

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
MICHAEL DARRIGO,	:	No. 447 EDA 2012
	:	
Appellant	:	

Appeal from the Judgment of Sentence, January 4, 2012,
in the Court of Common Pleas of Bucks County
Criminal Division at No. CP-09-CR-0005096-2008

BEFORE: FORD ELLIOTT, P.J.E., BENDER AND SHOGAN, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: January 16, 2013

This is an appeal from a judgment of sentence entered against appellant, Michael Darrigo, after he pled guilty to two counts of sexual abuse of children-disseminating photographs and one count of distributing obscene and other sexual materials.¹ In this appeal, appellant challenges only his classification as a sexually violent predator ("SVP"). We affirm.

The trial court has summarized the relevant and undisputed facts as follows:

On January 16, 2008, Detective Joseph Sciscio of the Bensalem Township Police Department was utilizing an undercover profile in Yahoo instant messenger and logged into chat room "fetishes 14." At 6:06 p.m., Detective Sciscio was contacted by user "male4femalepedo," who engaged Detective Sciscio in conversation until 6:32 p.m. During the

¹ 18 Pa.C.S.A. §§ 6312 and 5903, respectively.

course of that conversation, male4femalepedo sent Detective Sciscio eleven images of suspected child pornography. On January 18, 2008, Detective Sciscio was utilizing the same undercover profile in Yahoo instant messenger. At 5:11 p.m., Detective Sciscio was contacted again by user male4femalepedo, who engaged Detective Sciscio in conversation until 5:22 p.m. During the course of that conversation, male4femalepedo sent Detective Sciscio seven images of suspected child pornography. Dr. Albert Lehmicke of Main Line Healthcare reviewed the suspected child pornography images and found that fifteen of the eighteen images depicted prepubescent girls.

Subsequently, Detective Sciscio spoke to Detective Sergeant Kristen Paxos-Mecionis of the Prosecutor's Office in Bergen County, New Jersey. Detective Mecionis identified male4femalepedo as the defendant. A records check revealed that Defendant was under supervision in the State of New Jersey as a Tier 2 Megan's Law offender. During an interview with law enforcement, Defendant admitted that male4femalepedo was his screen name and he had not given his password to anyone.

Trial court opinion, 4/20/12 at 1-2 (references to the notes of testimony omitted).

On August 30, 2011, appellant pleaded guilty to the above-listed offenses. Appellant entered his guilty plea pursuant to a negotiation whereby the Commonwealth recommended a sentence of two years and six months less one day to five years less one day at a state correctional facility with a consecutive ten years' probation. Sentencing was deferred for an SVP assessment and hearing. Following a continuance requested by the Commonwealth, the SVP and sentencing hearings took place on January 4,

2012. At the conclusion of the hearings, the trial court found that appellant met the criteria to be classified as an SVP. Appellant was then sentenced pursuant to the negotiated guilty plea. Appellant filed a timely notice of appeal.

After seeking an extension of time to file his concise statement of errors complained of on appeal, appellant complied and raised two issues. However, appellant has chosen to raise only one issue before this court: "Did the trial court err in designating appellant as a sexually violent predator where the Commonwealth failed to establish sufficient evidence that appellant suffered from a mental abnormality, which renders him likely to engage in predatory sexually violent offenses?" (Appellant's brief at 4.)

The standards governing our review of this argument are well established:

A challenge to the sufficiency of the evidence is a question of law subject to plenary review. We must determine whether the evidence admitted at [the SVP hearing] 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 elements of the [statute]. A reviewing court may not weigh the evidence or substitute its judgment for that of the trial court. At a 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. 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 establish each element required by the statute. "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. Woods, 909 A.2d 372, 380 (Pa.Super. 2006), ***appeal denied***, 591 Pa. 714, 919 A.2d 957 (2007), quoting ***Commonwealth v. Evans***, 901 A.2d 528, 534 (Pa.Super. 2006) (citations omitted; bracketed information in original; emphasis added by ***Woods*** deleted).

Notably, Megan's Law defines a "sexually violent predator" as:

a person who has been convicted of a sexually violent offense as set forth in § 9795.1 and who is determined to be a sexually violent predator under § 9795.4 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. "Mental abnormality" is defined as "[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.***, while the term "predatory," in turn, is defined as "[a]n 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.***

Among the relevant sections of Megan's Law, Section 9795.4 provides:

§ 9795.4. Assessments

- (a) **Order for assessment.**--After conviction but before sentencing, a court shall order an individual convicted of an offense specified in section 9795.1 (relating to registration) to be assessed by the board. The order for an assessment shall be sent to the administrative officer of the board within ten days of the date of conviction.
- (b) **Assessment.**--Upon receipt from the court of an order for an assessment, a member of the board as designated by the administrative officer of the board shall conduct an assessment of the individual to determine if the individual should be classified as a sexually violent predator. The board shall establish standards for evaluations and for evaluators conducting the assessments. 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.

