

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

CARROLL JAY GOSHOW

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3206 EDA 2012

Appeal from the Judgment of Sentence October 10, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0003760-2011

BEFORE: BOWES, J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY MUNDY, J.:

FILED SEPTEMBER 06, 2013

Appellant, Carroll Jay Goshow, appeals from the October 10, 2012 judgment of sentence of five years' probation imposed after he pled guilty to one count of sexual abuse of children.¹ Prior to sentencing, the trial court determined that Appellant met the criteria of a sexually violent predator (SVP) under Megan's Law, 42 Pa.C.S.A. §§ 9791-9799.9.² After careful review, we affirm.

* Former Justice specially assigned to the Superior Court.

¹ 18 Pa.C.S.A. § 6312(d)(1).

² Although this was the statute in effect at the time of Appellant's SVP hearing, it expired on December 20, 2012. A new version went into effect the same day. **See** 42 Pa.C.S.A. §§ 9799.10 – 9799.40. We will proceed to address Appellant's claim under the version of the statute in effect at the time of the SVP proceedings.

We summarize the relevant facts and procedural history of this case as follows. On July 8, 2011, the Commonwealth filed an information charging Appellant with fifteen counts of sexual abuse of children, stemming from Appellant's possession of child pornography. **See** Trial Court Opinion, 1/7/13, at 1. On January 6, 2012, Appellant entered an open guilty plea to one count of sexual abuse of children. The Commonwealth *nolle prossed* the remaining counts. The trial court deferred sentencing and ordered a SVP hearing. The trial court conducted said hearing on October 10, 2012, at the end of which, the trial court concluded Appellant met the criteria for a SVP. That same day, the trial court imposed a sentence of five years' probation. On November 9, 2012, Appellant filed a timely notice of appeal.³

³ The trial court ordered Appellant to file a Rule 1925(b) statement on November 14, 2012. The statement was due 21 days from the date of that date, or by December 5, 2012. Appellant's Rule 1925(b) statement was not filed until December 7, 2012. Our Supreme Court has recently held that "Rule 1925(b) sets out a simple bright-line rule, which obligates an appellant to file and serve a Rule 1925(b) statement, when so ordered[.]" **Commonwealth v. Hill**, 16 A.3d 484, 494 (Pa. 2011).

However, this Court has held that failure to timely file a Rule 1925(b) statement is the equivalent of a failure to file said statement altogether. **Commonwealth v. Thompson**, 39 A.3d 335, 340 (Pa. Super. 2012), *citing Commonwealth v. Burton*, 973 A.2d 428, 433 (Pa. Super. 2009) (*en banc*). Both failures constitute *per se* ineffective assistance of counsel, which in criminal cases ordinarily requires a remand for the filing of a Rule 1925(b) statement pursuant to Pa.R.A.P. 1925(c)(3). **Id.** However, this Court held "[w]hen counsel has filed an untimely Rule 1925(b) statement and the trial court has addressed those issues we need not remand and may address the merits of the issues presented." **Id.** On January 7, 2013, the trial court issued its Rule 1925(a) opinion, accepting Appellant's untimely
(Footnote Continued Next Page)

On appeal, Appellant raises one issue for our review.

Was the evidence insufficient to support the [trial] court's determination that Appellant was a [SVP] where the record fails to provide evidence that Appellant's actions facilitated or supported victimization beyond that which is inherent in the commission of a crime against the person?

Appellant's Brief at 4.

Appellant's sole issue relates to the trial court's determination that Appellant meets the criteria for a SVP under Megan's Law. We begin our analysis by noting our well-settled standard of review.

The determination of a defendant's SVP status may only be made after an assessment and hearing before the trial court. In order to affirm [a] 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 sexually violent predator. Our review of a sufficiency of the evidence claim is plenary. As with any sufficiency claim, we view the evidence and all 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 sufficient to enable the trial court to determine that each element required by the statute has been satisfied.

Commonwealth v. Leddington, 908 A.2d 328, 335 (Pa. Super. 2006), *appeal denied*, 940 A.2d 363 (Pa. 2007).

(Footnote Continued) _____

Rule 1925(b) statement, and addressing the issue Appellant now raises before this Court. Therefore, pursuant to this Court's holding in ***Thompson***, we may address the merits of Appellant's claim.

