NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF:	:	IN THE SUPERIOR COURT OF
O.M., A MINOR,	:	PENNSYLVANIA
	:	
Appellant	:	No. 1200 MDA 2012

Appeal from the Dispositional Order, April 20, 2012,
in the Court of Common Pleas of York County
Juvenile Division at No. CP-67-JV-0000544-2011

BEFORE: FORD ELLIOTT, P.J.E., PANELLA AND PLATT,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JULY 09, 2014**

Appellant appeals the order of disposition following his adjudication as delinquent. Finding that the adjudication was improper, we are constrained to reverse the adjudication and vacate the order of disposition below.

It was alleged below that appellant performed anal intercourse on D.M., a five-year-old boy, and then had D.M. do the same to him. (Notes of testimony, 12/7/11 at 44-49.) D.M. was at appellant's home while appellant's mother was babysitting D.M and while the two were allegedly upstairs in appellant's brother B.M.'s bedroom. (***Id.*** at 43-44.) Appellant was 11 years old at the time. On September 13, 2011, a juvenile petition was filed against appellant alleging that the incident in question

* Retired Senior Judge assigned to the Superior Court.

occurred on May 6, 2011,[1] and charging appellant with involuntary deviate sexual intercourse with a child, aggravated indecent assault of a child, and indecent assault. On November 17, 2011, appellant filed a notice of alibi defense.

Appellant's mother would occasionally babysit D.M. and other children after they came home from school. (***Id.*** at 175.) D.M. generally arrived around 3:35 p.m. and departed at 5:00 p.m. (***Id.*** at 175-176.) During the week of the incident, D.M. was present in appellant's home on Monday, May 2, Tuesday, May 3, and Friday, May 6, 2011. (***Id.*** at 139-141.) D.M. claimed that the incident took place on the last day he was in appellant's home, and he revealed the incident to his mother the following Sunday. (***Id.*** at 56, 135-136.) Ordinarily, appellant would return home from school between 4:45 and 5:00 p.m. (***Id.*** at 180.) On May 6, 2011, however, appellant had trumpet lessons after school, and did not get home until 5:00. (***Id.*** at 197-198.) Appellant's mother testified that D.M. and appellant were not upstairs alone together on May 6, 2011, because appellant was not home on that date. (***Id.*** at 197.)

Appellant's mother also testified as to events that occurred on May 3, 2011. On May 3, 2011, appellant stayed home from school sick. (***Id.*** at 183.) When children started arriving at the house after school, appellant's

[1] No other date was mentioned, nor did the petition allege that the incident occurred "on or about" May 6, 2011.

mother sent him upstairs to his room. (***Id.*** at 184.) Appellant's mother took the children outside to play. (***Id.*** at 185.) At one point, D.M. stated that he had to go to the bathroom and was permitted to go into the house and use the bathroom. (***Id.***) Appellant's mother was unaware whether D.M. went upstairs while he was in the house. (***Id.*** at 186.) Appellant's mother stated that she sent appellant's brother into the house to check on D.M. (***Id.***)

Appellant also testified about the events on the day he stayed home sick. He was upstairs wearing his mother's loose-fitting pajama pants when he heard D.M. come upstairs and go into his brother B.M.'s bedroom. (Notes of testimony, 2/14/12 at 9-11.) Appellant then went into his brother's bedroom. (***Id.*** at 11.) D.M. turned on a radio and started to dance and appellant joined him. (***Id.***) Appellant testified that while they were dancing his pajama pants fell down, but that he was wearing underwear underneath them. (***Id.*** at 11-12.) Appellant stated that his brother then appeared and told D.M. that appellant's mother wanted him. (***Id.*** at 12.) Appellant testified that as D.M. was walking out the door, appellant tripped and fell on top of D.M. (***Id.***) Appellant stated that he was clothed at the time and had no sexual contact with D.M. (***Id.*** at 12-13.)

