year-old victim² and asked that the victim touch it. The victim attempted to leave, at which time McCutcheon yelled at the victim to touch his penis. As the victim again tried to walk away, McCutcheon masturbated and ejaculated in front of the victim.

¹ 18 Pa.C.S.A. § 3126.

² The Commonwealth presented testimony that the victim had diminished developmental abilities. N.T. (Sentencing), 6/25/12, at 7.

McCutcheon pled guilty to the above-mentioned charge. The trial court subsequently conducted a Megan's Law hearing, after which it designated McCutcheon as a sexually violent predator ("SVP"). Following the Megan's Law hearing, the trial court sentenced McCutcheon to 18-60 months in prison. Thereafter, McCutcheon filed the instant timely appeal, followed by a court-ordered Pennsylvania Rule of Appellate Procedure 1925(b) Concise Statement of matters complained of on appeal.

McCutcheon presents the following claim for our review:

Did the trial court err in finding [McCutcheon] to be a[n SVP] where the evidence presented at the Megan's Law Hearing was insufficient to support said finding[?]

Brief for Appellant at 4.

McCutcheon challenges his designation as an SVP. *Id.* at 8. Specifically, McCutcheon claims that the Commonwealth failed to prove, by clear and convincing evidence, that he met the criteria for such a designation. *Id.* at 12; *see* 42 Pa.C.S.A. § 9795.4 (setting forth factors for consideration in conducting an SVP assessment). In particular, McCutcheon states that Brenda Manno ("Manno"), who conducted the assessment, found that McCutcheon did not exceed the force necessary to achieve the offense. Brief for Appellant at 10. Further, McCutcheon directs our attention to evidence that he had not created an environment where he could sexually attack the victim; that the sexual contact was minor; that the Commonwealth presented no specific evidence as to the victim's mental age;

and that he had no relevant criminal conduct in the 22 years preceding the incident. *Id.* at 11-12.

Our standard of review is as follows:

The determination of a defendant's SVP status may only be made following an assessment by the [Sexual Offenders Assessment Board ("SOAB")] and hearing before the trial court. In order to affirm an SVP designation, we, as a reviewing court, must be able to conclude that the fact-finder found clear and convincing evidence that the individual is a[n SVP]. As with any sufficiency of the evidence claim, we view all the evidence and reasonable inferences therefrom in the light most favorable to the Commonwealth. We will reverse a trial court's determination of SVP status only if the Commonwealth has not presented clear and convincing evidence that each element of the statute has been satisfied.

The standard of proof governing the determination of SVP status, *i.e.*, "clear and convincing evidence," has been described as an "intermediate" test, which is more exacting than a preponderance of the evidence test, but less exacting than proof beyond a reasonable doubt.

* * *

The clear and convincing standard requires evidence that is "so clear, direct, weighty, and convincing as to enable the [trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts [in] issue."

Commonwealth v. Morgan, 16 A.3d 1165, 1168 (Pa. Super. 2011) (quoting ***Commonwealth v. Fuentes***, 991 A.2d 935, 941-42 (Pa. Super. 2012 (*en banc*)) (citations omitted)).

In its Opinion, the trial court addressed McCutcheon's claim and concluded that it lacks merit. Trial Court Opinion, 9/11/12, at 2-9. Upon our review of the parties' briefs and the certified record, we agree with the

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sound reasoning of the trial court, as set forth in its Opinion, and affirm on that basis.

Judgment of sentence affirmed.

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KATHLEEN M. KLOOS
CLERK AND REGISTER

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA
CRIMINAL**

COMMONWEALTH OF PENNSYLVANIA:

VS.

1680 CRIMINAL 2010

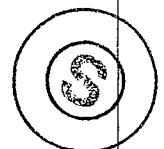
KENNETH F. McCUTCHEON,
Defendant

OPINION

This is an appeal from this Court's *Sentence Order* entered on June 25, 2012 designating the Defendant, Kenneth F. McCutcheon as a sexually violent predator under 42 Pa. C. S. § 9795.3. Following the Defendant's timely appeal, this Opinion is written pursuant to Rule 1925(b) of the Pennsylvania Rule of Appellate Procedure.

