

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
VICTOR THOMAS FOLKMANN,		
Appellant		No. 1875 EDA 2012

Appeal from the Judgment of Sentence of June 12, 2012,
in the Court of Common Pleas of Delaware County,
Criminal Division at No. CP-23-CR-0001557-2011

BEFORE: OLSON, WECHT and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.:

Filed: March 12, 2013

This is an appeal from a judgment of sentence. In addition, Appellant's counsel has filed a petition to withdraw and a brief pursuant to ***Anders v. California***, 386 U.S. 738 (1967). We grant counsel's petition and affirm the judgment of sentence.

The background underlying this matter can be summarized in the following manner. Appellant was charged with multiple crimes in connection to his repeated sexual assaults of his daughter and his attempt to sexually assault his daughter's friend. Appellant pled guilty to statutory sexual assault, incest, and attempted indecent assault. Thereafter, the trial court held a hearing in order to determine whether Appellant should be classified as a Sexually Violent Predator ("SVP"). After the hearing, the court

*Retired Senior Judge assigned to the Superior Court.

concluded that the Commonwealth proved that Appellant should be classified as an SVP. The court later sentenced Appellant, and this appeal followed. In addition, Appellate counsel petitioned this Court for leave to withdraw pursuant to **Anders**.

The following principles guide our review of this matter:

Direct appeal counsel seeking to withdraw under **Anders** must file a petition averring that, after a conscientious examination of the record, counsel finds the appeal to be wholly frivolous. Counsel must also file an **Anders** brief setting forth issues that might arguably support the appeal along with any other issues necessary for the effective appellate presentation thereof. . . .

Anders counsel must also provide a copy of the **Anders** petition and brief to the appellant, advising the appellant of the right to retain new counsel, proceed *pro se* or raise any additional points worthy of this Court's attention.

If counsel does not fulfill the aforesaid technical requirements of **Anders**, this Court will deny the petition to withdraw and remand the case with appropriate instructions (*e.g.*, directing counsel either to comply with **Anders** or file an advocate's brief on Appellant's behalf). By contrast, if counsel's petition and brief satisfy **Anders**, we will then undertake our own review of the appeal to determine if it is wholly frivolous. If the appeal is frivolous, we will grant the withdrawal petition and affirm the judgment of sentence. However, if there are non-frivolous issues, we will deny the petition and remand for the filing of an advocate's brief.

Commonwealth v. Wrecks, 931 A.2d 717, 720-21 (Pa. Super. 2007) (citations omitted).

Our Supreme Court has clarified portions of the **Anders** procedure:

Accordingly, we hold that in the **Anders** brief that accompanies court-appointed counsel's petition to withdraw, counsel must: (1) provide a summary of the procedural history and facts, with

citations to the record; (2) refer to anything in the record that counsel believes arguably supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous. . . .

Commonwealth v. Santiago, 978 A.2d 349, 361 (Pa. 2009).

We conclude that counsel has substantially complied with the ***Anders*** requirements. We, therefore, will undertake a review of the appeal to determine if it is wholly frivolous.

According to counsel, Appellant wishes to claim that the Commonwealth failed to present sufficient evidence to prove he meets the criteria to be classified as an SVP. More specifically, Appellant believes the Commonwealth failed to prove by clear and convincing evidence that Appellant has a mental abnormality or personality disorder that makes him likely to engage in predatory sexually violent offenses. The trial court issued an opinion wherein it addressed and rejected Appellant's claim. Trial Court Opinion, 10/17/12. With the proper standard of review in mind,¹ we

¹ We review such claims in the following manner.

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 inferences drawn therefrom, when viewed in the light most favorable to the Commonwealth as the 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
(Footnote Continued Next Page)

reviewed the certified record and concluded that the trial court's opinion provides a proper basis for rejecting Appellant's sufficiency-of-the-evidence claim. We, therefore, adopt that opinion in agreeing with counsel that this appeal is wholly frivolous and in affirming the judgment of sentence.

Judgment of sentence affirmed. Petition to withdraw granted.

(Footnote Continued) _____

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. Haughwout, 837 A.2d 480, 484 (Pa. Super. 2003) (citations and quotation marks omitted).

J. 507036/13

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

CP-23-CR-1557-2011

V.

VICTOR FOLKMAN

2012 OCT 17 PM 3:34
JUDICIAL CENTER
PHILADELPHIA, PA.

A. Sheldon Kovach, Esquire, on behalf of the Commonwealth
Thomas A. Dreyer, Esquire, on behalf of the Defendant

OPINION

OSBORNE, J.