Following appellant's testimony on February 14, 2012, the court found that appellant had committed the crimes alleged, but that the crime had

occurred on May 3, 2011, rather than on May 6, 2011, as alleged in the juvenile petition:

> In essence, this case rests on whether or not the Court finds the victim, [D.M.], in this matter to be credible. Clearly there were some discrepancies in [D.M.]'s testimony. He is five years of age. That being said, we do find that he was substantially consistent in the nature of the allegations that were made, where it happened, and how it happened.
>
> In light of that, the court can conclude beyond a reasonable doubt that the offense did occur as alleged. However, it is clear to the court that this incident most likely occurred on May 3rd and not on May 6th, as alleged in the complaint. An alibi notice was filed with respect to the May 6th date.
>
> That being said, we find it reasonable, given [D.M.]'s age, that there could be some discrepancy as to the exact time that this happened. We, therefore, do conclude, based upon [D.M.]'s age, that it is only to expand the time of the allegation made. We, therefore, find that [appellant] has committed the delinquent acts beyond a reasonable doubt.

Notes of testimony, 2/14/12 at 46.

Following the hearing, the court entered an order adjudicating appellant delinquent. On April 20, 2012, the order of disposition was entered. Following denial of post-disposition motions, this timely appeal ensued.

Appellant raises the following issues on appeal:

> A. Whether the juvenile was entitled to a judgment of acquittal where the alleged victim never testified that the juvenile's penis actually penetrated his anus?

> B. Whether the juvenile was entitled to a judgment of acquittal where the facts of record as testified to by the alleged victim show that the alleged sexual acts could not physically have occurred?
>
> C. Whether the juvenile was entitled to a judgment of acquittal when the Commonwealth of Pennsylvania could not prove the alleged crime occurred on the specific date set forth in the Verified Allegation Form, and when [O.M.] timely provided notice of an alibi defense?
>
> D. In the alternative, whether the juvenile was entitled to a judgment of acquittal where the evidence presented at trial did not support the verdict?

Appellant's brief at 4. We find merit in appellant's third allegation of error, issue C.

While not presented as such, appellant's third issue essentially questions the sufficiency of the evidence.

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable

> doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the finder of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Antidormi, 84 A.3d 736, 756 (Pa.Super. 2014), quoting ***Commonwealth v. Estepp***, 17 A.3d 939, 943-944 (Pa.Super. 2011), ***appeal dismissed as improvidently granted***, 617 Pa. 601, 54 A.3d 22 (2012).

We find that the Commonwealth failed to prove, as it must under the circumstances of this case, that the charged offenses occurred on May 6, 2011. Our decisional law is quite clear that where the Commonwealth alleges that a crime occurred on a certain date, and where the defendant responds with a defense of alibi, the time of the crime has been put at essence and the Commonwealth must prove that the crime occurred on the date charged. This court has previously had occasion to survey the law of other jurisdictions and come to the following conclusion:

> It has been uniformly held in other jurisdictions that where the state has alleged and relies on a fixed date and defendant also relies on that date in preparing his defense, it is error to permit a jury to find that the crime was committed on another date, time being of the essence where the defense is alibi.

Commonwealth v. Boyer, 264 A.2d 173, 176 (Pa.Super. 1970).

In ***Boyer***, the Indictment charged the defendant with committing a burglary and larceny 'on or about December 28, 1967.' The defendant

responded with an alibi defense as to that date. At trial, evidence was adduced that the crime actually may have occurred on December 27, 1967. This court found that in instructing the jury, the trial court permitted the jury to convict the defendant if they found that the crimes occurred on either December 27, December 28, or December 29. This court held that where a certain date is alleged in the Indictment and where the defense is alibi, the Commonwealth must prove the crime occurred on the date charged. Since the Commonwealth was limited to proving the crime occurred on December 28, 1967, and failed to prove that the crimes transpired on that date, the judgment of sentence was reversed.