BACKGROUND

On June 25, 2012, the Defendant was sentenced by this Court to incarceration for a period of 18 to 60 months in a State Correctional Institution ("SCI"). (Megan's Law & Sentencing Transcript, June 25, 2012, pg. 53). Prior to the sentencing hearing this Court held a Megan's Law hearing. (*Id.*, at pg. 3). At that hearing, testimony was received from Ms. Brenda Manno, a licensed social worker and a member of the



34

Sexual Offender Assessment Board. (*Id.*). Ms. Manno was recognized as an expert by stipulation of the Commonwealth and the Defendant. (*Id.*, at pg. 4).¹

Following Ms. Manno's testimony, this Court determined that the Defendant was a sexually violent predator ("SVP") under 42 Pa. C. S. § 9795.3. (*Id.*, at pg. 26). Accordingly, Defendant was notified of his rights and obligations as a designated sexually violent predator and signed the appropriate *Acknowledgement of Registration Requirement* provided by this Court.

DISCUSSION OF LAW AND FACTS

Error Raised & Relevant Law Pertaining Thereto

In his *Statement of Errors Complained of on Appeal* ("Statement"), the Defendant asserts one error:

That this Court erred in finding the Defendant to be a sexually violent predator, when the evidence presented was insufficient to do so.

Pennsylvania allows for the designation of an individual convicted of certain crimes that are sexual in nature to be classified as a sexually violent predator.

"A person who has been convicted of a sexually violent offense as set forth in section 9795.1 (relating to registration) and who is determined to be a sexually violent predator under section 9795.4 (relating to assessments) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses..."

(42 Pa. C. S. § 9792).

Generally, a court will request the Sexual Offender Assessment Board to perform an evaluation by a board member. (42 Pa.C.S. § 9795.4(b)). That board

¹ The Defendant was sentenced immediately after the Megan's Law hearing. At sentencing, the victim's mother, Cathy Negrea, testified on the victim's behalf, because the victim is developmentally challenged. The Defendant also made a statement during sentencing. Neither person's testimony will be discussed here, as they do not impact the error Defendant has raised on this appeal.

member will then conduct an assessment of the individual to determine if the individual should be classified as a sexually violent predator. (*Id.*). An assessment shall include, but not be limited to, the following:

- “(1) Facts of the current offense, including:
 - (i) Whether the offense involved multiple victims.
 - (ii) Whether the individual exceeded the means necessary to achieve the offense.
 - (iii) The nature of the sexual contact with the victim.
 - (iv) Relationship of the individual to the victim.
 - (v) Age of the victim.
 - (vi) Whether the offense included a display of unusual cruelty by the individual during the commission of the crime.
 - (vii) The mental capacity of the victim.
- (2) Prior offense history, including:
 - (i) The individual’s prior criminal record.
 - (ii) Whether the individual completed any prior sentences.
 - (iii) Whether the individual participated in available programs for sexual offenders.
- (3) Characteristics of the individual, including:
 - (i) Age of the individual.
 - (ii) Use of illegal drugs by the individual.
 - (iii) Any mental illness, mental disability or mental abnormality.
 - (iv) Behavioral characteristics that contribute to the individual’s conduct.
- (4) Factors that are supported in a sexual offender assessment field as criteria reasonably related to the risk of reoffense.”

(*Id.*).

After the assessment is made by the board member, a hearing is conducted, where both the individual and the Commonwealth have a right to present expert witnesses (invariably the board member will be called with their assessment and findings) and cross examine witnesses. (42 Pa.C.S. § 9795.4(e)(2)). At that hearing, if the Commonwealth can sustain its burden of proof by clear and convincing evidence, the individual can be designated as a sexually violent predator. (42 Pa.C.S.

