

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
HAKEEM LEE,	:	
	:	
Appellant	:	No. 285 EDA 2013

Appeal from the Judgment of Sentence December 21, 2012,
Court of Common Pleas, Bucks County,
Criminal Division at No. CP-09-CR-0003028-2011

BEFORE: GANTMAN, DONOHUE and OLSON, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED DECEMBER 04, 2013**

Appellant, Hakeem Lee (“Lee”) appeals from the trial court’s December 21, 2012 judgment of sentence. We affirm.

The trial court recited the pertinent facts in its Pa.R.A.P. 1925(a) opinion:

[O]n February 3, 2011, [Lee] was waiting for a bus in the area of a department store in a Warminster shopping mall when he observed the victim. He approached the victim, introduced himself, and asked if he could accompany her back to her parents’ apartment. He was informed by the victim that she was fourteen (14) years of age. [Lee] took steps to gain the confidence of the victim during their walk from the department store to the victim’s parents’ apartment in a nearby complex. As the pair approached the victim’s apartment building, [Lee] either persuaded or forced the victim to go into an adjacent building with him, where he forced her into a utility room. That room was the situs of the ensuing sexual offenses. The victim attempted to prevent the sex from occurring, without success.

[Lee] contends that there was no force involved in getting the victim into the utility room, and there was no force involved in the acts leading up to and/or including the consummated sex acts. The victim, after some inquiries by another family member, informed her mother of the incident within a short time after she returned home.

Trial Court Opinion, 2/6/13, at 2-3.

On March 12, 2012, a jury found Lee guilty of aggravated indecent assault, person less than 16 years of age (18 Pa.C.S.A. § 3125(a)(8)), and unlawful contact with minors (18 Pa.C.S.A. § 6138(a)(1)). On September 12, 2012, the trial court sentenced Lee to serve two to five years of incarceration for aggravated indecent assault and no further penalty for unlawful contact with minors. The Commonwealth filed a timely petition for reconsideration on September 19, 2012. At a December 21, 2012 hearing on the Commonwealth's petition, the trial court vacated its prior sentence and sentenced Lee to three to six years of incarceration for aggravated indecent assault and a consecutive one to two years for unlawful contact with a minor.

Lee filed a timely notice of appeal on January 17, 2013. He raises two issues for our review:

- A. Did the Commonwealth establish by clear and convincing evidence that [Lee] is a sexually violent predator in that the Commonwealth established the following: (1) [Lee] had the requisite mental abnormality; (2) the Commonwealth established the assessment factors under 42 Pa.C.S.A. § 9795.4(b); and (3) the

Commonwealth established that [Lee] was likely to engage in predatory sexual behavior?

- B. Did the trial court err in resentencing [Lee] after granting the Commonwealth's motion for reconsideration of sentence when the reasons relied upon by the trial court were outside of and not raised in the Commonwealth's motion for reconsideration of sentence?

Lee's Brief at 8.

Lee first argues that the record does not contain clear and convincing evidence supporting the trial court's finding that Lee is a sexually violent predator ("SVP"). An SVP is:

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. § 9792.

The procedure for determining whether a convicted sex offender is an SVP is as follows:

[A]fter a defendant is convicted of a predicate offense, but before he is sentenced, the trial court directs the [Sexual Offender Assessment Board] to make an initial assessment as to whether he should be classified as a sexually violent predator, that is, whether he suffers from a mental abnormality or personality disorder making him likely to engage in future 'predatory sexually violent offenses.' 42 Pa.C.S.A. § 9792. The Board makes this assessment

based upon various statutorily-prescribed, risk-related criteria and guidelines, as well as any other generally-applicable standards established by the Board. **See** 42 Pa.C.S.A. § 9795.4(b). After the Board issues its recommendation, the district attorney may request a hearing before the trial court to determine whether the individual should be adjudicated as a sexually violent predator. The individual and the district attorney are given notice of the hearing and an opportunity to be heard, 42 Pa.C.S.A. § 9795.4(e)(2) [...]. At the conclusion of the hearing, the court determines whether the Commonwealth has proven by clear and convincing evidence that the individual is a sexually violent predator. **See** 42 Pa.C.S.A. § 9795.4(e)(3). If the court so concludes, the individual is subject to lifetime registration, notification, and counseling; otherwise, he is deemed an 'offender,' and is subject to registration only, for a period of either ten years or the remainder of his life, depending upon the predicate offense and/or the number of convictions.

Commonwealth v. Maldonado, 576 Pa. 101, 104-05, 838 A.2d 710, 712 (2003).

To be clear and convincing, the evidence must be "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. Meals, 590 Pa. 110, 121, 912 A.2d 213, 219 (2006).

