

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

THOMAS LAWRENCE ALBERT,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

NO. 1299 WDA 2011

Appeal from the Judgment of Sentence July 6, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0002407-2010, CP-02-CR-0003395-
2010, CP-02-CR-0003918-2009

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E., and MUNDY, J.

MEMORANDUM BY STEVENS, P.J.

Filed: January 11, 2013

This is an appeal from the judgment of sentence imposed on July 6, 2011, following Appellant's plea agreement in the Court of Common Pleas of Allegheny County. Appellant plead guilty to two counts of Failure to Comply with Registration¹, one count of Aggravated Indecent Assault² and one count of Corruption of Minors³, and was sentenced to four to fourteen years incarceration. On that same day, a Sexually Violent Predator (SVP) hearing was conducted, and the trial court determined Appellant to be a Sexually

¹ 18 Pa. C.S. § 4915(a)(1).

² 18 Pa. C.S. § 3125(a)(8).

³ 18 Pa. C.S. § 6301(a)(1).

Violent Predator under Megan's Law⁴. Appellant argues that there was insufficient evidence to label Appellant as a Sexually Violent Predator. We affirm.

The facts of this case are as follows:

As relevant to the issues on appeal [Aggravated Indecent Assault, Corruption of Minors] Appellant in June of 2009 was living in an apartment building in the Beechview section of the City of Pittsburgh, Allegheny County.

The fourteen year old victim lived with her mother and sister in an upstairs apartment in the same building. On June 26, 2009, while their mother was at work, the victim and her sister were helping Appellant with a screening project in his apartment. The victim complained of sunburn pain and Appellant volunteered to put lotion on her back, which he did do.

Later that day Appellant applied more lotion to the victim's back but this time he unsnapped her bra. He suggested that they move to his bedroom because the floor on which Appellant had directed the victim to lay was dirty. Once in the bedroom Appellant told the victim to lay face down on the bed and he began to massage lotion into her back.

Appellant told the victim to roll over on her back and when she complied, Appellant unbuckled and unzipped her pants stating, "massages are for all over." Appellant pushed his hands into her pants, and then under her underwear and between her legs. The victim indicated that Appellant touched "everything" and put his hand "inside" her. The victim told Appellant that she wanted to leave, and Appellant asked her if she had ever been kissed. When she said no, Appellant kissed her on the lips and stated, "now you have." The victim then got up from the bed and walked out of the bedroom.

⁴ 42 Pa.C.S. §§ 9791-9799.9.

As the victim was walking toward the front door, Appellant asked her to stop and sit down for five minutes. Appellant asked her not to tell her mother and apologized stating, "I'm sorry please forgive me." The victim ran from the apartment to call her mother who was at work.

Appellant went to the victim's mother's place of work and told her mother that, "I was putting cream on her sunburn and things got out of hand; I'm sorry I could go to jail what do you want me to do, leave town(?)" When asked about the kiss, Appellant stated, "it was just a peck."

Trial Court Opinion 7/13/12, p. 2-5.

At the time of the incident, Appellant was 52 years old and his victim was 14 years old.

Appellant, in his sole issue on appeal, contends that there was insufficient evidence to label him as an SVP and argues that the trial court labeled Appellant as an SVP "without any basis grounded in the law." Appellant's Brief at 11. Our reviewing standard for Appellant's claim that the trial court relied on insufficient evidence when labeling Appellant as an SVP is as follows:

A challenge to the sufficiency of the evidence is a question of law requiring a plenary scope of review. The appropriate standard of review regarding the sufficiency of the evidence is whether the evidence admitted at trial and all reasonable inference drawn therefrom, when viewed in the light most favorable to the Commonwealth as verdict winner, is sufficient to support all the elements of the offenses. As a reviewing court, we may not weigh the evidence and substitute our judgment for that of the fact-finder. Furthermore, a fact-finder is free to believe all, part or none of the evidence presented.

At the hearing prior to sentencing the court shall determine whether the Commonwealth has proved by clear and convincing evidence that the individual is a sexually violent predator. Accordingly, in reviewing the sufficiency of the evidence regarding the determination of SVP status, we will reverse the trial court only if the Commonwealth has not presented clear and convincing evidence sufficient to enable the trial court to determine that each element required by the statute has been satisfied.

Commonwealth v. Brooks, 7 A.3d 852, 860 (Pa.Super. 2010), *quoting* ***Commonwealth v. Haughwout***, 837 A.2d 480, 484 (Pa.Super. 2003).

Megan's Law II mandates that a trial court must conduct a sexually violent predator hearing once the offender has been convicted of one of the statute's triggering offenses. 42 Pa.C.S. § 9795.4.

In the relevant statute, a "sexually violent predator" is defined, in pertinent part, as "[a] person who has been convicted of a sexually violent offense as set forth in [42 Pa.C.S.A.] section 9795.1 (relating to registration) and who is determined to be a sexually violent predator under [42 Pa.C.S.A.] 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.A. § 9792. This definition contains no requirement for a determination that the SVP engaged in predatory behavior in the instant offense. The statutory definition of "predatory," about which the arguments before us revolve, is relevant only in that an SVP must be found to have a mental abnormality or personality disorder which renders the SVP likely to engage in predatory behavior.