FILED: 10/17/12

On June 12, 2012 Defendant, Victor Folkman, was sentenced to an aggregate sentence of eleven and one half to twenty-three months of incarceration to be followed by twenty-four months of probation. A timely appeal was filed, necessitating this opinion.

On October 24, 2011 Defendant entered a negotiated guilty plea to one count of statutory sexual assault¹ and one count of incest² in the above-captioned matter. These charges arose from his sexual abuse of his daughter "H.B." On the same day, in Case Number 817-2011 Defendant entered a negotiated guilty plea to one count of

¹ 18 Pa.C.S.A. §3122.1

² 18 Pa.C.S.A. §4302

attempted indecent assault³. The victim in this second case was H.B.'s friend "J.U." Pursuant to "Megan's Law,"⁴ an assessment by the Pennsylvania Sexual Offenders Assessment Board was ordered before sentencing. Following that assessment the Commonwealth filed a praecipe pursuant to 42 Pa.C.S.A. § 9795.4(e) requesting a hearing to determine whether the Defendant is a Sexually Violent Predator ("SVP"). That hearing took place on April 10, 2012. Following the hearing, on April 25, 2012 the Court entered an Order, finding that the Commonwealth met its burden of proving that Defendant is a Sexually Violent Predator was entered. In "Defendant's Statement of Error Complained of on Appeal" the Defendant identifies this determination as grounds for his appeal. Specifically, Defendant claims that the Commonwealth failed to prove by clear and convincing evidence that "personality disorder, not otherwise specified" "is a mental abnormality or personality disorder which makes a person likely to engage in predatory sexual offenses." Defendant's Statement of Error Complained of on Appeal.

In Commonwealth v. Brooks, 7 A.3d 852, 660-61 (Pa.Super. 2010), the Superior Court considered a challenge to the sufficiency of the evidence supporting an SVP designation. The court reviewed the Commonwealth's evidence, including the testimony of a licensed psychologist and member of the Pennsylvania Sexual Offender Assessment Board, who found that the defendant "suffered from Personality Disorder Not Otherwise Specified and that this disorder predisposed [the defendant] to the

³ The terms of the plea agreement provided for a consecutive term of twenty-four months' probation in Case Number 817-11. Defendant was sentenced in accord with the agreement on June 12, 2012.

⁴ See 42 Pa.C.S.A. §9795.4

commission of sexual offenses” and affirmed the trial court’s determination that the evidence proved by clear and convincing evidence that the defendant was an SVP. *Id.* at 862 *citing Commonwealth v. Askew*, 907 A.2d 624 (Pa.Super. 2006). In *Brooks*, the defendant claimed that personality disorder NOS did not qualify as a “mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses” and he presented expert testimony in support of this position. The trial court however, found the Commonwealth’s evidence persuasive and accepted the expert’s diagnosis of personality disorder, NOS, along with additional circumstances supporting the SVP designation. Brooks sexually assaulted his step-daughter. Additionally, allegations regarding a male victim existed. Brooks used his relationship with the victim to facilitate a pattern of abuse, he committed past acts of unusual cruelty, he committed previous violent crimes, and had a history of substance abuse. All of the foregoing led the Commonwealth’s expert to conclude that he met the SVP criteria. In light of *Brooks*, we reject the claim that a diagnosis of personality disorder NOS cannot support a SVP finding.

A claim that the trial court erred and/or abused its discretion in concluding that the Commonwealth met its burden of proving by clear and convincing evidence that Appellant was a sexually violent predator is a challenge to the sufficiency of the evidence. *Commonwealth v. Brooks, supra*. Pursuant to 42 Pa. C.S.A. § 9795.4(e)(3), a court “shall determine whether the Commonwealth has proved by clear and convincing evidence that the individual is a sexually violent predator.” Likewise, in order to affirm a finding that an individual is a sexually violent predator, a reviewing court “must be able

to conclude that the fact-finder found clear and convincing evidence that the individual is a sexually violent predator." Commonwealth v. Dengler, 843 A.2d 1241, 1246 (Pa. Super 2004). "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. 2010) (en banc). See also Commonwealth v. Maldonado, 838 A.2D 710 (Pa. 2003); In re Fickert's Estate, 337 A.2d 592, 594 (Pa. 1975) (Clear and convincing evidence means that witnesses must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct, weighty, and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue). Credibility determinations are within the province of the trial court, sitting as fact finder. The court is free to believe all, part, or none of the evidence presented. See Commonwealth v. Merolla, 909 A.2d 337 (Pa.Super. 2006). When addressing the sufficiency of the evidence, the evidence admitted at trial, and is in this case at the SVP hearing and all reasonable inferences drawn therefrom, is viewed in the light most favorable to the Commonwealth. See Commonwealth v. Brooks, *supra*. The Commonwealth's burden is not lessened when the defendant refuses to meet with the person conducting the SVP assessment. Commonwealth v. Merolla, *supra*.