Under Megan's Law, a SVP is defined as "a person who has been convicted of a sexually violent offense [...] and who is determined to be a sexually violent predator under section 9795.4 [...] due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." **Commonwealth v. Martz**, 926 A.2d 514, 522 (Pa. Super. 2007), *appeal denied*, 940 A.2d 363 (Pa. 2008); **see also** 42 Pa.C.S.A. § 9792. When a person is convicted of one or more offenses set forth in section 9795.1, the trial court must order that a SVP assessment be performed by the Pennsylvania Sexual Offenders Assessment Board (SOAB), which is comprised, of "psychiatrists, psychologists and criminal justice experts, each of whom is an expert in the field of the behavior and treatment of sexual offenders." 42 Pa.C.S.A. § 9795.4; **see also Commonwealth v. Dixon**, 907 A.2d 533, 535 (Pa. Super. 2006), *appeal denied*, 920 A.2d 830 (Pa. 2007). Once an assessment is ordered, a SOAB member is chosen to perform the assessment and determine whether the offender fits the definition of a SVP as defined by the statute. **Dixon, supra** at 536.

The determination of whether an individual should be classified as a SVP is governed by examination of the following factors.

(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.

42 Pa.C.S.A. § 9795.4(b). Using the SOAB member's assessment and other evidence, the Commonwealth must prove to the trial court that the offender is a SVP by clear and convincing evidence. ***Dixon, supra*** (citation omitted). The trial court makes the ultimate determination. ***Id.***

In the case *sub judice*, Appellant pled guilty to sexual abuse of children, which is a triggering offense for a SVP assessment under Megan's Law. **See** 42 Pa.C.S.A. § 9795.1(a)(1). At the SVP hearing, the Commonwealth presented the testimony of Dr. Jennifer Hahn, a member of the SOAB. At the hearing, Appellant did not challenge Dr. Hahn's expert qualifications. N.T., 10/10/12, at 9. Upon our review of the record, we conclude that Dr. Hahn followed the guidelines of section 9795.4(b) and determined to a reasonable degree of scientific certainty that Appellant met the criteria of a SVP.

First, the record reveals that Appellant's diagnosis meets the statutory definition of "mental abnormality" within the meaning of Megan's Law. A mental abnormality is "[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." 42 Pa.C.S.A. § 9792. At the SVP hearing, Dr. Hahn diagnosed Appellant with pedophilia as defined by the fourth edition of the Diagnostic

and Statistical Manual for Mental Disorders (DSM-IV). N.T., 10/10/12, at 12. Dr. Hahn described the definition of pedophilia as follows.

So for a diagnosis of pedophilia, there's three criteria, basically. One is that for a period of at least six months, the individual has to display fantasies, urges, or behaviors, sexual behaviors, directed at prepubescent children. And that's generally defined as age 13 or lower.

And then the other two diagnostic criteria are that they have to be at least 16 years old and have to be at least five years older than the victim.

Id. at 16; **see also** Trial Court Opinion, 1/7/13, at 5 n.6. As Dr. Hahn noted, the victims contained in the images were approximately ten to 15 years old whereas Appellant was "about 53 to 57 years old at the time of the instant offenses." **Id.** at 15, 18. Dr. Hahn also noted that Appellant "reported that really, for at least three or four years, he had been downloading, viewing, masturbating to images of prepubescent children." **Id.** at 16. It is well settled that pedophilia qualifies as a "mental abnormality" under Megan's Law. **Commonwealth v. Meals**, 912 A.2d 213, 223 (Pa. 2006). Dr. Hahn also testified, both on direct and cross-examination, that Appellant's condition will make him "likely to engage in predatory sexually violent offenses." **Martz, supra.**

[Commonwealth]: So [Appellant] has one of the personality disorders or mental abnormalities that is needed for a [SVP]?

[Dr. Hahn]: Yes. In my opinion, that is pedophilia. Yes.

[Commonwealth]: What are the four statutory criteria for mental abnormality?

[Dr. Hahn]: One is that it needs to be a congenital or acquired condition. Pedophilia is considered to be congenital or acquired.

It must also be a chronic lifetime condition. And even though the frequency of these types of behaviors can wax and wane over time, you know, there's times where it will increase and times it will decrease. It does tend to be chronic and lifelong.

Also there is evidence that the condition has over road [sic] [Appellant]'s emotion or volitional control. And here he repeatedly printed out images of naked children. He reported that he could not control his behavior involving all forms of pornography, including the images of prepubescent children.

And then there has to be a likelihood of reoffending.

And as I said, there are the two major pathways; sexually deviant and antisocial. I believe that [Appellant] evidently has a sexually deviant pathway to offending. And deviant sexual interests are the single strongest predictor of re-offending.

[Commonwealth]: Dr. Hahn, the second prong of being a [SVP] is predatory behavior. How does [Appellant] meet that criteria?

[Dr. Hahn]: Well, the definition of "predatory" under the Act is that it's either an act directed at a stranger or it is an act directed at someone known.

In this case, the acts were directed toward stranger -- strangers.

All of the victims were presumably all strangers in the instant offense. And, therefore, I believe that he meets the predatory definition.

[Commonwealth]: Dr. Hahn, is it your expert opinion that [Appellant] is a [SVP]?

[Dr. Hahn]: Yes, that is my opinion.