The Commonwealth cites ***Commonwealth v. Fanelli***, 547 A.2d 1201 (Pa.Super. 1988), ***appeal denied***, 523 Pa. 641, 565 A.2d 1165 (1989), for the proposition that the prosecution need prove the date of the crime only with reasonable certainty:

> To explicate, in this jurisdiction the prosecution must establish the date of the alleged offense with "reasonable certainty" to withstand a demurrer or a motion in arrest of judgment. ***See Commonwealth v. Devlin***, 460 Pa. 508, 333 A.2d 888 (1975).
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> We consider ***Devlin*** to be the polestar in our assessment of whether the appellant's due process argument is to give way in favor of the child-victim's right to have her assault brought to justice. In ***Devlin***, our Supreme Court opted for a balancing approach to resolve conflicting interests of the accused vis-a-vis the victim when it came to the specificity required to be proven as to the time-frame of the alleged crime. It wrote:

> "Here, as elsewhere, 'The pattern of due process is picked out in the facts and circumstances of each case.'" ***Hoag v. New Jersey***, 356 U.S. 464, 468, 78 S.Ct. 829, 833, 2 L.Ed.2d 913 (1958), citing ***Brock v. North Carolina***, 344 U.S. 424, 427-28, 73 S.Ct. 349 [350-51], 97 L.Ed. 456 (1953); ***United States ex rel. Drew v. Myers***, 327 F.2d 174 (3d Cir.1964). Due process is not reducible to a mathematical formula. ***Gibbs v. Burke***, 337 U.S. 773, 781, 69 S.Ct. 1247 [1251] 93 L.Ed. 1686 (1949). Therefore, we cannot enunciate the exact degree of specificity in the proof of the date of a crime which will be required or the amount of latitude which will be acceptable. Certainly the Commonwealth need not always prove a single specific date of the crime. ***Cf. Commonwealth v. Morrison***, ***supra***; ***Commonwealth v. Mourar***, ***supra***. Any leeway permissible would vary with the nature of the crime and the age and condition of the victim balanced against the rights of the accused.
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> 460 Pa. at 515-16, 333 A.2d at 892 (Footnote omitted).

Fanelli, 547 A.2d at 1203-1204. The Commonwealth also cites ***Commonwealth v. Appenzeller***, 565 A.2d 170 (Pa.Super. 1989) (***en banc***), ***appeal denied***, 527 Pa. 584, 588 A.2d 507 (1990), and ***Commonwealth v. Willis***, 552 A.2d 682 (Pa.Super. 1988), ***appeal denied***, 522 Pa. 583, 559 A.2d 527 (1989), for similar reasons.

The focus of these cases is not whether the Commonwealth must prove a certain date when it has identified a certain date; rather, it is

whether the Commonwealth must prove a certain date where it has only identified a range of possible dates. An alibi defense in these cases was not available particularly because the Commonwealth could not specify a precise date.[2] Here, however, the Commonwealth identified a date certain, May 6, 2011, and appellant raised a defense of alibi. Instantly, as in ***Boyer***, it is the Commonwealth's identification of a date certain, coupled with appellant's response of alibi, that puts time of the essence and renders the Commonwealth responsible for proving the crime did, in fact, occur on the stated date. Thus, ***Devlin***, ***Appenzeller***, ***Willis***, and ***Fanelli*** are inapposite on this issue.[3]

Under ***Boyer***, we find that the trial court cannot be permitted to find appellant delinquent for conduct that may have occurred on May 3, 2011, where the Commonwealth charged May 6, 2011, where appellant had an alibi for May 6, 2011 and timely raised it, and where appellant came to court

[2] In fact, that was the exact objection on appeal of the appellant in ***Appenzeller***. The criminal complaint apparently referred only to "one day in April, 1984," as being the date of the crime. Appellant complained on appeal that the Commonwealth's inability to establish an exact date rendered an alibi defense impossible. This court noted that the Commonwealth has reasonable leeway in proving the time of the crime and cited to ***Devlin*** and ***Fanelli***. ***Appenzeller***, 565 A.2d at 171, n.2.

[3] This case would more resemble these cases if the Commonwealth had charged appellant with "acts occurring during the first week of May, 2011." In that situation, an alibi defense would likely have been rendered unavailable.

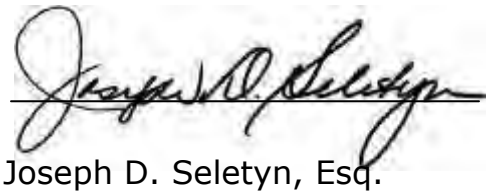
in the belief that he was going to have to defend his conduct only as to May 6, 2011.

Accordingly, we will vacate the order of disposition and reverse the adjudication of delinquency.

Order vacated. Adjudication reversed.

Panella, J. notes dissent.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/9/2014