In Commonwealth v. Morgan 16 A.3d 1165, 1168 (Pa.Super. 2011) the Superior Court described the trial court's task:

The process of determining SVP status is statutorily-mandated and well-defined. The triggering event is a conviction of one or more offenses specified in 42 Pa.C.S.A. § 9795.1, which, in turn, prompts the trial court to order an SVP assessment by the SOAB. The Board's administrative officer assigns the matter to one of the Board's members, all of whom are "experts in the field of behavior and treatment of sexual offenders." 42 Pa.C.S.A. § 9799.3. At the core of the expert's assessment is a detailed list of factors, which are mandatory and are designed as criteria by which the likelihood of reoffense may be gauged.

According to the statute:

An assessment shall include, but not be limited to, an examination of 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.

An SVP is defined as follows: "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.A. § 9592. See Commonwealth v. Haughwout, 837 A.2d 480, 485 (Pa. Super. 2003). A "mental abnormality" is a "[a] congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons." Id. A "predatory" act is "an act directed at a stranger or at a person with whom a relationship has been initiated, established, maintained, or promoted, in whole, or in part, in order to facilitate or support victimization." Id. While Section 9795.4(b) lists the factors which shall be considered

in an assessment, "there is no statutory requirement that all of them or any particular number of them be present or absent in order to support an SVP designation."

Commonwealth v. Brooks, 7 A.3d 852 at 863 *quoting*, Commonwealth v. Feucht, 955 A.2d 377, 381 (Pa.Super.2008). Furthermore, "the factors are not a check list with each one weighing in some necessary fashion for or against SVP designation." Id.

Dr. Thomas Haworth is a licensed psychologist and a member of the Sexual Offenders Assessment Board (SOAB) N.T. 4/10/12 pp. 6-7. Dr. Haworth considered the factors set forth in, 42 Pa.C.S.A. § 9795.4 to determine whether Defendant suffers from a mental abnormality or personality disorder that makes him likely to engage in predatory sexually violent offenses. Id. at pp. 7-8. See also 42 Pa.C.S.A. §9792. Defendant did not participate in an interview with Dr. Haworth. Id. at 19. In preparing his report Dr. Haworth reviewed, *inter alia*, the report of an SOAB investigator, the Criminal Complaints and Affidavits of Probable Cause filed in this case and in Case Number 817-11, police incident reports, a Child Protective Services investigative report, a Delaware County Office of Children and Youth Services Victim Interview, a George Hill Correctional Facility treatment update summary and a psychosexual evaluation authored by Dr. Catherine Surbeck. See Exhibit C-2. The victim in this matter is Defendant's biological daughter. N.T. 4/10/12 p. 9. Over the course of about four years, beginning when the victim was thirteen years-old the Defendant began a course of sexual contact that progressed from "rubbing" the victim with lotion, to "exposing himself," to directing the victim to touch his penis, to engaging in various sexual acts, including oral and vaginal intercourse. Id. at 8. The victim reported these acts when she

was seventeen years old, after her friend reported that the Defendant rubbed lotion on her back, pulled her shirt up and tried to pull her pants down. Id. at 9, 16. Defendant reported multiple psychiatric hospitalizations for a significant portion of his childhood beginning at the age of seven and continuing through his teenage years to the age of eighteen. Id. at 16. He has an extensive juvenile and adult history of criminal arrests and confinement including a violation of probation. Id. at 10, 17. Although Defendant's biological daughter is the only victim in the above-captioned matter, Defendant pled guilty on the same day to the attempted indecent assault of his daughter's friend, the second victim. Id. at 15. During his incarceration for the current offenses he completed a four-month sex offender treatment program. Id. at 17. Defendant committed these offenses when he was between forty-five and fifty years of age. Id. at 17. He admitted to using marijuana and pills and has a history of bipolar affective disorder. Id. Defendant suffers from Hepatitis C, a chronic debilitating and infectious disease. Id. at 18. His history demonstrates a longstanding lifetime history of breaking rules and exploiting others for his own satisfaction, beginning with thefts and assaults and culminating in the sexual assault of his daughter, risking her exposure to Hepatitis C in addition to the emotional and physical harm that would result from his actions. Id. at 18-19.