On appeal, we must view the evidence in the light most favorable to the Commonwealth, as prevailing party in the trial court. **Id.** at 119, 912 A.2d at 218. Furthermore, we must confine our analysis to an assessment of the § 9795.4(b) factors that the trial court cites in support of its SVP determination. **Id.** at 123, 912 A.2d at 220. If those factors are sufficient

to support the SVP determination, we must affirm the trial court. **Id.** We cannot reweigh the factors that support the trial court's order against those that do not apply. **Id.**

Lee undisputedly committed predicate offenses specified in § 9795.1. Lee argues that the Commonwealth failed to prove by clear and convincing evidence that he meets the criteria set forth in § 9795.4(b), including that he suffers from a mental abnormality, and that he is likely to reoffend, as per § 9792. Specifically, Lee argues that the testimony of the Commonwealth's expert, John Shanken-Kaye ("Shanken-Kaye"),¹ lacked credibility and failed to conduct a thorough analysis of the pertinent facts. Lee argues that Shanken-Kaye's testimony was not credible because he based his prediction of the likelihood of Lee's re-offense on his own clinical judgment rather than actuarial evidence. Lee's Brief at 17. Likewise, Lee argues that Shanken-Kaye failed to interview Lee,² failed to review the trial transcript, failed to review Lee's mental health records, relied on uncorroborated police reports, and failed to contact Lee's probation officer to ascertain whether Lee was in treatment. **Id.** at 17-19.

The record reflects that Shanken-Kaye testified that Lee suffers from two incurable mental abnormalities. N.T., 9/12/12, at 12-13, 28-29.

¹ Shanken-Kaye's name appears in the record alternately as Shaken-Kaye.

² Shanken-Kaye's failure to interview Lee is of no moment. Shanken-Kaye requested an interview and Lee exercised his right to decline. N.T., 11/15/12, at 31.

Specifically, Lee suffers from antisocial personality disorder and a form of sexual paraphilia known as hebephilia, and both of those disorders predispose him to reoffend. **Id.** Shanken-Kaye based this assessment on Lee's arrest history for sexual offenses as well as his conduct in the instant matter. **Id.** at 17-18. Lee has a history of delinquency dating to when he was 12 years old. **Id.** at 20. Lee committed repeated violations of institutional rules while he was incarcerated, and he was sanctioned for those violations. **Id.** at 20-21. Mental abnormalities that contribute to the likelihood of re-offense are relevant pursuant to § 9795.4(b)(3)(iii) and (4). Likewise, Lee's prior criminal record and sentencing history is relevant pursuant to § 9795.4(b)(2)(i) and (ii).

Likewise, Shanken-Kaye testified that Lee engaged in predatory behavior in that he approached the victim, a stranger to him, and engaged her in conversation with the intent to victimize her sexually. **Id.** at 21-22. Shanken-Kaye therefore concluded that Lee's conduct met § 9792's definition of predatory behavior. **Id.**

The trial court found Shanken-Kaye's testimony credible. **Id.** at 105. Shanken-Kaye was a properly qualified expert – Lee stipulated to his qualifications (**Id.** at 10), and the trial court was entitled to rely on Shanken-Kaye's expert opinion in support of the court's finding that Lee is a sexually violent predator. Shanken-Kaye's opinion provides a sufficient basis upon which the trial court could find, by clear and convincing evidence, that

Lee suffers from a mental abnormality and is likely to reoffend. Lee's argument to the contrary invites this Court to reject the trial court's credibility determinations and to weigh the inapplicable § 9795.4(b) factors against those that apply in this case. Neither course of action falls within the permissible scope of appellate review. **Meals**, 590 Pa. at 119-23, 912 A.2d at 219-20. Lee's first argument lacks merit.

For his second argument, Lee asserts that the trial court erred in granting the Commonwealth's motion for reconsideration of Lee's sentence. In his statement of the issue, Lee asserts that the trial court granted the motion on grounds that were outside the scope of the Commonwealth's motion. In the body of his brief, the only legal argument Lee develops is that the trial court violated his Fifth Amendment protection against double jeopardy. Lee's Brief at 21-22, 31-32.

Our Supreme Court addressed this issue in **Commonwealth v. Kunish**, 529 Pa. 206, 602 A.2d 849 (1992). There, the Court explained that protection against Double Jeopardy does not attach until after the defendant has a legitimate expectation of finality in the sentence. **Id.** at 212-13, 602 A.2d at 852. For example, Double Jeopardy does not bar the imposition of a more severe sentence after a statutorily authorized and successful government appeal, nor does it bar imprisonment after revocation of probation. **Id.** (citing **U.S. v. DiFrancesco**, 449 U.S. 117, 137 (1980)). Where the sentence is statutorily subject to appeal, the defendant has no

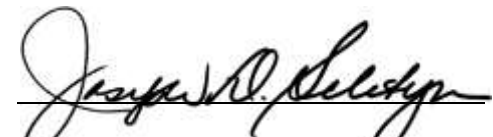
legitimate expectation of finality during the appeal period. **Commonwealth v. Postell**, 693 A.2d 612, 614-15 (Pa. Super. 1997), *appeal denied*, 550 Pa. 718, 706 A.2d 1212 (1998).

Rule 721 of the Pennsylvania Rules of Criminal Procedure expressly permits the Commonwealth to file a motion for reconsideration of sentence within 10 days of the trial court's imposition of sentence, as the Commonwealth did here. Pa.R.Crim.P. 721(A), (B). Since the Commonwealth acted pursuant to a statutorily prescribed means of obtaining reconsideration of Lee's sentence, Lee had no reasonable expectation of finality in his sentence for purposes of the Double Jeopardy clause. Thus, his constitutional argument does not merit relief. In addition, we note that Lee has not preserved any challenge to the discretionary aspects of the trial court's sentence. Lee is not entitled to relief on his second argument.

Since we have concluded that neither of Lee's arguments merits relief, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/4/2013