§ 9795.4(e)(3)). “Clear and convincing evidence” means “greater than a preponderance of evidence, but less than beyond a reasonable doubt.” *Estate of Vanoni*, 798 A.2d 203, 209 (Pa. Super. 2002).

Application of Relevant Law to Facts

In this case, the Sexual Offender Assessment Board received an Order from this Court requesting an assessment of the Defendant. (Megan’s Law & Sentencing Transcript, June 25, 2012, pg. 3). The Board assigned Ms. Brenda Manno to conduct an assessment. (*Id.*) The Defendant’s case was then assigned to an investigator, Ms. Nicole Barr, to collect records and offer the Defendant a chance to be interviewed. (*Id.*, at 4).²

Ms. Manno and Ms. Barr then proceeded to review court orders, police reports, affidavits of probable cause, and other documents, as well as the juvenile criminal history, adult criminal history, and court hearing transcripts concerning the Defendant. (*Id.*, at 4-5). Ms. Manno then reviewed information regarding the instant offense, noting that the victim was a 20 year old male who was reported to have development and mental limitations.³

The offense happened on or about September 3, 2010. (*Id.*, at 3). While the victim was helping the Defendant move out of his residence in Sharon, Pennsylvania, the Defendant exposed his penis to the victim, and requested that the victim touch it. (*Id.*, at 6). The victim attempted to leave, but the Defendant yelled at the victim to come back and touch his penis. (*Id.*). When the victim tried to walk away again, the Defendant yelled again and masturbated and ejaculated in front of the victim. (*Id.*).

² Ms. Barr did not testify in this case.

³ The victim’s name in this case was Robert “Bobby” Negrea.

Ms. Manno then testified regarding the following fourteen factors that are enumerated in 42 Pa.C.S. § 9795.4(b). (*Id.*, at 7).

(1) *Whether the offense involved multiple victims.*

Ms. Manno testified that there were not multiple victims involved. (*Id.*).

(2) *Whether the individual exceeded the means necessary to achieve the offense.*

Ms. Manno testified that the Defendant did not exceed the means necessary to achieve his particular offense. (*Id.*).

(3) *The nature of the sexual contact with the victim.*

There was an exposure of the Defendant's genitals, and a request to the victim to touch the Defendant's penis; when that request was not complied with, the Defendant masturbated until ejaculation in front of the victim. (*Id.*).

(4) *The relationship of the individual to the victim.*

The Defendant and the victim were not related to each other, they had been acquainted as neighbors. (*Id.*).

(5) *The age of the victim.*

The victim was twenty years of age at the time of the offense.

(6) *Whether the offense included a display of unusual cruelty by the individual during the commission of the crime.*

Ms. Manno found no undue cruelty present in the offense. (*Id.*).

(7) *The mental capacity of the victim.*

Ms. Manno opined that the victim's diminished developmental abilities would increase his vulnerability. (*Id.*).

(8) *The individual's prior criminal record, and*

(9) *Whether the individual completed any prior sentences.*

Ms. Manno then discussed the victim's prior offense history. (*Id.*, at 8). The Defendant had two charges of open lewdness at age 13, and a charge of simple assault by grabbing a female's genitals. (*Id.*). At age 15, there was a charge of indecent exposure, as well as an exposure with the charge of indecent assault. (*Id.*). At age 15 he was placed in the Youth Development Center in New Castle, and ordered to undergo mental health treatment. (*Id.*).

The Defendant was sentenced to incarceration at age 19 for yet another indecent exposure, and at age 22 another incarceration sentence for indecent exposure and open lewdness. (*Id.*). At age 25 the Defendant was sentenced to incarceration for indecent exposure. (*Id.*).

(10) *Whether the individual participated in available programs for sexual offenders.*

There was no record of the Defendant completing any mental health or sex offender treatment or rehabilitation programs (*Id.*).