Commonwealth v. Fletcher, 947 A.2d 776-777 (Pa. Super. 2008).

In the instant case, Appellant pleaded guilty to aggravated indecent assault, one of the triggering offenses listed in 42 Pa.C.S. § 9795.1, and trial court then held the mandated SVP hearing. Prior to the hearing, Dr. Kathy Clover, a licensed psychologist and a member of the Pennsylvania Sexual Offenders Assessment Board conducted an SVP assessment evaluation of Appellant. Though Appellant questions Dr. Clover's authority to evaluate Appellant in his brief, Appellant did not raise any objections to Dr. Clover's evaluation or testimony at the hearing. In fact, Appellant stipulated to Dr. Clover's expertise in the field.

Dr. Clover testified at the hearing that after a careful evaluation of the instant case, she was prepared to conclude with a reasonable degree of professional certainty that (1) Appellant suffered from the mental abnormality of Paraphilia, NOS, Children or Other Non-consenting Persons and (2) Appellant was likely to engage in predatory behavior.

Appellant contends that the trial court did not rely on clear and convincing evidence when labeling Appellant as an SVP, but, rather the court merely speculated on what might happen in the future. Appellant's Brief at 11. Appellant further argues that the evidence does not support a conclusion that Appellant has "a mental abnormality, that his behavior is violent or predatory, or that there is a significant likelihood of re-offense." Appellant's brief at 12.

Appellant highlights the portion of Dr. Clover's testimony wherein she states, "He was very gentle with this child. He was very caring about her. He approached the child as though she were a peer rather than as a teenager." Appellant Brief at 14. Appellant goes on to argue that the crime was "one of opportunity and not a relationship Mr. Albert sought as a means of access to the victims." Appellant's Brief at 17. This argument fails, as the "definition [of an SVP] contains no requirement for a determination that the SVP engaged in predatory behavior in the instant offense." ***Commonwealth v. Fletcher***, 947 A.2d 776 (Pa.Super. 2008). It need only be established that Appellant has a mental abnormality or personality disorder which renders him likely to engage in predatory behavior. ***Id.***

Instantly, Dr. Clover found that Appellant "**does suffer** from a Mental Abnormality/Personality Disorder as defined by the Act." Clover Evaluation Report at p. 9. Dr. Clover next concluded that Appellant was likely to engage in predatory behavior and considered relevant factors to consider when evaluating whether an individual has a mental abnormality that renders him more likely to engage in predatory behavior. These factors include: (1) prior offense history; (2) whether the offender participated in programs for sexual offenders; and (3) behavioral characteristics of the offender. 42 Pa.C.S.A. § 9795.4(b). Dr. Clover's report highlighted Appellant's prior conviction involving sexual violence and stressed the similarities between Appellant's prior conviction and his current conviction.

In both incidents, Appellant befriended neighborhood children, becoming a trusted caretaker and confidant to the girls in order to facilitate the sexualization of the relationship. The report also indicated that Appellant did not attend any sexual offender programs which may help him control his impulses. Finally, Dr. Clover found that Appellant had a lack of respect for the justice system and chose to ignore his problems rather than confront them, when he failed to meet his reporting requirements under Megan's Law.

Appellant next contends that even if this Court is to find that the diagnosis of a mental abnormality was proper, the Commonwealth still failed to prove by clear and convincing evidence that Appellant is likely to re-offend. Appellant's Brief at 18. Specifically, Appellant argues that the trial court failed to consider Appellant's age, the length of his sentence, the treatment he will receive while incarcerated, and the acceptance of responsibility through a guilty plea. Dr. Clover did, in fact, address the issue of Appellant's age at the sentencing hearing, stating, "Generally, criminal behavior all reduces as an individual ages, but what we have here is an individual who has not taken advantage of intervention and learned how to manage those experiences. There are perceptive factors, but, in fact, with Mr. Albert and the age, it does not affect this particular individual." Hearing Transcript 7/6/11 at 23. Further, Ms. Clover found that Appellant suffered from paraphilia because he engaged in sexually abusive behavior in 1997

and in 2009, showing “a significant continuation of interest and difficulty in controlling his behavior, less than 2 years [after being released from prison].” Clover Evaluation Report at 8. Ms. Clover’s report also stated that this was a lifetime condition, making it likely Appellant would reoffend.

We are satisfied that the Commonwealth has presented clear and convincing evidence that Appellant is an SVP. Appellant was convicted of an offense triggering an SVP hearing. At the hearing, the Commonwealth provided evidence from a licensed psychologist that (1) Appellant suffered from the mental abnormality of Paraphilia, NOS, Children or Other Non-consenting Persons and (2) Appellant was likely to engage in predatory behavior, thereby satisfying the statutory requirements under Megan’s Law II.

Judgment of Sentence affirmed.