42 Pa.C.S.A. § 9795.4. The above section delineates a non-exclusive list of factors to consider in the assessment of a defendant as an SVP. However,

as set forth in *Commonwealth v. Meals*, 590 Pa. 110, 126-127, 912 A.2d 213, 222-223 (2006), it cannot be said that each factor will be of relevance in every case or that the presence or absence of any of the enumerated factors will be decisive in the determination.

In this case, the trial court conducted the SVP hearing on January 4, 2012. The Commonwealth presented the testimony of Dr. John Shanken-Kaye who has been a member of the Sexual Offenders Assessment Board ("SOAB") since 2000. (Notes of testimony, 1/4/12 at 11-12.) Dr. Shanken-Kaye testified that he evaluated appellant and that appellant chose not to participate in the evaluation. (*Id.* at 21.) The parties stipulated to the following factors: the instant offense involved multiple victims; no force was used; there was no hands-on contact with the victims, but there was downloading and sharing of information; 15 of the 18 photographs showed children under the age of 18 years old, some were less than 13 years old; no unusual cruelty was involved; the mental capacity of the victims could not be determined; appellant's prior offense history includes 4 prior convictions for sexual offenses; appellant has completed his prior sentences, and has one violation of Megan's Law for failure to notify law enforcement; concurrent with the evaluation, appellant was in a treatment at Avenel which is a sexual offense maximum security prison in New Jersey; appellant was 43 years old at the time of the instant offense; and there was no evidence of illegal drug use by appellant. (*Id.* at 39-43.)

Dr. Shanken-Kaye determined that appellant suffered from the mental abnormality of paraphilia not otherwise specified (“NOS”) pedophilia. According to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, (“DSM IV”), a classification of mental disorders developed and published under the auspices of the American Psychiatric Association, the diagnostic criteria for pedophilia are as follows:

- A. Over a period of at least six months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger).
- B. The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.
- C. The person is at least age 16 years and at least 5 years older than the child or children in criterion A.

DSM IV at 572. Dr. Shanken-Kaye testified that this mental abnormality makes a person likely to engage in sexually violent behavior, and while directly discussing appellant’s actions, he stated “the age of the victims was key in solidifying the classification of pedophilia in that some of the individuals were under the age of thirteen.” (Notes of testimony, 1/4/12 at 30.) The doctor further testified that appellant’s “prior record was significant in that it provided additional support for a classification of pedophilia; that there were prior offenses, sexual offenses against individuals under the age of 13 which is in itself a criterion for a diagnosis of pedophilia.” (*Id.* at 46.)

With regard to the predatory nature of appellant's acts, Dr. Shanken-Kaye went on to state that appellant's behavior, both historically and currently, was predatory in nature. (*Id.* at 48.) Instantly, appellant attempted to "set up meetings [in chat rooms] to discuss his sexual desires in terms of potentially being able to have sexual relations with an 8 year old child." (*Id.* at 50.) The doctor stated "those entire conversations were predatory in nature in that [appellant] was attempting to establish and maintain a relationship for the purpose of sexual victimization." (*Id.* at 48.) In conclusion, Dr. Shanken-Kaye opined within "a reasonable degree of scientific certainty" that appellant met the statutory criteria for classification as an SVP. (*Id.* at 59-60.)

Based upon the evidence and testimony presented at the hearing on January 4, 2012, the trial court found by clear and convincing evidence that appellant was an SVP. The arguments appellant sets forth to this court are in three parts. First, appellant claims that the Commonwealth failed to demonstrate that appellant has an increased likelihood of re-offending. Second, appellant claims the Commonwealth failed to establish that he suffers from a mental abnormality or personality disorder making him likely to engage in future acts of sexual violence. Third, appellant claims the Commonwealth failed to present sufficient evidence that his conduct was predatory. We will address these arguments in what we consider a more logical order.