(11) *The age of the individual.*

The Defendant in this case was 47 years old at the time of the offense, and had been engaging in deviate sexual behavior since the age of 13 at

intermittent periods of time, supported by his prior criminal history.

(Id.).

(12) *Use of illegal drugs by the individual.*

Ms. Manno did not testify to any illegal drug use by the Defendant.

(13) *Any mental illness, mental disability or mental abnormality.*

Ms. Manno testified that the Defendant has the mental abnormality of paraphilia not otherwise specified, which makes him likely to engage in sexually violent predator offenses. *(Id., at 11)*. Ms. Manno said that there is significance in crossing sexes in his victims, and also crossed ages, as well as mental capacity. *(Id., at 10)*.

(14) *Behavioral characteristics that contribute to the individual's conduct.*

Mrs. Manno then testified that she reviewed the records and discovered that the Defendant's victims in these numerous crimes were of both sexes and of various ages. *(Id., at 8)*. The majority of Defendant's victims were females ranging from children to adults while he was a juvenile, and male and female victims as an adult, with the youngest victim being a seven year old male whom Defendant requested give him oral sex. *(Id., at 9)*.

Additionally, Ms. Manno testified that neither juvenile placement nor adjudication as well as incarceration as an adult deterred this type of behavior. *(Id., at 10)*. Ms. Manno testified that the Defendant's self-control due to this mental abnormality would be diminished either due to inability or lack of desire to control it. *(Id., at 12)*.

Factors that are supported in a sexual offender assessment field as criteria reasonably related to the risk of reoffense.

Ms. Manno testified that, given the presence of several factors in the Defendant's case, it was likely the Defendant would reoffend in the future. (*Id.*) Ms. Manno concluded that, with a reasonable degree of professional certainty, the Defendant met the diagnostic criteria for paraphilia and predatory behavior, and thus met the criteria for a sexually violent predator designation. (*Id.*, at 14).

Under cross examination, Ms. Manno testified that the relationship between the Defendant and the victim was promoted, at least in part, for Defendant's sexual conduct with the victim. (*Id.*, at 16). Ms. Manno also testified that this was the only known incident between the Defendant and the victim over several years, and that there was no indication that the Defendant created an environment in which the he could attack the victim. (*Id.*). Ms. Manno also testified that between 1989 and 2010, the Defendant had no record of committing any sexual offenses. (*Id.*, at 17).

In examining all the evidence presented by Ms. Manno, this Court found her testimony to be credible and consistent with her report, which was introduced into evidence by the Commonwealth as Exhibit 1. (*Id.*, at 26). Ms. Manno described that the Defendant had a rather lengthy history of sexual offenses, and that he had made no discrimination in the sexes, ages, or mental capacities of his victims. Several of the factors came into play regarding the Defendant's offense against the victim, but what was most telling was his prior record, his lack of mental health evaluations or counseling, and his telling behaviors of crossing gender and age lines, as well as preying upon someone who is developmentally challenged.

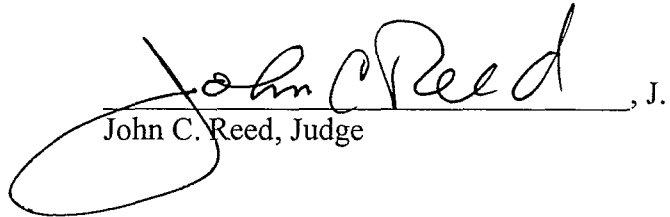
Finally, Defendant was described by Ms. Manno to be either unable or unwilling to practice self-control regarding his sexual behavior.

Because of this, this Court found that the Commonwealth had met its burden of proof by clear and convincing evidence and determined that the Defendant was a sexually violent predator as defined by 42 Pa. C. S. § 9795.3.

CONCLUSION

The Commonwealth having met its burden of proof, it is respectfully submitted that this Court's designation of the Defendant as a sexually violent predator was proper and should be affirmed.

BY THE COURT,

 J.
John C. Reed, Judge

Date: September 11, 2012