Dr. Haworth opined to a reasonable degree of psychological certainty, based on Defendant's pattern of behavior, that he suffers from a personality disorder NOS with anti-social and narcissistic features in addition to self-reported bipolar disorder. Id. at 23-24. A "personality disorder is an enduring pattern of inner experience and behavior

that deviates markedly from the expectations of the individual's culture," and is "manifested in two or more of the following areas, cognition, affectivity or range intensity and lability of emotion, interpersonal functioning, [and] impulse control." Id. at 21. In this case Defendant has exhibited anti-social behavior over his lifetime. He has committed thefts and assaults as a juvenile and as an adult. His anti-social behavior has progressed to the sexual assault of two minors "where he exploited his access and used that access to fulfill his own gratifications, but also....he had sexual contact without care or concern of exposing his own biological daughter to a life-threatening disease that is infectious by nature." Id. at 22. Bipolar affective disorder can not explain this behavior. Id. at 21-22. Rather, it is the result of an acquired condition. Id. at 22-23. Defendant's behavior demonstrates that this condition overrode his "emotional volitional control" as demonstrated by his enduring thinking and behavior problems. Id. Significantly, Dr. Haworth opined that the anti-social and narcissistic features that accompany Defendant's personality disorder increase the likelihood that Defendant will commit sexual offenses in the future. Id. at 25.

Concerning the predatory nature of the Defendant's behavior, Dr. Haworth found the facts that Defendant "promoted" his pre-existing relationship with his daughter to "one of victimization," and initiated contact with his daughter's friend by similar means evidenced predatory behavior. Id. at 27. In his opinion, Defendant's predatory behavior is a result of his mental abnormality or personality disorder, and he is therefore, a "sexually violent predator" as defined by statute. Id. at 27.

Licensed psychologist Timothy Foley, testified on behalf of the Defendant. Id. at 36. Dr. Foley agreed that Defendant meets the statutory criteria for a "predator" and recognized a history of anti-social behavior. Id. at 41, 43, 45. While he did not interview Defendant, he viewed Defendant's self-report of "running away" from various facilities about "150 times," as "fanciful. Id. at 42. He did not view Dr. Haworth's diagnosis of a personality disorder as well-founded and further opined that a diagnosis of personality disorder NOS generally has "low reliability and does not lead to "clear and convincing conclusions regarding the likelihood of re-offending. Id. at 41-44. In his brief and conclusory testimony he stated that available records did not allow him to make any diagnosis and he opined that Defendant does not satisfy statutory criteria for an SVP. Id. at 43, 47. In Dr. Foley's view, "most adults could be diagnosed with a personality disorder not otherwise specified" and none of the attendant traits that lead to this diagnosis strongly predicts sexual offense recidivism," "or any particular kinds of behavior." Id. at 37. Dr. Foley offered no explanation

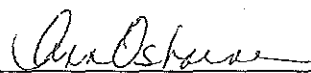
The fundamental questions in determining SVP status are whether the sexual offense was the result of a mental defect or personality disorder and the extent to which the offender is likely to reoffend. Commonwealth. v. Merolla, 909 A.2d 337, 344 (Pa.Super. 2006). The Commonwealth proved by clear and convincing evidence that Defendant has a personality disorder NOS with anti-social and narcissistic features. Notwithstanding Dr. Foley's contrary opinion, Dr. Haworth's assessment demonstrated that Defendant's longstanding personality disorder has caused him to engage in the acts that formed the basis for this conviction. Narcissistic features of his personality

allowed him to completely disregard the life-altering psychological harm his daughter would suffer as a result of the overwhelmingly self-focused and self-indulgent behavior that also put his biological daughter at risk for contracting Hepatitis C.

Both Dr. Foley and Dr. Haworth relied on the June 8, 2011 psychosexual evaluation by Dr. Surbeck which includes Defendant's claim that during the regular and sustained sexual activities he performed both on and in the presence of his daughter he never had "sexual thoughts" about his daughter. "It was an impulse thing." He explained that he engaged in sexual activity with his daughter because he "just thought he could get away with it." The facts of this case and the credible testimony lead to the conclusion that Defendant meets the statutory criteria for an SVP. He suffers from a personality disorder with features that make him likely to engage in sexually violent offenses and he is without question a predator.

In light of the foregoing it is respectfully submitted that the Court's determination that Defendant is a SVP should be affirmed.

BY THE COURT:



Ann Osborne, J.