Initially, we note there is no dispute that appellant pled guilty to two counts of sexual abuse of children-disseminating photographs and one count of distributing obscene and other sexual materials, both predicate offenses. **See** 42 Pa.C.S.A. § 9795.1(a) (listing specific offenses requiring registration). Thus, the question remaining is whether the Commonwealth proved by clear and convincing evidence that appellant's conviction was the result of a mental abnormality or personality disorder, and that he is likely to reoffend.

Dr. Shanken-Kaye considered the statutory factors set out in Section 9795.4 and examined the materials that were given to him by the district attorney's office, the police investigative reports, the copies of appellant's prior records, and the investigative report from the SOAB investigator. (Notes of testimony, 1/4/12 at 22.) Based on the instant offense as well as previous convictions, Dr. Shanken-Kaye was able to diagnose appellant with the mental abnormality of pedophilia. (*Id.* at 23.)

Appellant argues the pedophilia diagnosis was made without any factual basis; more specifically, for failing to show appellant's prior offenses involved children, that not all the photographs in the instant case were classified as child pornography, and there was no evidentiary support to find a six-month period of recurrent urges, fantasies or behaviors. Our review indicates the record belies appellant's arguments. First, the doctor's report was admitted into evidence and clearly lists a sexual assault on September

20, 2001 on a female victim under the age of thirteen. Second, it is true that not all of the photographs were determined to be child pornography. However, Dr. Shanken-Kaye testified that the possession of even one image would be enough to trigger the classification of SVP status. (*Id.* at 76). Instantly, there was more than one photo depicting child pornography.

Third, appellant's prior record indicates a pattern of abusive behavior since 2002. (Guilty Plea hearing, 8/30/11 at 35.) The Commonwealth described appellant's prior record as a 2002 conviction for sexual assault in New Jersey for which appellant served one year in prison and four years' probation (*id.*); a 2003 criminal sexual contact for which he served one year in prison and two years' probation (*id.*); and a 2007 failure to notify law enforcement, that was a violation of Megan's Law for which appellant served 18 months in prison. (*Id.*) Currently, he is serving a sentence for endangering the welfare of a minor. (*Id.* at 36.) The prosecutor also noted that during the course of the instant investigation, appellant was apprehended by Bergen County, New Jersey law enforcement officials while trying to set up a meeting in a chat room for the potential sexual victimization of a minor. (*Id.* at 35.) This record shows a pattern of recurring sexual crimes. Appellant's sustained sexual interest in children over a significant period of time supports his diagnosis of pedophilia.

Proof of a mental abnormality is not sufficient to prove SVP status. There must also be proof concerning predatory behavior. *Meals*, 590 Pa. at

129, 912 A.2d at 224. An act is predatory when the act is "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 argues the Commonwealth failed to establish that his behavior was predatory in nature due to the fact there was a stipulation that the instant offense did not involve hands-on contact and there was no relationship with the victim. As the Commonwealth points out, while the instant offense does not involve hands-on contact, appellant's extensive adult criminal history includes hands-on sexual offenses. (**See** Guilty Plea hearing, 8/31/12 at 35-36.) Dr. Shanken-Kaye mentioned appellant's four prior convictions for sexual offenses. (Notes of testimony, 1/4/12 at 30.) He stated, "This goes specifically to the issue of determining sexually violent predator status in that an individual can be said to have a mental abnormality that predisposes them to acts of sexual violence." (*Id.* at 30-31.) Both the instant offense and appellant's history reflect appellant's behavior is predatory in nature even if physical violence was never utilized.

Last, appellant argues the Commonwealth failed to demonstrate that appellant has an increased likelihood of re-offense. (Appellant's brief at 13.) As support for his argument, appellant points to the testimony of Dr. Shanken-Kaye in which he claims the doctor conceded that successful

completion of an adult sex offender program coupled with significant supervision and therapy reduces the likelihood of recidivism. (*Id.* at 14.)

The record reveals that Dr. Shanken-Kaye stated he was aware that appellant was receiving treatment at the Avenel facility. (Notes of testimony, 1/4/12 at 79.) The doctor was asked:

Question: Do you think that this lessens his likelihood of reoffending?

Answer: The, again, the successful completion of an adult sex offender program coupled with significant ongoing supervision and therapy and a highly motivated individual reduces the likelihood of recidivism.

Id. at 79-80. The record shows that appellant was in treatment at Avenel when he was arrested for the instant offense. (*Id.* at 31.) He had already re-offended. Clearly, appellant's own actions have discredited his argument.

In conclusion, our review of the record supports the trial court's determination that appellant meets the definition of an SVP. Therefore, we affirm the trial court.

Judgment of sentence affirmed.