[Commonwealth]: And is that opinion held to a reasonable degree of psychological certainty?

[Dr. Hahn]: Yes, it is.

...

[Defense Counsel]: But [Appellant] has never acted out upon these or actually had physical contact with a victim in a sexual way to your knowledge. So what is it about his age that makes you think he is more likely to do that in the future?

[Dr. Hahn]: ... The pedophilia, I believe, is what contributed to him engaging in this sexually violent crime. And he would be likely to engage in this type of sexually violent crime again.

As [Appellant] said, he was always clamoring for something different. He tended to simulate what he viewed in the pornography. And if that's what drove to his offending in the first place and because he does have this pedophilia, which is known to make on likely to re-offend, I can only conclude that he is likely to engage in this behavior again due to this mental abnormality.

N.T., 10/10/12, at 21-22, 60-61. As noted above, evidence that a defendant has a mental abnormality that will make him or her "likely to engage in sexual predatory offenses" is sufficient to classify said defendant as a SVP. **Martz, supra.**

However, Appellant argues that the trial court's determination that he qualified as a SVP was flawed. Appellant avers that Dr. Hahn's conclusion as

to predatory behavior is wrong because the statute defines predatory “as 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.” Appellant’s Brief at 12, *quoting* 42 Pa.C.S.A. § 9799.12 (emphasis removed). Appellant therefore argues that the Commonwealth is required “to demonstrate the manner in which an individual’s acts are intended to facilitate or support victimization by clear and convincing evidence.” *Id.* (internal quotation marks omitted).

This Court recently rejected a similar argument in ***Commonwealth v. Baker***, 24 A.3d 1006 (Pa. Super. 2011), *appeal granted in part*, 35 A.3d 3 (Pa. 2012). In ***Baker***, the defendant pled guilty to one count of sexual abuse of children, for possession of child pornography. *Id.* at 1013. Baker also made the argument that his SVP designation was flawed because the Commonwealth’s expert’s “opinion as to predatory must [fail], as there was no actual victim” *Id.* at 1035. This Court flatly rejected this argument and concluded that Baker was properly designated a SVP. *Id.* at 1036, 1037.

As the Pennsylvania Supreme Court explained in ***Commonwealth v. Davidson***,[] 938 A.2d 198, 215 (Pa. 2007), “each image of child pornography creates a permanent record of a child’s abuse, which results in continuing exploitation of a child when the image is subsequently viewed.” ***Davidson***,[] 938 A.2d at 219. We thus unequivocally reject any contention that the “mere consumption” of pornographic images of children does not constitute the victimization of those children. “The purpose of

Section 6312 is plainly to protect children, end the abuse and exploitation of children, and eradicate the production and supply of child pornography.” **Commonwealth v. Diodoro**,[] 970 A.2d 1100, 1107 ([Pa.] 2009)[, *cert. denied*, **Diodoro v. Pennsylvania**, 558 U.S. 875 (2009)] (*citing Davidson, supra*).

Id. at 1036 (parallel citations omitted).

In the case *sub judice*, we find **Baker** to be particularly instructive. As noted above, Appellant, “for at least three or four years, [admitted that] he had been downloading, viewing, masturbating to images of prepubescent children.” N.T., 10/10/12, at 16. As our Supreme Court noted in **Davidson**, each time an image of child pornography is viewed, the child depicted in the image is continuously exploited. **Commonwealth v. Davidson**, 938 A.2d 198, 219 (Pa. 2007); *accord Baker, supra*. Therefore, it follows that Appellant’s “downloading, viewing, [and] masturbating to [these] images on prepubescent children[.]” constituted continuous exploitation and victimization of the children depicted therein. N.T., 10/10/12, at 16; *see also Davidson, supra; Baker, supra*. Appellant argues that our decision in **Baker** is distinguishable because this court “also considered evidence that the defendant had attempted to persuade women to procure children and abuse them at his direction while he watched by webcam.” Appellant’s Brief at 13, *citing Baker, supra* at 1035. While **Baker** did include this additional evidence as Appellant describes, it does not alter this Court’s conclusion in **Baker** or our Supreme

Court's conclusion in **Davidson** that the viewing of child pornography continues the victimization of the children depicted. **See Davidson, supra; Baker, supra**. As a result, Appellant's argument fails.

Based on the foregoing, we conclude that the Commonwealth did present sufficient evidence that Appellant met the criteria for a SVP. We therefore further conclude that the trial court did not err when it concluded that Appellant met the criteria for a SVP. **See Leddington, supra**. Accordingly, we affirm the October 10, 2012 judgment of sentence.

Judgment of sentence affirmed.

Justice Fitzgerald files a Dissenting Memorandum.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen Gambetta", written over a horizontal line.

Prothonotary

Date: 9/6/2013